

Reflecting on the Role and Impact of the Constitutional Value of *uBuntu* on the Concept of Contractual Freedom and Autonomy in South Africa

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Abstract

Private parties have the freedom and autonomy to enter into a contract. This autonomy is deeply rooted in their dignity and personal liberties. Private individuals, in furtherance of their autonomy and freedom to enter into a contract, have certain reasonable expectations, most fundamental of which is the desire that maximum respect is given to their legitimately concluded agreement. The concept of contractual freedom and autonomy connotes the idea that private individuals (natural and juristic) have the liberty to arrange their affairs in a manner that meets their economic interest without governmental inhibition, control and/or interference. However, the operative scope and the practical manifestations of the concept of contractual freedom are circumscribed in the constitutional, statutory, legislative and other socio-cultural orders of States. This article seeks to reflect on the role and influence of the constitutional value of *ubuntu* on the principle of contractual freedom and autonomy, and the naturally accompanying concepts of *pacta sunt servanda* and sanctity of contract in South Africa. The article provides an analysis of the judicial interpretation and views on the concept of contractual freedom and autonomy relative to other competing values that underlie the Constitution of the Republic of South Africa. Furthermore, the article appraises the impact of those judicial views on international commercial agreements. The article also discusses the extent to which communitarian values such as the concept of *ubuntu* have been infused into South African contract law and further reflects on the implication of infusing such communitarian values in both domestic and international contracts. The article concludes with a suggestion that the introduction of traditional African values in South African contract law fundamentally alters the theoretical foundations of the principle of contractual freedom and autonomy in both domestic and international contracts.

Keywords

Contractual freedom and autonomy; traditional African values; *ubuntu*; constitutional limitations; Bill of Rights; public policy; *pacta sunt servanda*; relational contract theory; international commercial contract.

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1 Introduction

The principle of contractual freedom and autonomy is a libertarian doctrine enmeshed in the ideas of an open market economy, and flows from the concept of individual/personal autonomy. The principle mirrors the liberty private individuals have to regulate their affairs (through a contract) in a manner that promotes their interest without governmental direction, interference or inhibition.¹ The theoretical foundations of the concept of contractual freedom and autonomy have received judicial blessings in many countries. The concept of contractual freedom and autonomy has become the cornerstone for the conclusion of both international and domestic contracts. Generally, however, the idea that individuals ought to be afforded the freedom to pursue their economic interest, particularly through a contract, often triggers political questions, most of which relate to the need for the State to strike a balance between the regulation of private activities, on the one hand, and the necessity for individuals to have liberty and control over their private arrangements, on the other hand.² Accordingly, some legal systems constitutionally or statutorily regulate the operative scope of the principle of contractual freedom and autonomy, and the naturally accompanying concepts of *pacta sunt servanda* and the sanctity of contracts.

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¹ This article employs the phrase "contractual freedom and autonomy" to encapsulate the legal terms of "freedom of contract" and "party autonomy". See Johnston 1966 *Wm & Mary L Rev* 37; Pound 1970-1971 *S Texas LJ* 214; McDowell 1977 *BUL Rev* 429; Bauerfeld 1982 *Colum L Rev* 1659; Zhang 2000 *Temp Int'l & Comp LJ* 237; Johns 2008 *LCP* 243; Michaels 2008 *LCP* 73; Borchers 2008 *Tul L Rev* 1645; Fu 2013 *JICLT* 274; Maultzsch 2016 *J Priv Int L* 466; Fridman 1967 *Ottawa L Rev* 2; Martinek 2007 *TSAR* 4-6

² Haferkamp 2008 *Am J Comp L* 682.

This article seeks to reflect on the impact of the constitutional value of *ubuntu* on the principle of contractual freedom and autonomy, and the concomitant concepts of *pacta sunt servanda* and sanctity of contract. In addressing the foregoing aim, this article highlights the judicial constraints on contractual freedom and autonomy. The article also discusses the judicial interpretation and views on the concept of contractual freedom and autonomy *vis a vis* other competing constitutional values underlying the *Constitution of the Republic of South Africa*. Furthermore, the article provides an analysis of the impact of those judicial views on international commercial agreements. The article is divided into six sections. The first section discusses the applicability of the Constitution of South Africa in contract law and highlights the essence of the concept of *ubuntu* as a vital constitutional value that informs the public policy of South Africa. This is followed by an analysis of the nature of the concept of *ubuntu* and other traditional African values. The third section discusses the nature and essence of the concept of contractual freedom and autonomy as a value that underlies the Constitution of South Africa. The fourth section provides an analysis of the competing constitutional values of *ubuntu* and the concept of contractual freedom and autonomy and further highlights the views expressed by the Constitutional Court (CC) and Supreme Court of Appeal (SCA) of South Africa on the issue of constitutional fairness and the role of *ubuntu* in contractual relations. The fifth section reflects on the impact of infusing the value of *ubuntu* into South African contract law on domestic and international contracts. The final section concludes with a suggestion that infusing the value of *ubuntu* into contractual relations would fundamentally alter the theoretical foundations of the concept of contractual freedom and autonomy as understood in international commercial law.

2 The applicability of the 1996 Constitution in contractual relations

The impact of a constitution on contractual relations can be a double-edged sword, in that a constitution can, on the one hand, serve as a basis upon which the concept of contractual freedom and autonomy can be concretised, but on the other hand it can operate to limit the scope of contractual freedom and autonomy (this largely depends on judicial interpretation). The *Constitution of the Republic of South Africa, 1996* (hereafter "the 1996 Constitution") serves as the foundational legal framework for the activities of organs of state, state institutions and private/juristic persons in South Africa. The 1996 Constitution is an embodiment of the hopes and aspirations of the South African people. Underlying it are important principles and values such as equality, dignity and respect for fundamental human rights. The 1996 Constitution ushered South Africa into a regime of non-racialism.³ The Bill of Rights in the 1996 Constitution serves as the cornerstone of South African democracy and contains mandatory provisions that require government institutions as well as natural and juristic persons to uphold the rights and freedoms outlined in the Constitution.⁴ The 1996 Constitution provides for the right to and respect for human dignity,⁵ the right to own property and protection from the deprivation of property,⁶ the equality of all persons,⁷ and the right to have

³ Section 1 of the *Constitution of the Republic of South Africa, 1996* (the Constitution). Also see Currie and De Waal *Bill of Rights Handbook 2*; Bauman and Schneiderman 1996 *Rev Const Stud* 1; Du Plessis 2000 *Stell LR* 385; Grant 2007 *Hum Rights Law Rev* 299; O'Connell 2008 *ICON* 267; Rautenbach *Rautenbach-Malherbe Constitutional Law* 85; De Vos "Equality, Human Dignity, and Privacy Rights" 418; Chaskalson 2011 *Am U Int'l L Rev* 1380. Also see generally De Vos and Freedman *South African Constitutional Law in Context*.

⁴ Section 8 of the Constitution. See also De Vos 1997 *NQHR* 225-227; Cockrell 1997 *MLR* 529; Davis 1997 *SAJHR* 1; Sprigman and Osborne 1999 *SAJHR* 26; Malherbe 2000 *NQHR* 53; Langa 2001 *SMU L Rev* 2101; Du Plessis and Penfold 2006 *Ann Surv S Afr L* 45; Du Plessis and Penfold 2007 *Ann Surv S Afr L* 67; Bentele 2009 *Ga J Int'l & Comp L* 221.

⁵ Section 10 of the Constitution.

⁶ Section 25 of the Constitution.

⁷ Section 9 of the Constitution.

access to court or seek judicial redress in a dispute,⁸ among other things. There are instances where some rights and freedoms of individuals are limited in the furtherance of public interest, but such limitations must be in accordance with the rule of law and other constitutional values of human dignity and equality.⁹

The Bill of Rights in the 1996 Constitution has an impact on contracts and private relations in many respects. The applicability of the Bill of Rights to private legal arrangements under the 1996 Constitution raises important questions of whether or not fundamental human rights could be applied horizontally. The horizontal application of the Bill of Rights means that obligations arising out of a contract or any private legal arrangement must not infringe on the rights of individuals as laid out in the 1996 Constitution.¹⁰ The horizontal application of the Bill of Rights is at variance with the traditional approach of the vertical application of human rights.¹¹

The vertical application of human rights mirrors the idea that states must not infringe on the fundamental rights of individuals.¹² The horizontal application of human rights further raises the issue of whether or not the fundamental rights of individuals ought to be applied directly or indirectly to private agreements, and this has been treated in a variety of ways by academics.¹³ The CC in *Barkhuizen v Napier*¹⁴ highlighted the difference between the horizontal and direct application of fundamental human rights.

⁸ Section 34 of the Constitution.

⁹ Section 36 of the Constitution. Also see *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *August v Electoral Commission* 1999 3 SA 1 (CC) para 17; *Hoffman v South African Airways* 2001 1 SA 1 (CC) para 21; Rautenbach 2001 SALJ 618-619; Pieterse 2003 SALJ 42-43; Illes 2007 SAJHR 75-86; Rautenbach 2014 PELJ 2248.

¹⁰ O'Conneide 2003 *Hibernian LJ* 78-82; Knox 2008 *AJIL* 1; Kanalan "Horizontal Effect of Human Rights" 427; Dagan and Dorfman 2018 *Cornell Int'l LJ* 365-367; Altwicker 2018 *EJIL* 598.

¹¹ Tomuschat *Human Rights* 309; De Witte 2009 *Citizen Stud* 517-518.

¹² Tomuschat *Human Rights* 309.

¹³ Lane 2018 *EJCL* 14-30; Gardbaum 2003 *Mich L Rev* 389-390, 398; Chirwa 2006 *LDD* 30-31; Pieterse 2007 *SAJHR* 161-162; Bhana 2013 *SAJHR* 351; Futch 1997 *NC J Int'l L & Com Reg* 1010.

¹⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) (hereafter *Barkhuizen*).

Whereas a direct, horizontal application of fundamental rights per the decision in *Barkhuizen* implies that parties could, as a matter of right, invoke provisions contained in the Bill of Rights to establish a case or defend a claim, an indirect horizontal application of fundamental rights implies that a party must prove that a term of a contract violates a constitutional right and that a contract (or a provision in the contract) is contrary to public policy or illegal under the rules of common law.¹⁵ In general, however, determining whether fundamental rights in a constitution can be applied horizontally depends on the textual provisions of the constitution.¹⁶

The horizontal application of the Bill of Rights under the 1996 Constitution has been subject to much debate. While it used to be argued that an application of the Bill of Rights to contractual relations unleashes a high degree of uncertainty in contractual relations, the current constitutional order and predominant academic views point to the fact that the socio-politico-economic history of South Africa requires the need for the Bill of Rights in the 1996 Constitution to be applied horizontally to contractual/commercial arrangements so as to dismantle the legacy of colonialism.¹⁷

The general judicial and academic consensus is that sections 8(2) and (3) of the 1996 Constitution permit an indirect horizontal application of fundamental rights to private arrangements.¹⁸ The issue of the direct or indirect application of the Bill of Rights to private parties or in private legal relations was dealt with in the seminal case of *Barkhuizen*, where the CC¹⁹

¹⁵ *Barkhuizen* paras 23-30; Hutchison "Nature and Basis of Contract" 37.

¹⁶ Corrin 2009 *ICLQ* 70.

¹⁷ Lubbe 2004 *SALJ* 395-396; Pretorius 2003 *THRHR* 638; Bhana and Pieterse 2005 *SALJ* 867-872; Du Plessis 2019 *PELJ* 1.

¹⁸ *Du Plessis v De Klerk* 1996 3 SA 850 (CC); Rautenbach 2000 *TSAR* 300-311; Van der Walt 2001 *SAJHR* 346-356; Malherbe 2001 *TSAR* 6-8; Roederer 2003 *SAJHR* 70; Liebenberg 2008 *TSAR* 465-475; Friedman 2014 *SAJHR* 66-76; Ferreira 2006 *Speculum Juris* 241.

¹⁹ Section 167 of the Constitution. The Constitutional Court is the highest court of South Africa with original jurisdiction in constitutional matters. For further discussion on the Constitutional Court, see Lewis 2009 *LQR* 440; Webb 1998 *U Pa J Const L* 205; Mtshaulana and Thomas 1996 *Rev Const Stud* 98; Berat 2005 *ICON* 59.

cast grave doubt on the direct application of the Bill of Rights.²⁰ Speaking through Ngcobo J, the court stated that an attempt to test the constitutionality of a term of contract²¹ directly against the Bill of Rights would be fraught with difficulties.²² The CC accordingly stated that:

The proper approach to the constitutional challenges to contractual terms is to determine whether the term is contrary to public policy as evidenced by constitutional values, in particular those found in the Bill of Right.²³

Public policy is determined by taking into account the values that underlie the 1996 Constitution.²⁴ In the view of the CC, any term in a contract that is injurious to constitutional values is contrary to public policy.²⁵ The CC also posited that the public policy of South Africa has been codified by the 1996 Constitution, particularly the Bill of Rights. Further, public policy according to the CC "represents the legal convictions of a community; it represents those values that are held most dear by the society."²⁶ Embedded in the idea of public policy are key concepts such as reasonableness, fairness, good faith, equity and justice. According to the CC, foundational to these concepts of fairness, good faith, equity and justice is the vital constitutional value of *ubuntu*.²⁷ The concepts of reasonableness, fairness and good faith, and *ubuntu* tend to check the operational ambit of the principle of contractual freedom and autonomy. In other words, the values underlying the 1996 Constitution can be employed to strike a balance between the need to regulate the excesses or probable abuse of the concept of contractual freedom and autonomy, and permitting individuals the liberty and dignity to regulate their own lives or affairs.²⁸

²⁰ *Barkhuizen* para 26.

²¹ *Barkhuizen* paras 1-5.

²² *Barkhuizen* para 28.

²³ *Barkhuizen* paras 29, 30.

²⁴ *Barkhuizen* paras 29, 30.

²⁵ *Barkhuizen* paras 29, 30.

²⁶ *Barkhuizen* para 28.

²⁷ *Barkhuizen* para 51.

²⁸ *Barkhuizen* paras 12, 70.

The idea that private individuals have the freedom and autonomy to determine the content of their agreements is therefore circumscribed in the public policy of South Africa, which according to the CC is informed by the constitutional value of *ubuntu*. In essence, a contract or provisions in a contract must not be at variance with the constitutional value of *ubuntu*. A contract or provisions in a contract can therefore be weighed or tested against the constitutional value of *ubuntu*. The concept of *ubuntu* is an African traditional value that is informed by the ethos of communitarianism. The discussion in the next section provides an analysis of the nature, essence and significance of the African traditional value of *ubuntu* and the extent to which the concept has been introduced into many academic disciplines, including the area of contract and commercial law in South Africa.

3 The nature of the value of *ubuntu* and other traditional African values

African traditional society has several values and ethics. It is trite, however, that traditional African societies are founded on the ethic of communitarianism.²⁹ A person in a typical African society does not live in isolation but is rather expected to effectively relate with other people in the society.³⁰ The actions and inactions of people are somewhat intertwined with the communal relationships with others. It has been averred that in an African society, a person realises his/her potential through relations with other people. Self-realisation is therefore deeply rooted in the communal relations of individuals.³¹ This assertion stems from African maxims and

²⁹ Metz "Virtues of African Ethics" 276-284. Also see Metz "African Egalitarianism" 203-204; Gyekye *Essay on African Philosophical Thought*; Ikuenobe 2010 *Philos Pap* 245; Gyekye "Person and Community in African Thought" 102; Molefe 2018 *Politikon* 217-220; Hull *Equal Society* 9-10; Molefe 2017 *Phronimon* 182; Akiode "African Philosophy" 58-61.

³⁰ Dzobo "Image of Man in Africa" 123-135; Dickson *Aspects of Religion and Life in Africa* 4.

³¹ Metz "Virtues of African Ethics" 277-279.

proverbs that are said to encompass traditional African ethical ideas.³² For example, it is a common saying in southern African countries that "a person is a person through other persons".³³ Again in southern Africa, the communitarian ethic and value of *ubuntu* is said to constitute the moral fabric of southern African countries. *uBuntu* underscores the need for people to promote friendliness, good neighbourliness, hospitality, generosity and compassion towards one another.³⁴ According to Tutu,³⁵

[W]e say, a person is a person through other people. It is not 'I think therefore I am'. It says rather: 'I am human because I belong' I participate, I share...Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* - the greatest good. Anything that subverts or undermines this sought-after good is to be avoided like the plague.

Also in eastern and western African countries, the saying "I am because we are" is frequently used to denote the fact that a person cannot completely isolate him/herself from the operations of society.³⁶ Though these maxims do not in and of themselves reveal the physical interdependence of people on one another, Metz believes that they constitute an evaluative and normative "nomenclature" to understand traditional African ethics.³⁷ The maxims are therefore essential guidelines to individuals to develop and

³² Metz "Virtues of African Ethics" 277.

³³ Tutu *No Future without Forgiveness* 35.

³⁴ In *S v Makwanyane* 1995 3 SA 391 (CC) para 308, the Constitutional Court stated that the value of *ubuntu*, which metaphorically expresses itself in *umuntu ugumuntu ngabantu* envelops the "key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity... it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation". Also see generally Letseka "African Philosophy and Educational Discourse" 186; Mpedi 2008 *Acta Theologica* 111; Pieterse "Traditional African Jurisprudence" 442; Du Plessis *Harmonisation of Good Faith and Ubuntu* 16-20; Van Niekerk 1998 *CILSA* 167-168; Van Niekerk *Interactions of Indigenous Law and Western Law* 250; More "Philosophy in South Africa under and after Apartheid" 156-157; Nwipikeni 2018 *S Afr J Philos* 325; Rider 2016 *Tenn Law Rev* 814; Mokgoro 1998 *PELJ* 4-9; Gade 2012 *S Afr J Philos* 484, 485-488; Gade 2011 *S Afr J Philos* 307-308; Mokgoro 1998 *Buff Hum Rts L Rev* 15; Eze 2008 *S Afr J Philos* 387-390; Praeg 2008 *S Afr J Philos* 370-371; Mokgoro "Ubuntu as a Legal Principle in an Ever-changing World" 1; Himonga "Exploring the Concept of Ubuntu" 2; Bekker "Nature and Sphere of African Customary Law" 27; Le Grange "Philosophy of Ubuntu and Education in South Africa" 67.

³⁵ Tutu *No Future without Forgiveness* 35.

³⁶ Mbiti *African Religion and Philosophy* 141.

³⁷ Metz "Virtues of African Ethics" 277.

identify their real selves.³⁸ The communitarian nature of African society or tradition means that the actions of people must necessarily have a net aim of contributing to the benefit of society. To put it differently, the choices of individuals in an African society must seek to promote the greater good of the society – *summum bonum*.³⁹ Communitarianism can also be understood as attaching primacy to the overall interest of society rather than the interest of individuals in a society.⁴⁰ Inherent in man is a sense of communism, and hence human beings are interdependent and intrinsically communal creatures.⁴¹ Therefore, under African traditions, the interests of individuals are more often than not subjugated to those of society.

The foregoing assertion has been affirmed and intimated by several African philosophers. For example, Mentiki is of the view that "as far as Africans are concerned, the reality of the communal world takes precedence over realities of individual histories, whatever these may be."⁴² The conception of the role of the individual in an African society by Senghor resembles that of Mentiki. Senghor posits that "negro-African society puts more stress on the group than individuals, more on solidarity than on the activity and needs of the individual, more on communion of persons than on their autonomy. Ours is a community society."⁴³ According to Kenyatta, "nobody is an isolated individual. Or rather his uniqueness is a secondary fact about him; first and foremost he is several people's relative and several people's contemporary."⁴⁴

Gyekye describes the position taken by the foregoing scholars as a strict application and adherence to communitarianism and avers that the essence

³⁸ Metz "Virtues of African Ethics" 277.

³⁹ Tutu *No Future without Forgiveness* 35.

⁴⁰ Mbiti *African Religion and Philosophy* 141.

⁴¹ See generally Wiredu "African Concept of Personhood"; Wiredu "Moral Foundations of an African Culture"; Gyekye "Person and Community in African Thought" 103-105; Aborisade 2015 *Front Philos China* 616; Ikuenobe 2015 *Philos East West* 1006-1007; Ansah and Mensah 2018 *UJAH* 63.

⁴² Mentiki "Person and Community in African Traditional Thought" 171.

⁴³ Senghor *On African Socialism* 93-94.

⁴⁴ Kenyatta *Facing Mount Kenya* 297.

of the position of adherence to strict communitarianism is the fact that the community and nothing else defines a person.⁴⁵ Also, to those scholars a person is not defined by other qualities or attributes such as rationality and or the ability to make informed choices.⁴⁶ Their position also means that autonomy does not inhere in man as a matter of existence but rather is an attribute acquired and granted to a person as a matter of course.⁴⁷ It is observed, however, that pro-strict communitarian values are more often than not, informed by the principles underlying African socialism. African socialism was the main ideology that informed political independence in most African countries.⁴⁸

Some scholars have also refuted the claim that traditional African society is absolutely communitarian. They aver that it may be fallacious to assert that traditional African ethics completely obviate the notion of individual autonomy or the possibility for a person to take steps to seek self-growth and development.⁴⁹ Accordingly, some African philosophers have asserted that irrespective of the communitarian ethos in traditional African society, there are instances where individuals are empowered to discover their real selves.⁵⁰ For instance, on highlighting the values of African tradition Metz admitted that African tradition sometimes recognises the role that the individual has to play to ensure his/her own development. Metz states:⁵¹

I am not suggesting that the African tradition is devoid of more 'self-regarding' considerations. For instance, there are recurrent proverbs and counsels regarding prudence and moderation of one's desires. However, often (though

⁴⁵ Gyekye "Person and Community in African Thought" 107.

⁴⁶ Gyekye "Person and Community in African Thought" 105.

⁴⁷ Gyekye "Person and Community in African Thought" 112.

⁴⁸ Gyekye "Person and Community in African Thought" 103. For instance, Kwame Nkrumah avers, "If one seeks the socio-political ancestor of socialism, one must go to communalism... in Socialism the principles underlying communalism are given expression in modern circumstances." See Nkrumah *Consciencism-philosophy and Ideology for Decolonization and Development* 73. Senghor also states, "negro-African society is collectivist or, more exactly communal, because it is rather a communion of souls than an aggregate of individuals." See Senghor *On African Socialism* 49.

⁴⁹ Metz "Overview of African Ethics" 62-66.

⁵⁰ Gyekye *Tradition and Modernity* 48-52.

⁵¹ Metz "Virtues of African Ethics" 279.

not always) these individualist values are deemed to be instrumental worth, as means towards behaviour oriented towards communal end, or at least exemplifying virtue not only to the extent that they tend to foster community. For instance, if one did not look after oneself, then one would threaten to become a burden on others. However, one may reasonably question whether temperance, prudence and related traits are valuable only in so far as they have other-regarding dimension ...

Metz's view points to an interesting reality that even in those situations in which individuals have the freedom to advance their self-interest, the freedom granted is a mere tool or catalyst to propel society's development (the common good of society). Hence, in a typical Africa society, personhood is not "an end in itself but rather a means to an end". The end, in this case, is the greater good of society. Also, appraising the role of a person in an African society Gyekye disagreed with pro strict-communitarian scholars.

Gyekye expresses the opinion that though African society *ab initio* regards human beings as communal beings and believes that the communal feature remains man's most vital value, human beings possess other qualities or attributes to which pro strict-communitarian scholars must not generally be oblivious.⁵² To Gyekye, failure to recognise other innate attributes of human beings would mean an intrusion of communitarianism into other legitimate aspects of individual life that also require respect.⁵³ Placing communitarianism on this high pedestal, per Gyekye, has dire consequences for the innate attributes of individuals, which society also has a duty to protect. Gyekye therefore asserts that in the African society individuals have the freedom to engage in activities that promote their self-growth and development. Gyekye's view does not entirely disregard individual autonomy and the rights private persons may have in an African society, but cautions that inherent in personhood in an African society are other values that even African tradition itself encourages.⁵⁴ Gyekye explains

⁵² Gyekye "Person and Community in African Thought" 106.

⁵³ Gyekye "Person and Community in African Thought" 106.

⁵⁴ Gyekye "Person and Community in African Thought" 106.

that "the fundamental meaning of community is the sharing of an overall way of life, inspired by the notion of common good."⁵⁵

Similar views are shared by Paris, who states "no virtue is more highly praised among Africans and African Americans than that of beneficence because it exemplifies the goal of community."⁵⁶ Essentially, "the purpose of our life is community service and community belongingness."⁵⁷ The central thesis of Gyekye's works – the basis of the existence of a person in an African society is to act in a manner that ensures the common good of the society – remains untouched. He advocates a somewhat moderate communitarianism, however, as opposed to strict communitarianism.⁵⁸ To Gyekye, regardless of the communitarian ethos in African society, individuals have some personal rights that are not a derivative of the person's existence in society. Gyekye states,⁵⁹

Rights belong primarily and irreducibly to individuals; a right is the right of some individuals...communitarianism cannot disallow arguments about rights which may in fact form part of the activity of a self-determining autonomous individual possessed of the capacity for evaluating or re-evaluating the entire practice of his community. Some of such evaluations may touch on matters of right, the exercise of which self-determining individuals may see as conducive to the fulfilment of their human potential, and against the denial of which he may raise some objections. The respect for human dignity, a natural or fundamental attribute of the person which cannot, as such, be set at nought by communal structure, generates regard for personal rights.

The idea of empowering individuals in an African society to advance the course of self-development has also found favour with other African philosophers. Kasenene shares the view that the "actions of people that have the propensity to promote life or vitality must be encouraged because it is right to encourage such actions, whereas actions that decreases the

⁵⁵ Gyekye "Person and Community in African Thought" 106; Metz "Overview of African Ethics" 69.

⁵⁶ Paris *Spirituality of African People* 136.

⁵⁷ Iroegbu "Beginning, Purpose and End of Life" 442.

⁵⁸ Gyekye *Tradition and Modernity* 35-76; Gyekye "Person and Community in African Thought" 121; Metz "Overview of African Ethics" 68; Oyowe 2013 *Philosophia Africana* 117.

⁵⁹ Gyekye "Person and Community in African Thought" 113-114; Ansah and Mensah 2018 *UJAH* 63.

vital force of a person be discouraged because it is wrong to foster such actions."⁶⁰ Iroegbu also proffers a general opinion that "activities of people that diminish life in all cultures are considered as evil, whereas those that promote it are regarded as good."⁶¹ Notwithstanding the ambivalent position of whether an individual in an African society can embark on a mission of self-sufficiency without recourse to other people, it has increasingly become necessary, particularly today, to have due regard for individual autonomy in traditional African society. One thing is clear - traditional African societies do not attach absolute primacy to individual interest and personal autonomy. Individual autonomy in an African society does not exist as an autonomous body of virtue that underlies African philosophy.

In sum, individual or personal autonomy in an African society is a concept that is not detached from the operations of society. While some scholars aver that the individual does not have autonomy at all, since African society is communitarian rather than individualistic, other scholars have intimated that due regard ought to be given to other attributes of human beings. To those scholars, it would be appropriate to afford individuals the freedom to advance their desires, though the exercise of such freedom must coincide with the general good of society. It is generally accepted that in African society interactions of individuals are relational/cooperative rather than individualistic.

As indicated already, the communitarian ethic of *ubuntu* seems to have crept into various academic disciplines, including but not limited to law, business, health, legal education and jurisprudence.⁶² With respect to law,

⁶⁰ Kasenene "Ethics in African Theology" 138-147.

⁶¹ Iroegbu "Right to Life and Means of Life" 447. For further discussion on African philosophy, see Akinola 1982 *JHSN* 67; Metz "African Communitarianism and Difference" 1; Matolino 2018 *Theoria* 57-58; Molefe 2020 *S Afr J Philos* 194; Molefe *African Philosophy of Personhood, Morality and Politics* 17-33.

⁶² McDonald 2010 *Rev Afr Polit Econ* 139; West 2014 *J Bus Ethics* 47; Himonga 2013 *J Afr L* 165; Ndima 2015 *CILSA* 363-364; Naudé "Decolonising Knowledge" 217; Henrico "Transformative Constitutionalism and Transformative Legal Education" 21-24; Mokgoro 1998 *PELJ* 4-9; Kamga 2018 *AHRLJ* 627-629. Also see Bilchitz, Metz and Oyowe *Jurisprudence in an African Context*, Radebe and Phooko 2017 *S Afr J*

the foundational ideas of *ubuntu* have been given judicial backing by the apex court of South Africa, the CC.⁶³ In addition, several South African cases have accentuated the essence of the communitarian value of *ubuntu*. For instance, in *S v Makwanyane*⁶⁴ the CC stated that the concept of *ubuntu*, which carries the ideas of humanness, social justice and fairness, permeates the Constitution of South Africa and embodies the entrenched fundamental human rights.⁶⁵ Also in *Port Elizabeth Municipality v Various Occupiers*,⁶⁶ the CC succinctly described the nature and essence of the concept of *ubuntu* in the following manner:⁶⁷

The spirit of ubuntu, part of the deep cultural heritage of majority of the population, suffuses the whole constitutional order. It combines individual rights with communitarian philosophy. It is a unifying motif to the Bill of Rights, which is nothing, if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

Judging from the above narrative, the concept of *ubuntu* is a communitarian value that underlies the South African Constitution and informs the effectuation of fundamental human rights. Pivotal to the communitarian value of *ubuntu* are the concepts of humanness, fairness and social justice. In addition, the concept of *ubuntu* informs the public policy of South Africa. Accordingly, a contract or provisions in a contract must not be at variance with the public policy of South Africa. Considering the towering status of the communitarian value of *ubuntu* in the constitutional order of South Africa, coupled with the judicial acceptance of the value as an embodiment of the public policy of South Africa, the primary question therefore is the extent to

Philos 239; Keevy 2009 *JJS* 61; Praeg "Ubuntu and Emancipation of Law" 493; Venter 2004 *Stud Philos Educ* 149.

⁶³ See for instance, *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd* 2012 1 SA 256 (CC); *Botha v Rich* 2014 4 SA 124 (CC); *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 (CC) (hereafter *Beadica*).

⁶⁴ *S v Makwanyane* 1995 3 SA 391 (CC) (hereafter *Makwayane*).

⁶⁵ *Makwayane* para 237.

⁶⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (hereafter *Various Occupiers*).

⁶⁷ *Various Occupiers* para 37. Also quoted in Bennett 2011 *PELJ* 36-37; Himonga, Taylor and Pope 2013 *PELJ* 372, 397; Himonga 2013 *J Afr Law* 177; Cornell and Muvangua *uBuntu and the Law* 18.

which infusing the value of *ubuntu* into contract law can affect and/or alter the theoretical foundations and understanding of the principle of contractual freedom and autonomy in both international and domestic contracts. Generally, however, the infusion of the communitarian value of *ubuntu* into contract law in South Africa is not clearly established, as divergent views seem to be held by the CC and the SCA of South Africa.

4 Contractual freedom and autonomy as a constitutional value

In order to put the discussion of the impact of the constitutional value of *ubuntu* in contractual relations into proper perspective, it is necessary to highlight the general position of South African courts on the nature and essence of the concepts of contractual freedom and autonomy, and the concomitant principles of *pacta sunt servanda* and the sanctity of contracts. Firstly, South African courts regard the principles of contractual freedom and autonomy, and *pacta sunt servanda* as foundational constitutional values deeply rooted in the dignity and freedoms of individuals (natural or juristic persons).⁶⁸ This position has been expressed in several cases in South Africa. For instance, in *Barkhuizen* the CC stated that:⁶⁹

Public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and vital part of dignity.

In essence, even though the concept of contractual freedom and autonomy and the principle of *pacta sunt servanda* are not expressly stipulated in the 1996 Constitution of South Africa, South African courts have intimated that the concepts are values that underlie the Constitution and are firmly rooted

⁶⁸ Sections 1 and 10 of the Constitution. Also see Du Plessis *Harmonisation of Good Faith and Ubuntu* 206-230.

⁶⁹ *Barkhuizen* para 57.

in the dignity and personal liberties of individuals. Also, in *Brisley v Drotsky*⁷⁰ the SCA⁷¹ stated that:⁷²

The constitution's value of dignity and equality, and freedom requires that courts approach their task of striking down contracts with perceptive restraint...contractual autonomy is part of freedom. Shorn of the obscene excesses, contractual autonomy informs the constitutional value of dignity...This requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity.

Secondly, the position of South African courts on the nature and essence of contractual freedom and autonomy is to the effect that legitimately concluded contracts must be effectuated with all certainty. This provides the foundations on which commercial activities (both domestic and international) lie.⁷³ This position of commercial certainty can be deduced from pronouncements by the SCA and some decisions of the CC. For instance, the SCA stated in *Brisley* that judges ought to exercise perceptive restraint in setting aside a contract or a term of a contract lest the law of contract becomes unacceptably uncertain.⁷⁴ Further, in the case of *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff*⁷⁵ it was held that "without this principle [*pacta sunt servanda*], the law of contract would be subject to gross uncertainty, judicial whims and an absence of integrity between contracting parties."⁷⁶ Also, in *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*,⁷⁷ Brand JA stated that "a legal system in which the outcome of

⁷⁰ *Brisley v Drotsky* 2002 4 SA 1 (SCA) (hereafter *Brisley*).

⁷¹ Sections 168 of the Constitution. With the exception of constitutional matters, the SCA is the highest appellate court in South Africa. Only the CC can overturn the decisions of the SCA. See Bhana 2017 *SAJHR* 8; Berat 2005 *ICON* 39; Lewis 2009 *LQR* 440; Webb 1998 *U Pa J Const L* 205; Du Plessis *Harmonisation of Good Faith and Ubuntu* 160-162; Tladi 2002 *De Jure* 307; Roederer 2016 *JHR* 16.

⁷² *Brisley* paras 7-8; Ackerman *Human Dignity* 104; Laing and Visser "Principles, Policy and Practice" 336; Sharrock *Business Transactions Law* 101; Liebenberg *Socio-economic Rights* 360; Sibanda 2008 *De Jure* 323-324; Du Plessis *Harmonisation of Good Faith and Ubuntu* 154-160.

⁷³ *Brisley* para 2.

⁷⁴ *Brisley* para 7.

⁷⁵ *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 3 SA 78 (C) (hereafter *Mozart Ice Cream*).

⁷⁶ *Mozart Ice Cream* para 18.

⁷⁷ *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) (hereafter *Fourways Haulage*).

litigation cannot be predicted with some measure of certainty would fail in its purpose."⁷⁸

Also, recent decisions by the CC rehash the need for the rules of law, including the enforcement of terms in a contract, to be clear and ascertainable.⁷⁹ In *Affordable Medicines Trust v Minister of Health*⁸⁰ the CC stated that "the law must indicate with reasonable certainty to those who are bound by it what is required of them so they can regulate their conduct accordingly."⁸¹ In the view of the CC, introducing uncertainty into contract law in and of itself is inimical to the foundational tenets of the rule of law.⁸² In essence, the basis upon which private individuals (natural and juristic) enter into a contract, as well as the enforcement of their respective rights and obligations in their agreement, must be predictable and certain.⁸³

5 Constitutional value of *ubuntu* versus contractual freedom and autonomy

5.1 Position of the Constitutional Court

Generally South African courts accept the theoretical foundations of contractual freedom and autonomy, and the related principles such as *pacta sunt servanda* and the sanctity of contracts. However, the efficacy of the notion of contractual freedom and autonomy and the concomitant principle *pacta sunt servanda* seems to have been watered down by virtue of the

⁷⁸ *Fourways Haulage* para 16. Also see the SCA decision in *Roazer CC v The Falls Supermarket* 2018 3 SA 76 (SCA).

⁷⁹ *Beadica* para 81. Also see generally Lewis 2013 *THRHR* 80; Wallis 2016 *SALJ* 545.

⁸⁰ *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) (hereafter *Affordable Medicines*).

⁸¹ *Affordable Medicines* para 108.

⁸² *Beadica* para 81.

⁸³ In the English case of *Vallejo v Wheeler* [1774] 1 Cowp 143, Lord Mansfield stated "in all commercial transactions, the great object should be certainty; and therefore it is of more consequence that the rule is established one way or the other. Because speculators in trade then know what ground to go upon." Lord Salmon shared similar views in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia, The Laconia* [1977] AC 850.

horizontal application by South African courts, particularly the CC, of constitutional rights as well as the introduction of certain values such as equality, fairness, reasonableness, good faith and *ubuntu*. These values, it has been intimated, serve as checks to balance out and to a degree control the harsh effects of contractual freedom and autonomy. Suffice it to say that there is a sharp distinction between the position of the CC and that of the SCA concerning the applicability of "overarching values" such as good faith, fairness and reasonableness to limiting contractual freedom and autonomy. Further, the CC and the SCA are at variance on the role of *ubuntu* in contractual relations.

To begin with, in *Barkhuizen* the CC took the position that a contract or a provision/term will be enforced provided that giving effect to that contract or provision will not be unreasonable. The CC relied on its own decision in *Mohlomi v Minister of Defence*,⁸⁴ stating that the reasonableness of a clause in a contract must be assessed by taking into account the circumstances surrounding the contract, such the marginalisation, poverty, illiteracy and financial capability of the parties.⁸⁵ These factors, according to the CC, affect the ultimate bargaining power of the parties and ought to be taken into account in pursuing the ends of justice, which the court stated are informed by the concept of *ubuntu*.⁸⁶

Further, in the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd*,⁸⁷ the court took the same position as in *Barkhuizen* and reiterated the significance of the principle of good faith, and the desire to infuse the concept of *ubuntu* and other constitutional values into South African contract

⁸⁴ *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC).

⁸⁵ *Barkhuizen* para 64.

⁸⁶ *Barkhuizen* para 51.

⁸⁷ *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd* 2012 1 SA 256 (CC) (hereafter *Everfresh Market Virginia*).

law.⁸⁸ In a much more recent decision in *Botha v Rich*,⁸⁹ the CC again seized an opportunity to restate the position that contractual relationships are subject to the value of good faith, fairness and other values that underlie the Constitution.⁹⁰ The views of Madlanga, Justice of the CC, on the concept of freedom and individual autonomy vis-à-vis the communitarian ethos of *ubuntu* are riveting and could be taken to sum up the position of the CC. According to the learned judge,⁹¹

In South Africa, freedom cannot come down to individual autonomy alone and only to be understood from a western liberal perspective. The importance of embracing freedom within our context cannot be understated. Freedom cannot be disassociated from our colonial and apartheid past. So in order for the potential of all South Africans, black and white, to be truly realized, the social and economic structures of apartheid must be undone. Only then can the majority of the country robbed of their dignity through various forms of dispossessions and deprivation be considered truly free. So, negative liberties that value individual autonomy at the expense of redressing the injustices of the past are ill-suited to the South African situation.

The recent decision in *Beadica 231 CC v Trustees of the time being of the Oregon Trust* cements the position of the CC on the need to infuse the communitarian and constitutional value of *ubuntu* into South African contract law.⁹² In *Beadica* the CC was confronted with an issue regarding the proper constitutional approach to the judicial enforcement of the terms of a contract on the grounds of public policy.⁹³ In addressing the issue the CC restated its position that public policy is informed by the concepts of reasonableness, good faith, and fairness.⁹⁴ The CC furthermore indicated that the concepts of reasonableness, good faith and fairness are embodied

⁸⁸ *Everfresh Market Virginia* para 71. For further discussion, see Hutchison 2019 *Journal of Commonwealth Law* 227; Louw 2013 *PELJ* 44; Brand 2016 *Stell LR* 238; Du Plessis 2019 *PELJ* 1; Bennett 2011 *PELJ* 30; Hutchison 2019 *Acta Juridica* 99; Brand 2009 *SALJ* 71; Hutchison and Nkanyiso 2017 *SAJHR* 380; Himonga, Taylor and Pope 2013 *PELJ* 369; Djoyou 2018 *AHRLJ* 625; Du Plessis 2018 *Stell LR* 379; Sharrock 2015 *SA Merc LJ* 174; Barnard-Naudé 2013 *SAJHR* 467; Barnard-Naudé 2008 *CCR* 155.

⁸⁹ *Botha v Rich* 2014 4 SA 124 (CC) (hereafter *Botha*).

⁹⁰ *Botha* paras 45-46.

⁹¹ Madlanga 2018 *Stell LR* 367-368.

⁹² *Beadica* paras 212-214.

⁹³ *Beadica* para 1.

⁹⁴ *Beadica* para 17.

in the constitutional value of *ubuntu*.⁹⁵ Re-echoing the essence and significance of the concept of *ubuntu* in the constitutional and contract law jurisprudence in South Africa, Victor AJ expressed the opinion that:⁹⁶

ubuntu is not a constitutional value that must hover on the marginal boundaries of our jurisprudence...it is an important part of our constitutional jurisprudence, which is already embedded as a substantive value in the core values of our constitution...*ubuntu*, together with other underlying values, such as fairness and justice, is one of the central values of our jurisprudence when generally adjudicating fairness in contract.

Theron J succinctly captured the position of the CC on the judicial enforcement of the terms of a contract on the grounds of public policy in the following manner:⁹⁷

It is clear that public policy imports the values of fairness, reasonableness and justice. *Ubuntu*, which encompasses these values, is now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informs public policy. These values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy. While these values play an important role in the public policy analysis, they also perform creative, informative and controlling functions in that they underlie and inform the substantive law of contract. Many established doctrines of contract law are themselves the embodiment of these values. In addition, these values play a fundamental role in the application and development of rules of contract law to give effect to the spirit, purport and objects of the Bill of Rights.

The CC further averred that South African courts are enjoined by the provisions of the 1996 Constitution to promote the spirit, purport and objects of the Bill of Rights when developing common law and in instances "when common law deviates from the spirit, purport and objects of the Bill of Rights, courts are mandated to develop it in order to remove the deviation."⁹⁸ Froneman J stated that public policy takes into account the "necessity to do simple justice between individuals and is informed by the concept of *Ubuntu*."⁹⁹ The learned judge further stated that infusing the concepts of reasonableness, fairness and justice into contract law is "in accord with the general decline and transformation of the rigid classical notion of freedom

⁹⁵ *Beadica* para 35.

⁹⁶ *Beadica* para 210.

⁹⁷ *Beadica* paras 72-73.

⁹⁸ *Beadica* para 74.

⁹⁹ *Beadica* para 175.

of contract into a more socially situated or communally understood conception of personal autonomy."¹⁰⁰ The CC clearly stated that the principle of freedom of contract is not the only principle known under South African contract law, and that other concepts such as the concepts of good faith and fairness complement the principle of contractual freedom.¹⁰¹ Froneman J further intimated that there is the need not to rigidly focus only on the concept of freedom of contract at the expense of other constitutional values such as fairness, reasonableness and good faith, among others. Accordingly, the CC suggested that contractual freedom and autonomy be balanced with constitutional fairness in a manner "that ensures objectivity, reasonable practicality and certainty."¹⁰²

The CC further stated that infusing the communitarian value of *ubuntu* and the values that underlie it, i.e. the concepts of reasonableness, good faith, fairness and justice, into contract law accords with African philosophy.¹⁰³ As already explained in the previous sections, the primary idea underlying African philosophy is the belief that the interaction of people in a traditional African society is communitarian rather than individualistic. Differently stated, in traditional African societies, interactions of individuals are relational/cooperative rather than personal and/or individualistic.

5.2 Position of the Supreme Court of Appeal

The SCA has consistently held an opposing view on the use of good faith, reasonableness and fairness as overarching values to displace contractual freedom and autonomy. The SCA holds the view that those values are not free-floating independent grounds for setting aside or not enforcing contractual principles.¹⁰⁴ In other words, the values of good faith,

¹⁰⁰ *Beadica* para 177.

¹⁰¹ *Beadica* para 177.

¹⁰² *Beadica* para 108.

¹⁰³ *Beadica* para 212.

¹⁰⁴ *Brisley* para 22. Also see Hutchison 2001 *SALJ* 743-774; Hawthorne 2006 *Fundamina* 78; Lerm 2011 *THRHR* 52-55; Hawthorne 2003 *SA Merc LJ* 275; Glover 2007 *SALJ* 451; Millard 2014 *THRHR* 553; Bhana and Meerkotter 2015 *SALJ* 494;

reasonableness and fairness do not serve as an independent substantive body of rules that can operate to preclude the effectuation of a contract, a term of a contract, or a private legal arrangement. As succinctly pointed out by the SCA:¹⁰⁵

The constitution and its value system does not confer on judges a general jurisdiction to declare contracts [or a term of a contract] invalid on the basis of their subjective perception of fairness or on the grounds of an imprecise notion of good faith.

The SCA has also emphasised that the fact that a contract or a provision in a contract is harsh or unfair does not automatically mean it offends constitutional principles and warrants intervention by the court.¹⁰⁶ In essence, the SCA's position is to reiterate the non-interventionist position of courts in the sphere of contractual relations, and by extension contractual freedom and autonomy.¹⁰⁷ In *Bredenkamp v Standard Bank of SA Ltd*¹⁰⁸ the SCA recapitulated its position on the values created by the CC and characterised the notion of fairness as an overarching value as a slippery concept.¹⁰⁹ Further in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*¹¹⁰ the SCA was again confronted with the issue of whether the concept of *pacta sunt servanda* ought to be developed by infusing the traditional South African values of *ubuntu* and fairness into the law of contract.¹¹¹ In *Mohamed's Leisure Holdings* it was argued that

Mupangavanhu 2016 SALJ 870; Stoop 2015 SA Merc LJ 200; Lewis 2013 THRHR 81; Du Plessis 2007 TSAR 321, 322; Huneberg 2019 THRHR 115; Sharrock 2010 Ann Surv S Afr L 591; Bhana 2015 SAJHR 526; Mupangavanhu 2015 De Jure 123; Naudé and Lubbe 2005 SALJ 441; Du Plessis 2018 Stell LR 379; Du Plessis *Harmonisation of Good Faith and Ubuntu* 141.

¹⁰⁵ *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 3 SA 511 (SCA) para 28 (hereafter *African Dawn Property*).

¹⁰⁶ *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA).

¹⁰⁷ *South African Forestry Company Limited v York Timbers Limited* 2004 4 All SA 167 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA). Also see Naudé and Lubbe 2005 SALJ 441-442; Hutchison 2011 SALJ 273.

¹⁰⁸ *Bredenkamp v Standard Bank of SA Ltd* 2010 4 SA 468 (SCA) (hereafter *Bredenkamp*).

¹⁰⁹ *Bredenkamp* paras 53 and 54. See also Mupangavanhu 2015 De Jure 123-126; Hawthorne 2010 De Jure 395; Barnard-Naudé 2011 Stell LR 170; Bhana 2014 SAPL 512; Du Plessis 2018 Stell LR 379; Hutchison 2010 Stell LR 418.

¹¹⁰ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) (hereafter *Mohamed's Leisure Holdings*).

¹¹¹ *Mohamed's Leisure Holdings* para 1.

importing the principles of "*ubuntu* and fairness required that parties take a step back, reconsider their position and not snatch at a bargain at the slightest contravention" – an argument that essentially supports the notion that the principle of *pacta sunt servanda* ought not to be considered as a "sacred cow that should trump the spirit and letter of the Constitution of South Africa."¹¹² Speaking through Mathopo JJA, the SCA stated that:¹¹³

[T]he 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 or is against public policy. In some instances, constitutional values of equality and dignity may prove decisive where the issue of the party's relative power is an issue. There is no evidence that the respondent's constitutional right to dignity and equality were infringed. It was impermissible for the high court to develop the common law of contract by infusing the spirit of *ubuntu* and good faith so as to invalidate the term or clause in question...It would be untenable to relax the maxim *pacta sunt servanda* in this case because that would be tantamount to the court then making the agreement for the parties.

The decision in *Mohamed's Leisure Holding* cements the SCA assertion that parties to a contract must be held to their contractual bargain – underscoring the need not to relax the nature and essence of the doctrines of *pacta sunt servanda* and the sanctity of contracts. Indeed in a very recent pronouncement in *Trustees for the time being of Oregon Trust v Beadica 231 CC*¹¹⁴ the SCA reiterated the essence and significance of the doctrine of *pacta sunt servanda* and accordingly stated that parties must be held to the bargain in their agreement.¹¹⁵ Generally, the views expressed by the SCA are informed by the fact that holding parties to their contractual bargain ultimately breathes an air of certainty and predictability into contractual and commercial relations.

¹¹² Mohamed's Leisure Holdings paras 12 and 16.

¹¹³ Mohamed's Leisure Holdings paras 30 and 33. The SCA took the same position of not infusing communitarian value of *ubuntu* into contract law in the case of *Roazer CC v The Falls Supermarket CC 2017 2 All SA 665 (GJ)*.

¹¹⁴ *Trustees for the time being of Oregon Trust v Beadica 231 CC 2019 4 SA 517 (SCA)* (hereafter *Beadica (SCA)*).

¹¹⁵ *Beadica (SCA)* paras 25-38.

5.3 Reconciling the position of the CC and the SCA

The above discussion highlights the opposing views held by the CC and the SCA. While the CC insists on the significance of the concept of good faith, reasonableness and the desire to infuse the traditional African value of *ubuntu* into contract law jurisprudence in South Africa, the SCA, on the other hand, has stated that the overarching values created by the CC cannot be applied independently to displace the contractual principles of freedom of contract and *pacta sunt servanda*. Academics in South Africa have expressed concerns that the lack of consensus between the two appellate courts creates a high degree of uncertainty regarding the operative scope of the concept of contractual freedom and autonomy, and the concomitant principles of *pacta sunt servanda* and the sanctity of contract.¹¹⁶ Accordingly, there have been calls by academics to reconcile the divergent views adopted by the CC and the SCA.

Cameron and Boonzaier remark that there is a need to integrate the two perspectives or views adopted by the CC and SCA.¹¹⁷ Hutchison avers that the views expressed by the CC should be more applicable to consumer contracts, while the position adopted by the SCA should be considered in matters involving large commercial contracts.¹¹⁸ Bhana suggests that the views adopted by both the CC and the SCA have positive features. However, none of the approaches is entirely satisfactory, and it is accordingly argued that the appropriate approach in dealing with the issue of the constitutional value of fairness lies somewhere between the approaches adopted by the CC and SCA.¹¹⁹ This article agrees with the suggestion that the views expressed by the CC should be seen to be more applicable to consumer contracts, whereas the position of the SCA should be considered in large commercial contracts.

¹¹⁶ Hutchison "Nature and Basis of Contract" 34.

¹¹⁷ Cameron and Boonzaier 2020 *RabelsZ* 786.

¹¹⁸ Hutchison "Nature and Basis of Contract" 34.

¹¹⁹ Bhana 2017 *SAJHR* 10

Suffice it to say that the CC in *Beadica* seized an opportunity to resolve the divergence regarding the approach adopted by the SCA and the CC on the role of *ubuntu* and constitutional fairness in contractual relations.¹²⁰ In *Beadica* the CC admitted that the opposing view adopted by the SCA on the issue of constitutional fairness and the infusion of the value of *ubuntu* into contractual relations has created an undesirable uncertainty in the South African law of contract.¹²¹ Theron J, however, intimated that the divergence between the approaches adopted by the CC and the SCA is more perceived rather than real. The CC explained that:¹²²

Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its objective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self standing status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.

The CC accordingly posited that the certainty in holding parties to their contractual bargain serves as the bedrock for economic activities in South Africa and that denigrating the concepts of *pacta sunt servanda* and the sanctity of contract would hinder the advancement of constitutional rights as well as the achievement of the South African constitutional vision.¹²³ That notwithstanding, the doctrine of *pacta sunt servanda* is not the only constitutional value that informs the judicial control of the terms in a contract, and in the new constitutional dispensation there is no basis for privileging the doctrine of *pacta sunt servanda* over other constitutional rights and values.¹²⁴ According to the CC, the assessment of the idea of commercial

¹²⁰ *Beadica* paras 1 and 18.

¹²¹ *Beadica* para 18.

¹²² *Beadica* para 80.

¹²³ *Beadica* para 85.

¹²⁴ *Beadica* paras 86-87.

certainty should be through the prism of the substantive constitutional value of *ubuntu*, which is a more focused legal method of achieving justice between the parties to a contract.¹²⁵

On the issue of the role of the concept of *ubuntu* in South African contract law, Victor AJ expressed the opinion that the constitutional value of *ubuntu* should be considered as a concept that stands alongside other constitutional values such as fairness, good faith, justice, equity and reasonableness.¹²⁶ According to the learned judge, whereas the constitutional values of fairness, reasonableness, equity and justice operates to address the issue of fairness in contractual relations, the constitutional value of *ubuntu* adds substance.¹²⁷ Victor AJ accordingly called for the need to characterise the concept of *ubuntu* as a substantive constitutional value in South African constitutional law and contract law.¹²⁸ In the view of Victor AJ, characterising *ubuntu* as a substantive constitutional value leads to a "more context-sensitive basis in its adjudication and facilitates a constitutionally transformative result."¹²⁹ Victor AJ further intimated that:¹³⁰

In true fidelity of our transformative constitutional project, ubuntu is an appropriate adjudicative constitutional value in determining substantive fairness between contracting parties. Ubuntu provides a particularistic context in the law of contract, when for example addressing the economic positions or bargaining powers of the contracting parties.

The decision in *Beadica* therefore accentuates the essence of the concept of *ubuntu* as an indispensable value in the law of contract in South Africa, particularly in terms of determining the fairness of a contract or provisions in a contract. Contrary to the views expressed by the SCA that infusing *ubuntu* into contract law unleashes uncertainty in contractual relations, the CC holds the view that the value of *ubuntu* can be infused into contract law

¹²⁵ *Beadica* para 216.

¹²⁶ *Beadica* para 206.

¹²⁷ *Beadica* para 206.

¹²⁸ *Beadica* para 206.

¹²⁹ *Beadica* para 206.

¹³⁰ *Beadica* para 206.

in a manner that ensures objectivity, reasonable practicality and certainty. It is noteworthy that the views expressed by the CC in previous decisions on the need to infuse the constitutional value of *ubuntu* into contractual relations remain untouched. In fact, the CC in *Beadica* advocated that the concept of *ubuntu* be characterised as a substantive constitutional value that stands alongside the values of good faith, reasonableness, and fairness.¹³¹ Essentially therefore the CC used the opportunity in *Beadica* to cement its views on the need to characterise *ubuntu* as a substantive constitutional value. It is important to indicate, however, that the constitutional values expounded by the CC seem to apply to all contracts, whether large commercial contracts or small commercial contracts.

6 Infusing *ubuntu* into contract law: The implication

The freedom that private individuals have to enter into contract and determine the content of their agreement is irreducibly personal and thus dependent on the choices of contracting parties. The concept of the freedom of contract represents the liberty individuals have to voluntarily enter into transactions or agreements with others (state-individual relationship, or individual-individual contractual relations) without governmental interference.¹³² The legal and philosophical essence of the concept is to emphasise the free and autonomous choices of individuals in their private legal dealings.¹³³ The concept further symbolises the idea that individuals through their contracts are capable and free to manage and regulate their affairs in a manner that represents their interests. Private individuals impose legally enforceable obligations on themselves through their contracts. The law requires the parties to fulfil those contractual obligations.¹³⁴ Therefore,

¹³¹ *Beadica* paras 204-232.

¹³² Smith 1996 *MLR* 167; Penner 1996 *Legal Theory* 326-340.

¹³³ Kessler 1943 *Colum L Rev* 630; Lucy 1989 *OJLS* 139; Leonhard 2012 *Case W Res L Rev* 57-58; Dagan and Heller 2019 *Theo Inq L* 596-597; Markovits and Schwartz 2019 *Theo Inq L* 571; Fried 2019 *Theo Inq L* 367; Bix *Jurisprudence* 267; Kimel 2001 *OJLS* 473; Hosemann "Freedom of Contract" 38; Mensch 1981 *Stan L Rev* 755-757; Bridgeman 2004 *MLR* 684.

¹³⁴ Mittlaender 2019 *JELS* 119; Smith 1997 *MLR* 361.

by virtue of this concept, private individuals have the freedom to determine the content (the terms of the contract) of their contracts and with whom they would want to enter into those contracts.¹³⁵

The position of the CC is conclusive on the need to infuse the constitutional value of *ubuntu* into the law of contract in South Africa. In addition, the CC has indicated that courts should not rigidly focus on the concepts of contractual freedom and autonomy and the naturally accompanying principles of *pacta sunt servanda* at the expense of the other values that underlie the Constitution of South Africa, such as reasonableness, fairness and good faith. This article shares the view expressed by academics in South Africa that infusing the value of *ubuntu* into contractual relations leads to an introduction of communitarian values into South African contract law.¹³⁶ An introduction of the communitarian value of *ubuntu* into contract law shifts the traditional understanding of contract law (domestic and international contracts), which is based on and/or enmeshed in libertarian doctrines of individual/personal autonomy, to a relational/cooperative understanding of contract law. In other words, the decision taken by the CC to infuse the traditional African value of *ubuntu* into contract law and thereby determine whether a contract or a term in contract should be effectuated shifts the basis of contracting under South African contract law to one that is relational rather than individualistic (founded on the notion of individual autonomy). The position of the CC serves as an impetus for the development of relational contract theory in South Africa, and academic views support this assertion. According to Hutchison, traces of relational contract theory can be deduced from decisions (*obiter dicta*) of the CC as well as some South African literature.¹³⁷ However, the legal scholarship on relational contract theory in South Africa is not well developed.¹³⁸

¹³⁵ Holmes 1986 *Tul L Rev* 752; Movsesian 2002 *Cardozo L Rev* 1529.

¹³⁶ Du Plessis 2019 *PELJ* 16-20; Hutchison 2017 *SALJ* 319-320.

¹³⁷ Hutchison 2017 *SALJ* 319. Also see Hawthorne 2007 *SA Merc LJ* 234-235; Hutchison and Sibanda 2017 *SAJHR* 380.

¹³⁸ Hutchison 2017 *SALJ* 319.

The development of relational contract theory is largely attributed to the scholarly works of Stewart Macauley and Ian Macneil in the 1960s and 1970s respectively in the United States.¹³⁹ Pivotal to relational contract theory is the need to highlight the social and economic aspects of the law of contract.¹⁴⁰ Relational contract theory is therefore a socio-legal theory of contract.¹⁴¹ The underlying purpose of the theory is to primarily stress the need to shift from the strict/traditional/doctrinal or classical view of the law of contract to a contract law regime that takes into account the interdependence and relations of the contracting parties as well as their ensuing business practices.¹⁴² Adherents of relational contract theory also highlight the practical aspects of the law of contracts in business relations.¹⁴³ Macneil is known to have developed the normative aspects of relational contract theory.¹⁴⁴ In developing this normative aspect Macneil distinguished between one-off contracts (what he referred to as "discrete transactions") and the long-term contracts (what he described as "relational contracts").¹⁴⁵

According to Macneil, one-off or discreet transactions do not involve relations between the contracting parties.¹⁴⁶ Long-term or relational contracts are, however, dependent on the relationships of the parties to the

¹³⁹ Macneil 1985 *JITE* 541; Macaulay 1963 *Am Sociol Rev* 55; Macaulay 2003 *MLR* 45; Macaulay "The Real and the Paper Deal" 415; Goetz and Scott 1981 *Va L Rev* 1089; Gudell 1998 *Buff L Rev* 763-764; Hutchison 2017 *SALJ* 296-297; Jennejohn 2020 *JCL* 887; Galletti 2014 *CILSA* 248; Hawthorne "Relational Contract Theory" 137; Hawthorne 2007 *SA Merc LJ* 234; Hawthorne 2007 *THRHR* 373; Markovits 2004 *Yale LJ* 1450; Campbell "Ian Macneil and the Relational Theory of Contract" 3.

¹⁴⁰ Hutchison 2017 *SALJ* 296-297; Levin 2003 *Am Econ Rev* 837; Schwartz 1992 *JLS* 275.

¹⁴¹ Hawthorne 2007 *THRHR* 371; Hutchison 2017 *SALJ* 296-297.

¹⁴² Hutchison 2017 *SALJ* 297.

¹⁴³ Hutchison 2017 *SALJ* 297.

¹⁴⁴ See Macneil 1974 *Va L Rev* 589; Macneil *New Social Contract*; Macneil 1974 *S Calif L Rev* 691; Macneil 1983 *NWULR* 340; Macneil 1985 *Wis L Rev* 483; Macneil "Barriers to the Idea of Relational Contract" 31; Macneil 2000 *NWULR* 877; Macneil 1985 *JITE* 541; Campbell "Ian Macneil and the Relational Theory of Contract" 3; Macneil 1987 *JITE* 272.

¹⁴⁵ Macneil 1974 *S Calif L Rev* 691; Macneil *New Social Contract* 39.

¹⁴⁶ Macneil *New Social Contract* 39-50; Hawthorne 2007 *THRHR* 377; Feinman 2000 *NWULR* 740-745.

transaction.¹⁴⁷ Differently stated, whereas one-off or discreet transactions maintain the individualistic aspects of contract law, relational contracts primarily focus on the cooperation and the relations of the parties.¹⁴⁸ Fundamental to Macneil's argument is the claim that the classical/doctrinal understanding of contract law focussed primarily on discrete contracts or one-off transactions.¹⁴⁹ Macneil's central thesis is that the doctrinal understanding of contract law should be developed in a manner that gives room for relational norms and precepts.¹⁵⁰

Macneil argues that embedded in the idea of relational contract are the concepts of cooperation, trust, reciprocity and interdependence (which is informed by the ethos of solidarity).¹⁵¹ These concepts are essential because of the very nature of relational/long-term contracts, which are dependent on the relationship of the parties.¹⁵² Macneil buttresses his argument with a historical account of the law of contract in the US. Macneil posits that the development of contract law in the US proves that to a certain degree that there was an incorporation of the concepts of flexibility and the implied duty of good faith, among others, which are important in modern times.¹⁵³ In sum, the proponents of the relational contract theory suggest the need to view contract law not only from a purely individualistic or classical point of view but also from the perspective that modern contract law considers the social and relational aspects of private persons.

As indicated already, academics in South Africa have suggested that traces of the relational contract theory can be deduced from the pronouncements (*obiter dicta*) of the CC. Commenting on the linkage of the relational contract

¹⁴⁷ Macneil 1987 *JITE* 274; Macneil *New Social Contract* 39; Gudel 1998 *Buff L Rev* 763-765; Feinman 2000 *NWULR* 740-745; Fox 2003 *Case W Res L Rev* 3-11.

¹⁴⁸ Liyanto 2008 *HBLJ* 315.

¹⁴⁹ Macneil 1974 *S Calif L Rev* 691.

¹⁵⁰ Macneil *New Social Contract* 39; Fox 2003 *Case W Res L Rev* 11; Hutchison 2017 *SALJ* 300; Hawthorne 2007 *THRHR* 377.

¹⁵¹ Macneil *New Social Contract* 40; Fox 2003 *Case W Res L Rev* 11; Hawthorne 2007 *THRHR* 377.

¹⁵² Macneil 1974 *S Calif L Rev* 691.

¹⁵³ Macneil 1974 *S Calif L Rev* 691.

theory and its significance in South African contract law, Hutchison averred:¹⁵⁴

Relational contract theory is not a particularly well-developed branch of South African contract law scholarship, although there are traces of it in the literature. It also had a certain impact in debates outside of contract law, such as the proper approach to traditional land ownership. I believe that this branch of legal theory has a lot to offer, particularly in the post-apartheid contract-law setting. Relational theory would lend support to the rise of flexible standards in the common law of contract, as appears to be heralded by several dicta of the Constitutional Court. The emphasis on contextual factors such as the identity and inter-dependence of contracting parties, as well as on customary commercial norms in a given business community, may provide a theoretical backbone for a more communitarian law of contract which still has commercial values and economic realism at its heart.

Underlying the jurisprudence of the CC is an important concept of solidarity. From the discussion in the previous sections it could be deduced that the concept of solidarity is embedded in the communitarian and constitutional value of *ubuntu*. According to Hutchison, the scope, nature and essence of relational contract theory mirrors the jurisprudence of the CC and their suggestion to infuse the constitutional value of *ubuntu* into South African contract law.¹⁵⁵ Academics in South Africa suggest that relational contract theory could play an enormous role in South African contract law. Taking into account the fact that the CC is the highest appellate court with original jurisdiction in constitutional matters, it is safe to conclude that the ethic of *ubuntu* has been introduced as an essential part of South African contract and commercial law jurisprudence. Accordingly, the interpretation of constitutional values in the 1996 Constitution encompasses the communitarian value of *ubuntu* (embedded in it is the ethos or values of fairness, good faith and reasonableness, among others), which plays an important role in contract and commercial law in South Africa.

The SCA has consistently held a contrary view that the concept of *ubuntu* does not have a role to play in contractual relations, especially with regard to the doctrine of *pacta sunt servanda*. Academics in South Africa have

¹⁵⁴ Hutchison 2017 *SALJ* 320.

¹⁵⁵ Hutchison 2017 *SALJ* 320-321.

suggested that the position adopted by the SCA should be applicable to large commercial agreements. Generally, however, the academic suggestions on the role of *ubuntu* in South African contract law do not entirely consider the impact of the views of the CC and SCA in international commercial contracts. This article suggests that the views expressed by the CC and SCA may also affect the theoretical foundations of and the basis of concluding international commercial agreements. Accordingly, there is a need to assess the probable impact of the approaches adopted by the CC and the SCA. It is important to do so from a transnational commercial law perspective for three main reasons.

First, the views expressed by the CC and SCA may become applicable to an international commercial agreement where contracting parties expressly or tacitly choose the law of South Africa, particularly the substantive contract and commercial law, as the applicable law to govern and determine their rights and obligations under their agreement. Secondly, the views expressed by the CC and SCA may become applicable to an international commercial contract where the contracting parties do not expressly choose an applicable law to govern their contract, but substantial connections and provisions in their agreement point to South Africa as the legal system to govern their international agreement. Thirdly, the laws of South Africa could apply to an international commercial agreement by virtue of their mandatory character – these laws include the *Consumer Protection Act* 68 of 2008.¹⁵⁶ In essence, the substantive contract and commercial law as well as the views expressed by the CC and the SCA may become applicable to an international commercial agreement. However, in the global legal order on transnational commercial law, principles such as the doctrine of *pacta sunt*

¹⁵⁶ De Villiers 2013 *TSAR* 480-481; Van Niekerk 2011 *TSAR* 159; Neels and Fredericks 2003 *SA Merc LJ* 64; Schoeman, Roodt, and Wethmar-Lemmer *Private International Law* 51; *Guggenheim v Rossenbaum* 1961 4 SA 21 (W); *Standard Bank of South Africa v Effroiken and Newman* 1924 AD 171; *Improvair (Cape) (Pty) Ltd v Etablissement Neu* 1983 2 SA 138 (C); *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D); Neels and Fredericks 2011 *De Jure* 103; Forsyth 2002 *TSAR* 63; Sibanda 2008 *De Jure* 323.

servanda, commercial certainty and predictability are strongly upheld as they serve as the foundation upon which contracting parties can attenuate any risks that may arise out of their transnational commercial relations. In addition, in the global legal order on transnational commercial law, the relations of private individuals (natural and juristic) are largely individualistic and/or personal.

Parties to an international commercial contract are exposed to many risks.¹⁵⁷ The idea that contracting parties ought to be afforded the freedom to exercise full control over the content of their agreement serves not only as a conveyor belt for efficient international trade and commerce, but it also to a very large extent affords the parties the opportunity to mitigate their risks in their transnational commercial relations. Parties' risks are mitigated when the basis upon which they contract and the enforceability of the provisions in their contract are not shrouded with uncertainties.¹⁵⁸ In the global legal order on transnational commercial law, parties to a contract have a reasonable expectation that their transaction will be enforced and the basis upon which they conclude their agreement will be respected.¹⁵⁹ The principles of contractual freedom and autonomy and the naturally accompanying concepts of *pacta sunt servanda* and sanctity of contracts are indispensable principles that underlie international commercial agreements and major international legal instruments on commercial law, such as the *United Nations Convention on Contracts for the International Sale of Goods* (CISG) of 1980, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention) of 1958, the *UNIDROIT Principles on International Commercial Contracts* (UPICC) of 2016, the *Hague Principles on Choice of Law in International Commercial*

¹⁵⁷ Golbert 2011 *Nev LJ* 503.

¹⁵⁸ *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia, The Laconia* [1977] AC 850; *Vallejo v Wheeler* [1774] 1 Cowp 143; Sealy and Hooley *Commercial Law* 10; Adhar 2014 *CLJ* 40; Shawn 2012 *Hofstra L Rev* 55-58; Stinchcombe 1999 *J Polit Philos* 209; Neuhaus 1963 *LCP* 797; Peterson 1998 *Am J Comp L* 197-200.

¹⁵⁹ Golbert 2011 *Nev LJ* 503.

Contracts (Hague Principles) of 2015 and the *Hague Convention on Choice of Court Agreements* (Hague Choice of Court Convention) of 2005.¹⁶⁰

Underlying these international instruments is the key idea that private individuals ought to be afforded the utmost freedom and autonomy to regulate the content of their commercial agreements. The extent of the freedom and autonomy conferred on private individuals in the above-mentioned international instruments extends to the power of the parties to modify the provisions of the international treaties to suit their commercial needs. For instance, the CISG and the UPICC confer power on the contracting parties to modify its provisions to suit their commercial needs.¹⁶¹ The concept of freedom of contract under the CISG and the UPICC is further consolidated by the concept of *favor contractus*, which is to the effect that contracts should be preserved whenever it is possible to do so.¹⁶² The freedom and autonomy granted to parties under the UPICC is to allow them to exercise full control over their agreements.¹⁶³ The net aim of granting private individuals the highest degree of autonomy over their commercial agreements is informed by the idea that affording private individuals control over their commercial agreements enhances commercial certainty and predictability, thereby aiding the contracting parties to mitigate the risks they may be exposed to in their cross-border commercial agreements.

The approaches adopted by the CC and the SCA could have an impact on the basis of concluding and giving effect to provisions in an international

¹⁶⁰ Wethmar-Lemmer 2016 *TSAR* 256; Ferrari 1999 *EJLR* 217; Borisova "Freedom of Contract" 39.

¹⁶¹ Gillette and Walt *UN Convention on Contracts for the International Sale of Goods* 66; Murray 1988 *J L & Com* 23; Bianca and Bonell *Commentary on the International Sales Law* 56; Bridge 2014 *Unif L Rev* 630; Hugo 1999 *SA Merc LJ* 21-23; Vogenauer "Interpretation of the UNIDROIT Principles" 157-164; Vogenauer 2010 *ERCL* 143; Bonell and Lando 2013 *Unif L Rev* 17-20.

¹⁶² Keller "*Favor Contractus*" 247-249; Borisova "Freedom of Contract" 39; Schroeter 2018 *Loy LA Int'l & Comp L Rev* 20; Ferrari 1994-1995 *Ga J Int'l & Comp L* 225; Rabello and Lerner 2003 *Unif L Rev* 614-615; Berger 2000 *Unif L Rev* 164-165; Bonell 1994-1995 *Tul L Rev* 1137; Doudko 2000 *Unif L Rev* 490-491; Saidov 2006 *Unif L Rev* 799; Lerner 2019 *Unif L Rev* 147; Bonell 2012 *Unif L Rev* 151; Sica 2006 *NJCL* 14.

¹⁶³ Lando 2005 *Am J Comp L* 387.

commercial agreement. This article accordingly suggests that the views expressed by the SCA would favour the effectuation of international commercial agreements, and that the position of the CC should not be extended to international commercial contracts. The views of the SCA would consolidate the need to promote commercial certainty and predictability in transnational commercial contracts, which would ultimately help the parties to mitigate the inherent risks associated with their transnational commercial agreements. Certainty and predictability, as already explained, are the cornerstones of international commercial agreements. The position adopted by the CC, which is influenced mainly by the communitarian ethic of *ubuntu*, on the other hand, fundamentally alters and is at variance with the theoretical and philosophical foundations of the concept of contractual freedom and autonomy as understood in international commercial law.

7 Concluding reflections

This article has reflected on the role and impact of the constitutional value of *ubuntu* in contractual relations in South Africa. The article has also discussed the applicability of the *Constitution of the Republic of South Africa* of 1996 to private legal relations. The 1996 Constitution applies both vertically and horizontally. The provisions of the 1996 Constitution, including the Bill of Rights, have an immense influence on contractual relations and private legal arrangements. The horizontal application of the 1996 Constitution is not in doubt, as the judicial position and academic views agree that the Bill of Rights applies horizontally but indirectly to contracts and other private legal relations. The concepts of contractual freedom and autonomy, though not expressly mentioned in the 1996 Constitution, have been variously held by South African courts as values that underlie the 1996 Constitution and are deeply rooted in the dignity and personal liberties of private individuals.

This article has also discussed the issue of the infusion of constitutional fairness and other constitutional values such as reasonableness and good

faith, among others, into South African contract law. Two opposing views have been expressed by the CC and the SCA regarding the impact of values such as reasonableness, fairness and good faith as well as the communitarian value of *ubuntu* on South African contract law. Whereas the CC has held that the overarching values of fairness and good faith operate to check the excesses of contractual freedom and autonomy, and thus can serve as a basis for a court not to give effect to a contract or provisions in a contract, the SCA takes the position that the overarching values of good faith and fairness, among others, are not substantive or independent norms that can operate to displace a contract or a provision in that contract. In addition, the CC has indicated the need to introduce the traditional African value of *ubuntu* into the area of the law of contract, especially in terms of giving effect to a contract or the provisions in a contract.

The divergence of the views of the two appellate courts has triggered some concerns amongst academics in South Africa. General academic consensus is to the effect that there is a need to reconcile the divergent views adopted by the CC and the SCA. Recent decisions by the CC also acknowledge the fact that the divergent views adopted by the SCA on the issue of constitutional fairness unleash a high degree of uncertainty in South African contract law, and the CC has accordingly attempted to smooth over the differences it had with the SCA. Furthermore, academics in South Africa have also suggested that the views expressed by the CC could serve as an impetus for the development of relational contract theory in South African contract and commercial law jurisprudence. The suggestion by the academics, which this article agrees with, is anchored in the fact that the views expounded by the CC seem to lead to the introduction of the communitarian concept of *ubuntu* into South African contract law.

This article has suggested that the views expressed by the CC and the SCA may potentially affect the basis of concluding and giving effect to the provisions in a transnational commercial agreement. The article has

highlighted the ways in which the substantive contract and commercial law as well as the opposing views of the CC and the SCA could be applicable to an international commercial contract. The article has accordingly suggested that the views expressed by the SCA would favour the effectuation of the provisions in an international commercial contract. The article has further suggested that the views adopted by the CC should not be extended to international commercial contracts. The views of the SCA seek to emphasise the need to promote commercial certainty and predictability in private legal agreements. The concepts of certainty and predictability are essential to the conclusion and effectuation of international agreements. Promoting certainty in contract law, especially in international contracts, affords the parties the opportunity to mitigate the inherent risks that are associated with the conclusion and enforcement of international contracts.

The CC's desire to infuse the communitarian and constitutional value of *ubuntu* into contract law fundamentally alters the theoretical and philosophical foundations of the concepts of contractual freedom and autonomy as understood in domestic and international commercial law. Differently stated, the ideas espoused by the CC on the need to infuse the communitarian concept of *ubuntu* into contract law are at variance with the philosophical foundations of contractual freedom and autonomy as understood in international commercial contracting. The position taken by the CC has created the impetus for the development of relational contract theory in South Africa.

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Legislation

Constitution of the Republic of South Africa, 1996

Consumer Protection Act 68 of 2008

List of Abbreviations

AHRLJ	African Human Rights Law Journal
AJIL	American Journal of International Law
Am Econ Rev	American Economic Review
Am J Comp L	American Journal of Comparative Law
Am Sociol Rev	American Sociological Review
Am U Int'l L Rev	American University International Law Review
Ann Surv S Afr L	Annual Survey of South African Law
Buff L Rev	Buffalo Law Review
Buff Hum Rts L Rev	Buffalo Human Rights Law Review
BUL Rev	Boston University Law Review
Cardozo L Rev	Cardozo Law Review
Case W Res L Rev	Case Western Reserve Law Review
CC	Constitutional Court
CCR	Constitutional Court Review

CILSA	Comparative and International Law Journal of Southern Africa
CISG	United Nations Convention on Contracts for the International Sale of Goods
Citizsh Stud	Citizenship Studies
CLJ	Cambridge Law Journal
Colum L Rev	Columbia Law Review
Cornell Int'l LJ	Cornell International Law Journal
Dev World Bioeth	Developing World Bioethics
EJCL	European Journal of Comparative Law and Governance
EJIL	European Journal of International Law
EJLR	European Journal of Law Reform
ERCL	European Review of Contract Law
Front Philos China	Frontiers of Philosophy in China
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
HBLJ	Hastings Business Law Journal
Hibernian LJ	Hibernian Law Journal
Hofstra L Rev	Hofstra Law Review
Hum Rights Law Rev	Human Rights Law Review
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
IJGLS	Indiana Journal of Global Legal Studies
J Afr L	Journal of African Law
J Bus Ethics	Journal of Business Ethics
J Contemp Afr Stud	Journal of Contemporary African Studies
J L & Com	Journal of Law and Commerce
J Polit Philos	Journal of Political Philosophy
J Priv Int L	Journal of Private International Law
JCL	Journal of Corporation Law
JELS	Journal of Empirical Legal Studies
JICLT	Journal of International Commercial Law and Technology
JITE	Journal of Institutional and Theoretical Economics
JHR	Northwestern Journal of Human Rights
JHSN	Journal of Historical Society of Nigeria
JJS	Journal of Juridical Sciences

JLS	Journal of Legal Studies
LCP	Law and Contemporary Problems
LDD	Law, Democracy and Development
Loy LA Int'l & Comp L Rev	Loyola of Los Angeles International and Comparative Law Review
LQR	Law Quarterly Review
Mich L Rev	Michigan Law Review
MLR	Modern Law Review
NC J Int'l L & Com Reg	North Carolina Journal of International Law and Commercial Regulation
Nev LJ	Nevada Law Journal
NJCL	Nordic Journal of Commercial Law
NQHR	Netherlands Quarterly of Human Rights
NWULR	Northwestern University Law Review
NY Sch J Int'l & Comp L	New York Law School Journal of International and Comparative Law
OJLS	Oxford Journal of Legal Studies
Ottawa L Rev	Ottawa Law Review
PELJ	Potchefstroom Electronic Law Journal
Philos East West	Philosophy East and West
Philos Pap	Philosophical Papers
Rabelsz	Rabel Journal of Comparative and International Private Law / Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev Afr Polit Econ	Review of African Political Economy
Rev Const Stud	Review of Constitutional Studies
S Afr J Philos	South African Journal of Philosophy
S Calif L Rev	South California Law Review
S Texas LJ	South Texas Law Journal
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
St Louis ULJ	Saint Louis University Law Journal
Stan L Rev	Stanford Law Review
SMU L Rev	SMU Law Review
Stell LR	Stellenbosch Law Review
Stud Philos Educ	Studies in Philosophy and Education

Temp Int'l & Comp LJ	Temple International and Comparative Law Journal
Tenn L Rev	Tennessee Law Review
Theo Inq L	Theoretical Inquiries in Law
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Tul L Rev	Tulane Law Review
U Pa J Const L	University of Pennsylvania Journal of Constitutional Law
UJAH	Unizik Journal of Arts and Humanities
Unif L Rev	Uniform Law Review
Va L Rev	Virginia Law Review
UPICC	UNIDROIT Principles on International Commercial Contracts
Wis L Rev	Wisconsin Law Review
Wm & Mary L Rev	William and Mary Law Review
Yale LJ	Yale Law Journal