

APPLICATION OF THE CONSTITUTIONAL VALUE OF UBUNTU IN PRIVATE RELATIONS: THE PRIVATE LAW OF CONTRACT AS A TEST CASE

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Ubuntu [...] speaks of the very essence of being human. [...] It is to say, "My humanity is caught up, is inextricably bound up, in yours." We belong in a bundle of life. We say, "A person is a person through other persons".

Desmond Tutu, No Future without Forgiveness

I INTRODUCTION

With the advent of the South African constitutional era, the African notion of ‘ubuntu’ came to be recognised as a broad, overarching founding value of our democratic dispensation. While the constitutional status of *ubuntu* as a foundational value is widely accepted, the normative content of *ubuntu* and its effect on private relations remains elusive. A further complication is that while most people accept that constitutional values form the bedrock of the South African constitutional dispensation, the application of these values to private relations remains a contentious issue.¹ The contentions are prominent in the debate on the relationship between the Constitution of the Republic of South Africa, 1996 (1996 Constitution) and the private law of contract. One dimension of the debate relates to the impact of the Constitution and its values on inequitable contractual relations. Although it is trite that the law of contract does not have a general fairness defence, some have asked whether the Constitution creates an imperative for a new standard that requires fairness and equity in dealings between private individuals. Whereas it is necessary for the law of contract to align with the constitutional dispensation, others have

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¹ Van Huyssteen ‘The horizontal application theory and its influence on freedom of agreement in the law of contract - a South African perspective’ (1998) 2 *Law Democracy & Dev.* 209; Van Aswegen ‘The Implications Of A Bill Of Rights for the Law Of Contract and Delict’ (1995) 11 *SAJHR* 50. Rautenbach ‘The bill of rights applies to private law and binds private persons’ (2000) *SALJ* 296; Liebenberg ‘The application of socio-economic rights to private law’ (2008) *SALJ* 464.

cautioned against a 'constitutional colonisation of the private law of contract' and its (possibly) disastrous impact on commercial certainty.

This paper explores a new development in the debate: the applicability of *ubuntu* to private contractual relations in light of the Constitutional Court decision in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.² This paper is divided into five parts. The first and second parts of this paper provide a brief exposition of the meaning of *ubuntu* (or the lack thereof), focusing on the normative content of *ubuntu* and how it has been understood in our post-1994 jurisprudence. The third part is a discussion of good faith (reasonableness and equity) in contractual relations. The discussion focuses on how common law principles were affected by the Constitution. The fourth part explores the applicability of *ubuntu* as a substantive equity requirement, as alluded to by the Court in *Everfresh*. The last part discusses the concern of commercial uncertainty, specifically how the application of *ubuntu* as an equity requirement would impact on the principle of *pacta sunt servanda*.

II THE IDEA OF *UBUNTU*

It is impossible, if not utterly futile, to define *ubuntu* with any degree of conviction.³ This is due to a number of reasons, two of which follow. First, *ubuntu* is a loan-word in the English language.⁴ Therefore, the term has no concrete meaning in the English language outside its vernacular context.⁵ Second, *ubuntu* reflects an African world-view that is arguably too broad and expansive to fit into a definition in the western legal sense.⁶ For natives,⁷ *ubuntu* is an idea of how to appropriately relate to fellow human beings.⁸

²*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) (*Everfresh*).

³Tshoose 'The emerging role of the constitutional value of ubuntu for informal social security in South Africa' (2009) *AJLS* 14 at pages 14-19.

⁴Bennett 'Ubuntu: An African Equity' in Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (Juta 2011) at page 4.

⁵Cornell and van Marle 'Exploring ubuntu: Tentative reflections' (2005) 5 *AHRLJ* 195. See also: Gade 'The historical development of the written discourses on *ubuntu*' (2011) 30 *South African Journal of Philosophy* at page 303; Nussbaum 'African Culture and Ubuntu: Reflections of a South African in America' (2003) Vol 17 Issue 1 *World Business Academy* 1.

⁶Khunou and Nthai 'The Contribution of Ubuntu to the Development of Constitutional Jurisprudence in a Democratic South Africa' in Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (Juta and Co, 2011) at page 52.

Despite the lack of meaning, there have been various attempts to at least understand the normative content of the idea of *ubuntu*.⁹ The most useful attempt comes from Mokgoro J who describes *ubuntu* as:

[a] philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be person through others. In other words the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is basically a humanistic orientation towards fellow beings.¹⁰

It should be cautioned that because *ubuntu* represents a world-view, it should not be taken outside of the social context which underlies its social meaning and value.¹¹ The idea envelops other broad values, such as 'group solidarity, conformity, human dignity, humanistic orientation and collective unity'.¹² Commentators have warned of a superficial, out-of-context perception of the idea of *ubuntu*.¹³ A world-view cannot be neatly packed into a definition without the risk of oversimplification,¹⁴ and without watering down its more expansive, flexible and philosophically accommodating ideal nature.¹⁵

⁷ I use 'natives' in a rather archaic sense to mean people of African descent.

⁸ *Id* at page 52-3.

⁹ Broodryk 'Ubuntu in South Africa' (LLD Thesis, Pretoria 1997); Mokgoro 'Ubuntu and the South African Law' (1998) 1(1) *PELJ* 2; Mbigi and Maree *Ubuntu: The Spirit of African Transformation Management* (Sigma Press Johannesburg 1995) at page 1.

¹⁰ Mokgoro above n 9 at page 3.

¹¹ *Id.*

¹² *Id.*

¹³ Kunene "The Essence of being Human: An African Perspective" (Inaugural Lecture 16 August 1996, Durban) 10. See also, Kroeze 'Doing things with values II: the case of *ubuntu*' (2002) 13 *Stell LR* 252; English 'Ubuntu: the quest for an indigenous jurisprudence' (1996) 12 *SAJHR* 641; van Niekerk 'A common law for Southern Africa: Roman law or indigenous African law?' (1998) XXXI *CILSA* 158.

¹⁴ Louw 'The African Concept of Ubuntu and Restorative Justice' in Sullivan and Tifft (eds) *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2005) at page 161.

¹⁵ Mokgoro above n 9 at page 2.

Ubuntu is not a static concept; its social value evolves with its social context.¹⁶ According to Mokgoro J, *ubuntu* has been invoked ‘as a basis for a morality of co-operation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood, all the time emphasising the virtues of that dignity in social relationships and practices’.¹⁷

In the next part, I will consider how *ubuntu* was introduced into South African law and how the concept has been understood by the courts in their jurisprudence. The purpose of the next part is to show that *ubuntu* is now a constitutional value firmly rooted in our Constitution and understood as such in our case law.

III *UBUNTU* IN SOUTH AFRICAN LAW

The idea of *ubuntu* existed in general public discourse in South Africa as far back as the 1920s.¹⁸ However, *ubuntu* did not enter the legal discourse until 1993, when it was introduced by the post-script of the Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution). The post-script, headed ‘National Unity and Reconciliation’, declared that ‘these [struggles of the past] can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.’¹⁹

Ubuntu made a fervent debut in the jurisprudence of the Constitutional Court in *S v Makwanyane*.²⁰ The *Makwanyane* court gave a detailed exposition of the content of *ubuntu* and sealed its place as a constitutional value. Mokgoro J held as follows:²¹

Metaphorically, [*ubuntu*] expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops 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

¹⁶ Id at pages 2-5.

¹⁷ Id at page 3.

¹⁸ Bennett above n 4 at page 3.

¹⁹ Id.

²⁰ *S v Makwanyane* 1995 3 SA 391 (CC) (*Makwanyane*).

²¹ Bennett above n 4 at pages 5 – 6.

emphasises respect for human dignity, marking a shift from confrontation to conciliation.²²

Langa J held further that:

[*Ubuntu*] recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community [that] such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.²³

Unfortunately *ubuntu* was not expressly included among the values in the founding provisions of the final Constitution.²⁴ It has been argued that the exclusion of *ubuntu* from the Constitution effectively de-Africanised the Constitution and the law in general.²⁵ However, despite its exclusion, the constitutional status of *ubuntu* as a value has been reaffirmed by the Constitutional Court,²⁶ the Supreme Court of Appeal (SCA)²⁷ and the High Court.²⁸

²² Above n 15 at para 308.

²³ Above n 21 at para 224. See also at paras 223-5, 227, 237, 262-3, 307-8 and 374.

²⁴ Constitution of the Republic of South Africa, 1996. Section 1(a)-(d) of the Constitution mentions human dignity, equality, human rights and freedoms, non-racialism and non-sexism and the rule of law, among other values.

²⁵ E Moosa 'Tensions in legal and religious values in the 1996 South African Constitution' in M Mamdani (ed) *Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture* (2000) 131. See also Cornell and van Marle above n 5 at pages 207 – 208.

²⁶ In *Port Elizabeth Municipality v Various Occupiers* Sachs J (as he then was) held that the spirit of *ubuntu* 'suffuses the whole of our constitutional order' (para 37); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) where Van der Westhuizen J held that 'This court has also recognised the concept of *ubuntu* as underlying the Constitution'; *Joseph and Others v City Of Johannesburg And Others* 2010 (4) SA 55 (CC) where Skweyiya J held that 'It seems to me that *Batho Pele* gives practical expression to the constitutional value of *ubuntu*, which embraces the relational nature of rights'; *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC) at paras 164-5, 168, 210 and 216-8; *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) at para 200; *Van Vuren v Minister for Correctional Services and Others* 2010 (12) BCLR 1233 (CC) at para 51; *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amici Curiae)* 2010 (4) SA 327 (CC) at para 62; *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at para 78; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 51; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at paras 68-9, 86, 112-8 and 121; *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amici Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) at paras 45 and 163; *Christian Education South Africa v Minister of Education*

Before going on to consider whether the constitutional value of *ubuntu* introduces a requirement of fairness and equity into private contractual relations, it is necessary to first understand the *status quo*. In the next part I will survey how the common law treats injustice in private contractual arrangements. I also consider how the common law position was changed by the Constitution, if at all. While the section is headed 'good faith', the phrase should be understood to mean 'private justice', which includes fairness and equity between private contracting parties.

IV GOOD FAITH

Justice Brand of the Supreme Court of Appeal, writing in an academic article, sets out the history of the principle of 'good faith' in South African law.²⁹ He points out that the South African law of contract has never recognised a general equity defence.³⁰ Instead, the courts have used various instruments to import abstract values of fairness and equity into the substantive law of contract.³¹ One such instrument was the Roman-law defence of 'bad faith' – the *exceptio doli*. The *exceptio doli* was used by the courts to introduce into our law of contract various equitable doctrines, such as fictional fulfilment,³² rectification³³ and estoppel.³⁴

In 1988 the *exceptio doli* was effectively removed from our law. Joubert JA, writing for the majority in *Bank of Lisbon and South Africa v De Ornelas*,³⁵ held that it was time to bury the *exceptio doli* as a 'superfluous defunct anachronism'.³⁶

2000 (4) SA 757 (CC) at para 50; and *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) at paras 3, 19 and 48. (own emphasis)

²⁷ *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) at para 39; See also *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA) where Harms JA held at para 22 that 'I believe that the application of the basic principles of ubuntu placed an ethical duty on him to respond to her queries'.

²⁸ *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn And Another* 2008 (2) SA 375 (C) Davis J held 'a point reinforced by the value of ubuntu which seeks to assert that individual values are reflected from community' (para 31)

²⁹ Brand 'The role of good faith, equity and fairness in the South African law of contract – the influence of the common law and the Constitution' (2009) 126 SALJ 71.

³⁰ *Id* at page 73.

³¹ *Id* at pages 73-4. See Girvin 'The architects of the mixed legal system' in Reinhard Zimmerman & Daniel Visser (eds) *Southern Cross, Civil Law and Common Law in South Africa* (1996) 95.

³² *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924AD 573 at page 591.

³³ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at pages 292 and 296.

³⁴ *Sonday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 (2) SA 521 (C) at page 526.

³⁵ 1988 (3) SA 580 (A) (*Bank of Lisbon*).

³⁶ *Id* at 607B.

However, and indeed quite paradoxically,³⁷ Jansen JA in a minority judgment in the same case introduced 'public policy' as an alternative doctrine of equity, fairness and good faith in our law of contract. Jansen JA held that:

[T]he *exceptio doli generalis* constitutes a substantive defence, based on the sense of justice of the community. As such it is closely related to the defences based on public policy (interest) or *boni mores*. Conceivably they may overlap: to enforce a grossly unreasonable contract may in the appropriate circumstances be considered as against public policy or *boni mores*.³⁸ (Footnotes in the original omitted)

The dictum quoted above was understood by some litigant, and indeed some judges, to mean that public policy could be invoked to challenge contractual provisions that are 'grossly unreasonable'.³⁹

It was not long after *Bank of Lisbon* that public policy was invoked as an equity defence. In *Sasfin (Pty) Ltd v Beukes*⁴⁰ a challenge was brought against a deed of cession which, according to the court, 'virtually relegated [the respondent, one Dr Beukes] to a slave, working for the benefit of Sasfin'.⁴¹ The respondent argued that the deed of cession was contrary to public policy.⁴² Smalberger JA writing for the appellate court held as follows:

No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness... In the words of Lord Atkin in *Fender v St John-Mildmay* "the doctrine should only be invoked in clear cases in which the harm to the public is substantially

³⁷Brand above n 30 at page 74.

³⁸*Bank of Lisbon* above n 36 at page 617G-H.

³⁹Brand above n 30 at page 75.

⁴⁰1989 (1) SA 1 (A) (*Sasfin*).

⁴¹*Id* at page 13H.

⁴²*Id* at pages 6G-7H.

incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds.”⁴³ (Footnotes in the original omitted)

Soon after *Sasfin*, in *Eerste Nasionale Bank v Saayman*,⁴⁴ the Appellate Division had another opportunity to fine-tune the public policy test. Olivier JA, in a concurring minority judgment, held that the contract could not be enforced because principles of *bona fides* (good faith) and equity militated against strict application of the established rules of contract.⁴⁵ In his view, the courts were entitled to refuse enforcement of unfair or unreasonable terms in a contract, even though enforcement may be required by the rules of contract law.⁴⁶ Olivier JA’s dictum in *Saayman* led to a plethora of diverging decisions.⁴⁷ In *BOE Bank v Van Zyl*⁴⁸ the Cape Provincial Division of the High Court held that Olivier JA could not have intended to create a defence of equity in our law of contract. However, in *Janse van Rensburg v Grieve Trust*,⁴⁹ *Mort NO v Henry Shields-Chiat*⁵⁰ and *Miller & another NNO v Dannecker*⁵¹ judges of the same division of the High Court expressed support for Olivier J’s views.

The issue was finally settled by the SCA in *Brisley v Drotsky*.⁵² In *Brisley* the SCA held that *Janse van Rensburg*, *Mort* and *Dannecker* were wrongly decided.⁵³ According to the Court, although the principles of good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent, substantive rules that courts can employ to intervene in contractual relationships.⁵⁴

A public policy challenge came again before the SCA in *Afrox Healthcare Bpk v Strydom*.⁵⁵ In *Afrox* the respondent challenged the validity of an exemption clause contained in a hospital admission form. The form absolved the appellant hospital

⁴³ Id at 9B-G.

⁴⁴ 1997 (4) SA 302 (SCA) 336 (*Saymaan*).

⁴⁵ Id at 318ff.

⁴⁶ Id at page 326G (A translation from Afrikaans by Brand (above n 30 at 78)).

⁴⁷ See for example: *BOE Bank v Van Zyl* 2002 (5) SA 165 (C); *Janse van Rensburg v Grieve Trust* 2001 (1) SA 315 (C); *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C); *Miller & another NNO v Dannecker* 2002 (1) SA 928 (C).

⁴⁸ 2002 (5) SA 165 (C).

⁴⁹ 2001 (1) SA 315 (C) (*Van Rensburg*).

⁵⁰ 2001 (1) SA 464 (C) (*Mort*).

⁵¹ 2002 (1) SA 928 (C) (*Dannecker*).

⁵² *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (*Brisley*).

⁵³ Id at para 22.

⁵⁴ See Brand above n 24 at page 81; Rautenbach ‘Constitution and Contract: The application and of the Bill of Rights to Contractual Clauses and their Enforcement – *Bredenkamp v Standard Bank SA Ltd* 2010 9 BCLR 892 (SCA)’ (2011) 74 *THRHR* 510 at page 511.

⁵⁵ 2002 (6) SA 21 (SCA) (*Afrox*).

from liability for medical negligence. The respondent contended that the exemption clause was contrary to public policy and that its enforcement was unreasonable, unfair and against the principle of good faith.⁵⁶ For this proposition the respondent relied on Olivier J's minority judgment in *Saayman*.⁵⁷ The respondent contended further that the clause contravened his fundamental right to have access to health care services.⁵⁸ The SCA confirmed its earlier decision in *Brisley*, on the role of good faith, reasonableness and fairness in private contractual relationships.⁵⁹

The approach of the SCA in *Brisley* and *Afrox* was subsequently confirmed by the Constitutional Court in *Barkhuizen v Napier*.⁶⁰ In *Barkhuizen* the applicant challenged the validity of a time-limitation clause in a standard form insurance contract. The clause was to the effect that a claim would lapse if the insured failed to serve summons on the insurer within ninety days after being informed of the insurer's repudiation of the claim.⁶¹ The applicant contended, primarily, that the provision was in conflict with the constitutional right of access to courts as found in section 34⁶² of the Bill of Rights and was thus unreasonable and against principles of good faith.⁶³ The majority of the court dismissed the appeal on the ground that the alleged infringement was not established in evidence.⁶⁴

The starting point for the majority⁶⁵ was that contractual clauses that conflict with the Constitution are unenforceable.⁶⁶ However, the court held that 'as the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance, good faith is given effect to by the existing common law rule that contractual clauses that are impossible

⁵⁶ Id at paras 9 and 31.

⁵⁷ Id at para 31.

⁵⁸ Section 27(1)(a) of the Constitution provides that 'Everyone has the right to have access to health care services'.

⁵⁹ *Afrox* above n 56 at para 32.

⁶⁰ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (*Barkhuizen*).

⁶¹ Id at para 3.

⁶² Section 34 provides that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

⁶³ *Barkhuizen* above n 61 at para 19.

⁶⁴ Penned by Ngcobo J (as he then was), Madala J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concurring.

⁶⁵ There were two separate concurring judgments handed down by Langa CJ and O'Regan J and two dissents penned by Moseneke DCJ (Mokgoro J concurring) and Sachs J.

⁶⁶ *Barkhuizen* above n 61 at para 34.

to comply with should not be enforced.⁶⁷ Brand J points out that, in his view, public policy will be used 'as the doctrinal gateway for importation of constitutional values into the law of contract'.⁶⁸

The approach of the majority in *Barkhuizen* seems to be a roundabout way of interpreting and applying constitutional rights.⁶⁹ It appears that the majority and the separate concurring judgments were wary of creating uncertainty in private commercial dealings.⁷⁰ The court reasoned that the content of public policy is, in any event, comprised of the values in the Constitution.⁷¹ Further, the bounds of public policy are drawn sharply by the content of the Constitution.⁷² So long as the notion of public policy adequately serves the spirit, purport and object of the Constitution, it is unnecessary for the court to develop the common law in terms of section 39(2).⁷³ However, the Court in *Barkhuizen* did not altogether exclude the possibility that public policy may need to be developed to allow for abstract values of fairness, equity and good faith to be directly applicable to contractual relations.⁷⁴

More recently, in *Bredenkamp v Standard Bank SA Ltd*⁷⁵ the SCA was faced again with a challenge against a contract on the ground of inconsistency with the Constitution. The court reaffirmed that 'fairness is not a free-standing requirement for the exercise of a contractual right'.⁷⁶ However, the Court also reaffirmed the *Sasfin* principle that our common law does not recognise contracts that are contrary to public policy.⁷⁷ The difference, it appears, is that public policy is now infused with constitutional values (a notion that has been recognised by the SCA since *Brisley*).⁷⁸ In *Bredenkamp*, the court held that:

Public policy and the *boni mores* are now deeply rooted in the Constitution and its underlying values. This does not mean that public policy values cannot be

⁶⁷Id at para 82.

⁶⁸Brand above n 24 at page 83.

⁶⁹Bhana 'The law of contract and the Constitution' (2007) 124 SALJ 269 at 274.

⁷⁰Discussion in part VI below.

⁷¹*Barkhuizen* above n 61 at para 35.

⁷²Id.

⁷³Section 39(2) provides that:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

⁷⁴*Barkhuizen* above n 45 at para 82.

⁷⁵2010 9 BCLR 892 (SCA).

⁷⁶Id at para 53.

⁷⁷*Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I-9H

⁷⁸*Brisley* above n 53.

found elsewhere. A constitutional principle that tends to be overlooked when generalized resort to constitutional values is made is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.⁷⁹

In *Maphango v Aengus Lifestyle Properties*⁸⁰ the Court held that ‘reasonableness and fairness are not free-standing requirements for the exercise of a contractual right’,⁸¹ a view which the SCA (per Brand JA) was at pains to confirm in *Potgieter v Potgieter*.⁸²

It is therefore fair to conclude, as Brand J does in his article, that the South African law of contract has to date not recognised a general equity defence.⁸³ The post-1994 case law dealing with the impact of the Constitution on the law of contract did not resolve the question whether the values in section 1 of the Constitution require the common law to be developed in this regard. In *Afrox*, *Barkhuizen* and *Bredenkamp*, the courts held that it was not necessary in the specific circumstances of those cases to develop the common law.⁸⁴ The notion of public policy has not been challenged on the ground that it does not give effect to the spirit, purport and object of the Constitution. This issue was complicated somewhat by Cameron JA in *Barkhuizen v Napier*.⁸⁵ Cameron JA held that:

[T]he constitutional values of dignity, equality and the advancement of human rights and freedoms... provide no general all-embracing touchstone for invalidating a contractual term.⁸⁶ Nor does the fact that a term is unfair or may operate harshly by itself lead to the conclusion that it offends against constitutional principle... the Constitution prizes dignity and autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one’s life by freely engaged contractual arrangements.⁸⁷ The

⁷⁹*Bredenkamp* above n 76 at para 39.

⁸⁰*Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA).

⁸¹*Id* at para 23.

⁸²[2011] ZASCA 181.

⁸³Above n 24 at page 83. See also, MacQueen and Zimmerman (eds) *Good Faith in European Contract Law* Edinburgh Studies in Law vol 2 (2006) 43 at page 49.

⁸⁴See discussion above. In *Barkhuizen* [above n 45 at para 82] Ngcobo J held that:

Whether, under the Constitution, this limited role for good faith is appropriate and whether the maxim *lex non cogit ad impossibilia* alone is sufficient to give effect to the value of good faith are, fortunately, not questions that need be answered on the facts of this case and I refrain from doing so.

⁸⁵[2006] 2 All SA 469 (SCA).

⁸⁶*Id* at para 11.

⁸⁷*Id* at para 12.

Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements.⁸⁸

It has been argued that the effect of Cameron JA's view is to elevate 'freedom of contract' (*pacta sunt servanda*) to a constitutional value.⁸⁹ Commentators⁹⁰ have launched sharp criticism against the *dictum* on the basis that it elevates the empowerment aspects of dignity and freedom, while side-stepping the restrictive aspect (thus providing dangerous precedent for the potential abuse of freedom of contract).⁹¹ Interestingly, Brand J, who concurred with Cameron JA in *Brisley* and *Afrox*, appears to have subsequently reconsidered his position. In his article he notes that:

[A]lthough I concurred with Cameron JA in both *Brisley* and *Afrox*, I now, upon consideration, tend to agree with Professor Gerhard Lubbe that the values of 'dignity' and 'freedom' display a perplexing capacity to pull in several directions at the same time and may accordingly fulfil very different roles. By their very nature these values are simply too vague to provide a decisive answer in deciding cases. Fortunately, I do not believe that we need to find a specific constitutional value, expressly referred to in the Constitution, to underpin every rule of contract law.⁹² (Footnote in the original omitted)

The labyrinth of decisions sketched above reveals two things. First, our courts have accepted public policy as the correct standard for determining whether a private

⁸⁸ Id at para 13.

⁸⁹ See Bhana above n 70 at 274.

⁹⁰ Bhana and Pieterse "Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited" (2005) 122 SALJ 865-895; Sutherland 'Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 1' (2008) 19 *Stell LR* 390.

⁹¹ Lubbe 'Taking fundamental rights seriously: The bill of rights and its implications for the development of contract law' (2004) 121 SALJ 359.

⁹² Brand above n 30 at page 86.

contractual arrangement conforms to the values in the constitution. Secondly, because our public policy is infused with our constitutional values, public policy is offended when constitutional rights or values are contravened by private contractual arrangements.

The exercise of infusing public policy with constitutional values is, in my view, more difficult than the courts appear to appreciate. In *Barkhuizen*, Ngcobo J held that:

Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.⁹³

The practical effect of the dictum is not immediately clear. Consensus and free will (*animus contrahendi*) have always been a requirement of our law of contract.⁹⁴ Therefore, it is not clear how the values of freedom and dignity change the *status quo*, if at all. If the rule of law, dignity and freedom all weigh in favour of enforcing contractual arrangements that are concluded freely and voluntarily, then it is not clear when these values may militate against enforcing a contract. In *Barkhuizen*, Ngcobo J held further that:

The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.⁹⁵

⁹³ *Barkhuizen* above n 61 at para 57.

⁹⁴ *Wessels v Swart* NO 2002 (1) SA 680 (T); *Church of the Province of South Africa, Diocese of Cape Town v CCMA* 2002 (3) SA 385 (LC) at paras 32-8.

⁹⁵ *Barkhuizen* above n 61 at para 30.

The approach suggested by Ngcobo J mirrors the test laid down by the Appellate Division in *Sasfin*.⁹⁶ Even before the advent of the constitution, as was made quite clear in *Sasfin*,⁹⁷ the courts had the power to decline enforcement of contractual arrangements that are contrary to public policy.⁹⁸

Bhana takes a slightly different view.⁹⁹ She argues that:

The essential premise [of the majority in *Barkhuizen*], is that freedom of contract *can, and must be balanced*, against the values of fairness, justice and reasonableness, as they underpin the s 34 constitutional right of access to court i.e. fairness, justice and reasonableness, in terms of access to court, must curb the unacceptable excesses of the reach of contractual autonomy.

Moreover, the CC adjusted the framework within which the “access to court-public policy” enquiry takes place. Whereas, the “all or nothing” common law approach focuses only on the clause in question, the CC also drew attention to the particular circumstances of the contractants and therefore, the particular outcome of the case. In doing so, it is submitted, that the CC infused elements of s 8(2) and s 36(1), to guide the constitutional adjustment of the common law methodology, contemplated by s 39(2). Further, this resonates with the methodology applied by the common law, to contracts in restraints of trade. The net result, therefore, is a shift along the continuum, from a completely abstract, tendency-based analysis of a contractual term, to a more concrete, outcomes-based analysis. Arguably, this was an attempt to create a more even-handed approach to contractual autonomy, so as to afford greater recognition to the substantive constitutional right implicated by the time-bar clause.¹⁰⁰ (Footnotes in the original omitted).

While Bhana welcomes the development, she also criticises the court on the basis that it was ‘not sufficiently rigorous in its identification and interrogation of considerations specific to the *external reach dimension* of contractual autonomy; it

⁹⁶ See *Sasfin* above n 41.

⁹⁷ *Id* at 9B-G.

⁹⁸ *Id*.

⁹⁹ Bhana *Constitutionalising Contract Law: Ideology, Judicial Method and Contractual Autonomy* (LLD Thesis, University of Witwatersrand, 2013) available on <http://wiredspace.wits.ac.za/jspui/bitstream/10539/12816/2/PHD%20D%20BHANA.pdf> (accessed 21.10.2013).

¹⁰⁰ *Id* at page 164.

being a *legality* issue. Nor was it careful, in its allocation of the relevant considerations, to the respective levels of the scale.¹⁰¹

While I do not disagree with Bhana, I do not think that the so-called ‘outcomes-based analysis’ changes the *status quo*. I submit that our law of contract has not departed to any appreciable degree from the principles laid down in *Sasfin*. Therefore, it appears that the only change that took place in the eighteen-year period between *Sasfin* and *Barkhuizen* relates to the content of public policy. If this is correct, then it becomes necessary to interrogate the ‘new’ content of public policy that was introduced by constitutional values.

In the next part I argue that the first step in interrogating the new content of public policy came from the Constitutional Court decision in *Everfresh*. I will argue that the minority in *Everfresh* sounded a bold call to infuse the common law notion of public policy with the constitutional value of *ubuntu*. I submit that the value of *ubuntu* is an essential piece of the public policy puzzle. The analysis is in two parts. First, I ask whether the value of *ubuntu* has been infused with public policy, a question which must, in my view, be answered in the affirmative. Secondly, I will interrogate the ‘new’ content of public policy introduced by the value of *ubuntu*.

V EVERFRESH, GOOD FAITH AND UBUNTU

*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*¹⁰² concerned the enforcement of an option clause in a lease agreement. Everfresh (Pty) Ltd (the applicant) leased property from Shoprite (Pty) Ltd (the respondent). Clause 3 of the lease agreement required the parties to negotiate renewal of the lease after five years. When Everfresh purported to renew the lease, Shoprite refused and sought an eviction. The reasons given by Shoprite were that clause 3 did not give Everfresh a right of renewal and that Shoprite wanted to develop the property. Everfresh thus went to court seeking an order to the effect that Shoprite had a duty to negotiate in good faith. Everfresh contended that, on a proper construction of the contract, the right to evict did not accrue until Shoprite had made a *bona fide* attempt to negotiate.¹⁰³

¹⁰¹ Id.

¹⁰² 2012 (1) SA 256 (CC).

¹⁰³ *Everfresh* above n 2 at para 13-5.

A major stumbling block in the way of Everfresh's argument was that, according to our common law, the duty to negotiate in good faith is not enforceable. In *Southernport Developments (Pty) Ltd v Transnet Ltd*¹⁰⁴ the SCA held that a promise to negotiate in good faith, without any concrete matter or a 'readily ascertainable objective standard', is too illusory or too vague and uncertain to be enforceable.¹⁰⁵ To overcome this stumbling block, Everfresh argued that the common law should be developed in terms of section 39(2) of the Constitution to the extent that it does not preclude parties from refusing to 'negotiate in good faith if an agreement, properly interpreted, requires them to do so.'¹⁰⁶

Everfresh argued that the Court should develop the common law so as to require parties who undertake to negotiate new rental for a new term of the lease to do so reasonably and in good faith.¹⁰⁷ For the proposition, Everfresh relied on the constitutional value of *ubuntu*.¹⁰⁸ Shoprite, on the other hand, contended that such clauses should not be enforceable as good faith is vague and uncertain.

The majority of the Constitutional Court, per Moseneke DCJ, dismissed the application for leave to appeal on the ground that the constitutional issue was not properly pleaded before the High Court or SCA. The Court held that it was not in the interests of justice to allow Everfresh to raise the constitutional issue for the first time on appeal. However, the minority of the Court made important remarks about the value of *ubuntu* and the private law duty of good faith. These remarks were approved by the majority, although it disagreed with the outcome.^{bh}

Yacoob J (as he then was), writing for the minority, held as follows:

Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists

¹⁰⁴ 2005 (2) SA 202 (SCA).

¹⁰⁵ *Shoprite Checkers (Pty) Limited v Everfresh Market Virginia (Pty) Limited*, Case No. 6675/09, KwaZulu-Natal High Court, Pietermaritzburg, 25 May 2010 at para 26 read with para 25; see also *Coal Cliff Collieries Pty Ltd and Another v Sijehama Pty Ltd and Another* (1991) 24 NSWLR 1; *Southernport* above n 62 at paras 15-6.

¹⁰⁶ *Everfresh* above n 2 at paras 13-4.

¹⁰⁷ *Id* at para 22.

¹⁰⁸ *Id* at para 23.

that good faith requirements are enforceable should be determined sooner rather than later.¹⁰⁹

The point of departure for Yacoob J was that the 'the values embraced by an appropriate appreciation of *ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution.'¹¹⁰ He cautioned that 'the development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law.'¹¹¹ In his view, the development of the common law,

[...] should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.¹¹²

Yacoob J held then that an approach which says that a contract of lease between two businesses with limited liability does not implicate questions of *ubuntu* is too narrow.¹¹³ He took the view that contractual terms that require negotiation are not only entered into by businesses with limited liability but are often entered into between individuals and often poor, vulnerable people on one hand and on the other hand powerful, well-resourced companies.¹¹⁴

Yacoob J held that the common law of contract should be developed in terms of section 39(2) of the Constitution.¹¹⁵ The duty to develop the common law is not discretionary. The courts should always be alive to the need to develop the common law to accord with the spirit, purport and object of the Constitution and the Bill of Rights.¹¹⁶

¹⁰⁹ *Everfresh* above n 2 at para 22.

¹¹⁰ *Id* at para 23.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id* at para 24.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id* at para 34; See also *Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC); 2005 (6) SA 419 (CC).

As noted earlier, although the majority found that it was not in the interests of justice to grant leave to appeal, Moseneke DCJ made similarly important remarks about *ubuntu* and good faith. He held as follows:

Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of *ubuntu*, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of *ubuntu*. It emphasises the communal nature of society and “carries in it the ideas of humaneness, social justice and fairness” and envelopes “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.¹¹⁷ (Footnotes in the original omitted)

The Deputy Chief Justice continued:

Were a court to entertain Everfresh’s argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of *ubuntu*, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.¹¹⁸

Unfortunately, due to procedural defects in the applicant’s case, we do not have the benefit of the court’s complete thinking on the impact of the constitutional value of *ubuntu* on private contractual relations. However, two points emanate from Yacoob J’s minority judgment. First, our common law -- specifically the common law notion of public policy -- has been infused with constitutional values and the values include *ubuntu*. Secondly, *ubuntu* may require that people should deal with each other in good faith.

¹¹⁷ *Everfresh* above 2 at para 71.

¹¹⁸ *Id* at para 72.

I submit that Yacoob J's views are correct. It is indisputable that *ubuntu* is a constitutional value.¹¹⁹ If we accept that *ubuntu* is a constitutional value, we must also accept that – in accordance with *Barkhuizen* – the common law notion of public policy has been infused with the value of *ubuntu*.

A difficulty which arises is that Yacoob J did not go so far as deciding whether *ubuntu* in fact requires parties to deal with each other in good faith. I submit that this challenge is not fatal. I will answer this below. Yacoob J also does not give any indication of what it means to deal in good faith. However, Hutchison gives some assistance. He points out, quite correctly, that:

There is a close link ... between the concepts of good faith, public policy and the public interest in contracting. This is because the *function of good faith has always been to give expression in the law of contract to the community's sense of what is fair, just and reasonable*. The principle of good faith is thus an aspect of the wider notion of public policy, and the reason why the courts invoke and apply the principle is because the public interest so demands. Good faith accordingly has a dynamic role to play in ensuring that the law remains sensitive to and in tune with the views of the community.¹²⁰ (Emphasis added)

The remaining question is whether *ubuntu*, in principle, creates an imperative of good faith in private contractual relations. *Ubuntu*, as often expressed in the Nguni aphorism '*umuntu ngumuntu ngabantu*',¹²¹ encompasses the concept of interdependence.¹²² According to Mokgoro J, an individual is an integral part of a community and therefore, his or her relationship with the community is an integral part of being an individual.¹²³ Botha points out that *ubuntu* refers to a practical humanist disposition towards the world and denotes compassion, tolerance and

¹¹⁹ Keevy is, as far as I am aware, the only commentator to reject that *ubuntu* is a constitutional value. See Keevy 'Ubuntu: Ethnophilosophy and core constitutional value(s)' in Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (Juta 2011) at page 38.

¹²⁰ Hutchison 'Non-variation clauses in contract: Any escape from the *Shifren* straitjacket?' 2001 (118) *South African Law Journal* 720 at page 742.

¹²¹ "A person is a person because of (or through) other people." See Jobodwana 'Customary courts and human rights: Comparative African perspectives' 2000 *SAPR/PL* at pages 26-7.

¹²² See Roderer and Moellendorf *Jurisprudence* (Juta and Co, 2004) at pages 441-55.

¹²³ Mokgoro 'Ubuntu as a Legal Principle in an Ever-changing World' in Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (Juta 2011) at pages 1-2.

fairness.¹²⁴ I submit that the value of *ubuntu* imports notions of fairness and humanness to our common law of contract. Further, *ubuntu* requires parties to deal with each other in good faith. The notion of good faith is more expansive than the notion of public policy.¹²⁵ Good faith will align with the ‘fairness’ required by *ubuntu*.

Unfortunately, although Yacoob J makes a bold call for development of the common law in terms of section 39(2) of the Constitution to require private contracting parties to deal with each other in good faith,¹²⁶ he does not actually develop the common law.¹²⁷ Therefore, the role of *Everfresh* is limited. Be that as it may, the developments in *Everfresh* shine a new light on the notion of good faith and equity in contractual relations. Although the Court did not use term ‘equity’, it is submitted that *Everfresh* opens the door to further developments, which may inevitably establish a standard of fairness and equity in contractual relations.

As positive as the developments in *Everfresh* may be, they also give rise to valid concerns about the commercial uncertainty. The question relates to the effect that abstract notions of fairness and equity will have on principle that agreements entered into freely and voluntarily must be honoured. In the next part, I deal with the concern about commercial uncertainty. I submit that the concern is overstated.

VI COMMERCIAL UNCERTAINTY

The primary reason for the courts’ reluctance to introduce abstract values of reasonableness and fairness to weigh against sanctity of contract has been the concern against causing commercial uncertainty. The concern is that ‘if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.’¹²⁸ This concern is not new. The *Sasfin* court was alive to the concern when it held that ‘[t]he power to declare contracts contrary to public policy should, however, be exercised sparingly and only

¹²⁴ Botha *Statutory Interpretation* (Juta and Co, 2005) at page 86. See also Khunou and Nthai ‘The Contribution of Ubuntu to the Development of Constitutional Jurisprudence in a Democratic South Africa’ in Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (Juta and Co, 2011) at page 51.

¹²⁵ Hutchison above n 113 at page 742.

¹²⁶ *Everfresh* above n 2 at para 22-4.

¹²⁷ *Id* at para 38-9.

¹²⁸ *Potgieter* above n 83 at para 34. See also *Preller v Jordaan* 1956 (1) SA 483 at 500; Nienaber ‘Regters en juriste’ 2000 TSAR 190 at 193; Hefer ‘Billikheid in die kontraktereg volgens die Suid-Afrikaanse regskommissie’ 2000 TSAR 143.

in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.¹²⁹

The concern was expressed vividly by the SCA in *South African Forestry Co Ltd v York Timbers Ltd*.¹³⁰ The court held that:

[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relations. These abstract values perform creative, informative and controlling functions through established rules of the law of 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.¹³¹

The concern was reiterated by the SCA in *Brisley*,¹³² *Bredenkamp*,¹³³ *Maphango*,¹³⁴ and more recently in *Potgieter*, where Brand JA held that:

[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge.¹³⁵

Commercial certainty is a consequence of the rule of law¹³⁶ and principle of legality,¹³⁷ which are strongly entrenched in our law.¹³⁸ The principle of legality guards against discretionary rules of law.¹³⁹ It protects individuals from being subjected to

¹²⁹ *Sasfin* above n 41 at 9B-G.

¹³⁰ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).

¹³¹ *Id* at para 27.

¹³² *Brisley* above n 53 at paras 21-4 and 93-5.

¹³³ *Bredenkamp* above n 76 at para 38.

¹³⁴ *Maphango* above n 81 paras 22-5.

¹³⁵ *Potgieter* above n 83 at para 34.

¹³⁶ Davis 'Private law after 1994: Progressive development or schizoid confusion?' 2008 *SAJHR* 318;

¹³⁷ Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard LR* 1685, 1720-21.

¹³⁸ *Id* at page 1701.

¹³⁹ *Id*.

arbitrary value judgements.¹⁴⁰ As Harms DP put it eloquently in *Bredenkamp*: ‘A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.’¹⁴¹

Commentators have also cautioned against a ‘constitutional colonisation of the common law [of contract]’.¹⁴² The concern is that importing public law notions into the private law of obligations will impact detrimentally on individual liberties, that is, the right of capable individuals to enter into commercial transactions, even if those transactions are to their detriment.¹⁴³

This argument is somewhat overstated. Freedom is not the only value in our constitutional dispensation. The freedom to enter into commercial transactions cannot be interpreted so as to surpass other constitutional values.¹⁴⁴ What is required is the crafting of a common law framework that accounts and gives effect to all values, as the context may demand. This, however, is not the end of the matter. It is absolutely imperative for South Africans to engage with the idea of *ubuntu* in order to properly unscramble its content and to give effect to its purport. Our common law can no longer ignore indigenous values.¹⁴⁵ The extent of this task cannot be overstated, as English warns:

[C]onstitutional adjudication is about conflict, not harmony, and if *ubuntu* is to be a useful addition to constitutional discourse, we have to get rid of this idea that it is in some way a balm for the conflict at the heart of society. If it is a distinct conception of justice, it would be enlightening if it played more of a role in cases where rival interests – those of the individual and those of the community – collide, so that it can be used in true resolution of that conflict. And without more specific reference to elements of indigenous law which are distinct from Western values but which at the same time support the values behind the Constitution, the

¹⁴⁰ See *Bredenkamp* above n 76 at para 39; *Potgieter* above n 83 at para 36.

¹⁴¹ *Id.*

¹⁴² Van der Merwe ‘Constitutional Colonization of the Common Law: A Problem of Institutional Integrity’ (2000) *TSAR* 12.

¹⁴³ *Barkhuizen* above 61 at para 57.

¹⁴⁴ Bhana above n 101.

¹⁴⁵ Himonga and Bosch ‘The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning’ (2000) 117 *SALJ* 306 at pages 319-328.

effort at promoting a specifically ethnic South African jurisprudence is bound to fail.¹⁴⁶

Essentially, our courts have two choices. First, the courts could apply accept the applicability of the constitutional value of *ubuntu* and embark on interpretive exercise to engage its content and boundaries. Secondly, the courts could simply reject the applicability of the value. In my view the second choice is untenable in our constitutional democracy. The impact of requiring good faith in private relations will not be to negate (or water down) the implicated freedom, but to strengthen it.

VII CONCLUSION

It is submitted that the judgment of the Constitutional Court in *Everfresh* may prove to be the starting point in a new chapter in our private law jurisprudence. The decision opens a gateway for a new approach in private dealings, an approach which gives proper effect to the value of *ubuntu*. As the court held in *Everfresh*, the common law should be developed to the extent that it requires good faith in private dealings. In light of what was said about *ubuntu* in this judgment, it is submitted that this value (system) should have broader application in our law of contracts than just in the context of good faith negotiations under so-called ‘agreement to agree’, which the court was faced with in this matter. It has also been argued above that good faith can be interpreted, as it was during the heydays of the *exceptio doli*, to require equity and reasonableness in contractual dealings. How or whether our courts will be able to give content to such concepts without causing uncertainty in our law of contract – which has so worried the judges of the SCA to date – only time will tell.

¹⁴⁶English above n 13 at page 648.