

A critical analysis of the role of the *boni mores* in the South African law of contract and its implications in the constitutional dispensation.

Dissertation Submitted by:

Marie Sharp
210537908

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Supervisor: Dr A Louw

DECLARATION

I, Marie Sharp, declare that this work, unless indicated to the contrary in the text, is my own work. Furthermore, the dissertation has not previously been submitted towards any other academic qualification.

Signed:



Date:

18/12/14

Acknowledgement:

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Abstract:

This dissertation considers the current position of the *boni mores* in the South African law of contract, and will examine the correctness and constitutionality of this position. Since the advent of the Constitution, there has been a constant movement towards a system of law which promotes the fundamental values upon which our Constitution is based, namely the values of freedom, equality and dignity. However the law of contract has remained somewhat resistant to this call for transformation, with the Supreme Court of Appeal clinging to legal certainty and the ideals of the classical liberal model to prevent the greater incorporation of certain normative values which would ensure the achievement of the transformation which the Constitution envisages.

Although the principles of freedom and sanctity of contract, ensure legal certainty, predictability, and efficiency, these principles alone, fail to achieve the results which our Constitution calls for. One could even argue that these principles have the potential to achieve results which are potentially at odds with the demands of the Constitution. The *boni mores*, it is argued, is a value which can ensure the transformation of the law of contract in light of the Constitution, to a model of contract law which is focused on an objective standard that will achieve substantive fairness and contractual justice. This will ensure the focus will no longer be merely on the intention of the parties and the principles of freedom and sanctity of contract, and will enable a shift towards a model which will balance these principles with contractual justice and substantive fairness. This approach has been taken in the law of delict, which can be seen as fully embracing the transformative and developmental goals of the Constitution.

This dissertation will consider the judgments of the Supreme Court of Appeal in which it was stated that normative values, such as the *boni mores*, cannot be used in the law of contract as an independent ground for interfering in contractual relationships. The main judgment being the case of *Brisley v Drotsky*;¹ this case will be considered in detail, and a critical analysis of the judgment and the reasons put forward by the Supreme Court of Appeal will be undertaken. The constitutionality of the current position of the *boni mores* will then be examined.

¹ 2002 (4) SA 1 (SCA) 91.

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Chapter 1:

Introduction:

“Illud constat”, asserts Gaius, “si quis de ea re mandet quae contra bonos mores est, non contrahi obligationem, veluti si tibi mandem ut Titio furtum aut iniuriam facias”: no obligation is created if a morally objectionable mandate is given.’¹

1.1 Introduction:

This dissertation will focus on the current role of the *boni mores* in the South African law of contract. The *boni mores* has been a part of South Africa’s common law for many years playing its most prominent role in the wrongfulness enquiry in the law of delict. In recent years the courts have considered the possible role of the *boni mores* in the South African law of contract. The courts have had very different opinions regarding the role that the *boni mores* should play in this context.

In the case of *Mort v Henry Shields-Chiat*² Davis J suggested that the *boni mores* should play a more prominent role in our contract law. Davis J stated that although the constitutional value of freedom supports the contractual principles of freedom and sanctity of contract, other constitutional values, namely dignity and equality, calls for parties to observe a ‘minimum threshold of mutual respect’³ in terms of which the ‘unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts’.⁴ Davis J stated that the court is given a constitutional mandate which gives the court the power to use the concept of *boni mores* to ensure that all contracts are in line with the Constitution⁵ (hereafter referred to as the ‘Constitution’) and to incorporate other normative values to bring fairness and equity into the law of contract, such as good faith.⁶

¹ R Zimmerman *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1992) 707.

² *Mort v Henry Shields-Chiat* 2001 (1) SA 404 (C).

³ *Ibid* 475B.

⁴ *Ibid* 475B-C.

⁵ The Constitution of the Republic of South Africa, 1996.

⁶ *Mort* (note 2 above) 475D-E.

However, in the case of *Brisley v Drotsky*⁷ (hereafter referred to as the ‘*Brisley case*’) the majority of the Supreme Court of Appeal (hereafter referred to as the ‘SCA’) held that it cannot permit the use of the principle of the *boni mores* in the South African law of contract for two reasons. The first reason is that the use of the *boni mores* in the South African law of contract would cause ‘unacceptable chaos and uncertainty.’⁸ The second reason given by the SCA is that the *boni mores* cannot be used in the law of contract the way in which it is used in the law of delict as there are ‘material policy differences’ between the two fields of law.⁹

The view of the SCA that normative values, such as the *boni mores*, cannot play a role in the law of contract has been confirmed in subsequent cases such as *Afrox Health Care Ltd v Strydom*¹⁰ and *SA Forestry Co Ltd v York Timber Ltd*.¹¹ However, more recently the conservative approach to limit the role of normative values, taken by the SCA in the *Brisley case*, has been questioned.¹² The most recent example appears in the case of *Siyepu and others v Premier, Eastern Cape*¹³ where Alkema J stated that the law of delict and the law of contract are not as different as was stated in the *Brisley case*, and set out the many similarities between the law of delict and the law of contract. The judge stated further that there are circumstances where the use of the intention of the parties to determine the enforceability of the contract will fail and argues that the use of the wrongfulness enquiry, based on the legal convictions of the community, would be more suitable to determine enforceability of a contract.¹⁴ Another case which indicates a change in the thinking regarding normative values is the Constitutional Court judgment in the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,¹⁵ where the Constitutional Court stated that it is necessary to ‘infuse the law of contract with constitutional values, including values of Ubuntu.’¹⁶ This

⁷ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

⁸ *Ibid* 21.

⁹ *Ibid* 21- Translation obtained from: A Louw ‘Yet another call for a greater role for good faith in the South African law of contract: can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16 (5) *PER / PELJ* 70.

¹⁰ *Afrox Health Care Ltd v Strydom* 2002 (6) SA 21 (SCA).

¹¹ *SA Forestry Co Ltd v York Timber Ltd* 2005 (3) SA 323 (SCA).

¹² D Bhana, M Pieterse ‘Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited’ (2005) 122 4 *SALJ* 872- the authors argue that despite the constitutional mandate given to the courts to infuse the law of contract with constitutional values and to ‘engage in normative reasoning’; there has been an increase in the conservatism in the courts approach in respect of the open-ended constitutional values. They argue that this conservative approach culminated in the *Brisley case*.

¹³ *Siyepu and others v Premier, Eastern Cape* 2013 (2) SA 425 (ECB).

¹⁴ *Ibid* 53 – 54.

¹⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

¹⁶ *Ibid* 71.

statement, although made in respect of the value of good faith, shows that the courts are more willing to recognise that the Constitution demands that the law of contract be developed to ensure that it embraces the Constitution and the values which underlie it.

1.2 Purpose of the study:

The law of contract forms a fundamental part of our everyday lives; we enter into many contracts merely performing our usual daily activities. Often we enter into these contracts without realizing that we are doing so, for example entering private property on which a disclaimer is displayed exempting the liability of the owner and his or her employees for any loss or harm you might suffer on his or her property. Commerce would be unimaginable in the absence of the ability to enter into contracts.¹⁷ Almost every aspect of the law of contract is subjected to precise rules, leaving little place for open-ended principles that strive for substantive equity and fairness in the law of contract.¹⁸

The South African law of contract is founded upon principles such as freedom of contract and *pacta sunt servanda*, concepts which emerged centuries ago.¹⁹ It is based on a model in terms of which a 'free market where voluntary participation by individuals on an equal footing in a bargaining process without state intervention' is deemed to result in the 'greatest public good'.²⁰ However this fails to consider the social and economic realities which South Africa faces, today contracting parties are almost always in different bargaining positions, while the 'ignorance and inexperience' of some contracting parties and the emergence of standard form contracts adversely affects freedom.²¹ This is especially apparent today where many people are motivated by profit and self-interest and as a result the values of fairness, equity and justice can be compromised. This is evident in the South African law of contract where frequently parties take advantage of the weakness of the other contracting party and where parties enter into contracts which might be technically lawful but which society would not approve of.

¹⁷ S Cornelius 'Consensus and contracts' (2011) *The Daily Mail-Legally speaking* 48.

¹⁸ A Van Aswegen 'The implications of a Bill of Rights for the law of contract and delict' (1995) 11 *S. Afr. J. on Hum. Rts.* 65.

¹⁹ Bhana & Pieterse (note 12 above) 866.

²⁰ Van Aswegen (note 18 above) 66.

²¹ Van Aswegen (note 18 above) 65.

The potential for the abuse of the contractual principle of freedom of contract, present in the South African law of contract, was identified by the South African Law Commission in its discussion paper on unfair contract terms; in which it set out examples of the injustices in the law of contract in its current form.²² These examples were set out as follows:

‘Common examples of such situations abound, but a few examples will suffice: the head of a homeless family urgently in need of a roof over their heads signs a lease which gives the lessor the right to raise the rent unilaterally and at will, and the lessor doubles the rent within five months; an uneducated man signs a contract of loan in which he agrees to the jurisdiction of a High Court, to find out only later, when he is sued that a lower court also had jurisdiction over the matter and that the case could have been disposed of at a much lower cost to himself; a man from a rural area purchases furniture from a city store on standard, pre-prepared hire-purchase terms, later to find out that he has waived all his rights relating to latent defects in the goods sold; an illiterate and unemployed bricklayer agrees to act as subcontractor for a building contractor on the basis that he must at his own expense procure an assistant, and so on.’²³

Van Aswegen has acknowledged that the South African law of contract is not ‘flexible enough’ to bring about the change which is necessary to address these issues.²⁴ Therefore one can argue that there is a need for a mechanism in the law of contract which could impose a form of ‘social control’ over the private law right to freedom of contract as was suggested by the South African Law Reform Commission in its report on the promulgation of general unfair contract terms legislation.²⁵ The *boni mores*, which is informed by good morals, constitutional values and the legal convictions of the community, can be used as a mechanism to incorporate an ethical standard into the law of contract and can be used to address the abuse of freedom of contract by imposing a form of external and objective control over the contract. Therefore the rationale for this study is to argue in favour of the use of the *boni mores* in the South African law of contract as a way to incorporate an equity mechanism and to ensure that the law of contract meets the demands of the Constitution.

²² South African Law Commission Paper 65 *Unreasonable stipulations in contracts and the rectification of contracts* (April 1996).

²³ *Ibid* para 1.3.

²⁴ Van Aswegen (note 18 above) 65.

²⁵ South African Law Reform Commission Report on Project 47: ‘Proposals for the promulgation of general unfair contract terms legislation’ SALRC (1998).

The purpose of this study is to critically analyse the current role of the *boni mores* in the South African law of contract; and to consider whether this role is in line with the demands of the Constitution. A further purpose of this study is to consider the correctness of certain views of the courts²⁶ in respect of the role of the *boni mores* in contract law and to pose the question whether this role is constitutional and logical. The final purpose of this study is to examine whether the *boni mores* is an appropriate mechanism to incorporate an ethical standard into the law of contract.

1.3 Outline of the proposed research:

This study will be divided into six chapters. The second chapter will contain a discussion of various concepts which will be used throughout this study. These concepts will be discussed with reference to various academic writings and case law. The third chapter will contain a discussion of the development of the role of the *boni mores* in the South African law of contract and will set out the role currently played by the *boni mores* in this context. This discussion will include reference to the case law which is of direct relevance to this study.²⁷ Reference will also be made to various academic writings. This chapter will also consider the arguments regarding whether or not the *boni mores* and public policy are merely the same concept with the same meaning. Further this chapter will contain a discussion of how the *boni mores* is used in the delict and how the courts apply this principle in delictual cases.

Chapter four will contain a critical analysis of the *Brisley* case which has set the precedent on this matter. The facts of this case and the conclusion of the SCA will briefly be set out. The focus of the analysis will be on the reasoning of SCA in respect of its refusal to allow the *boni mores* to play a greater role in the South African law of contract. The correctness of this reasoning will be evaluated, with reference to academic writings and case law which have discussed this case. Further this chapter will contain a discussion of the SCA's predilection to the use of the intention of the parties to determine the enforceability of a contract over the use of normative values such as the *boni mores*. Lastly this chapter will contain a discussion of whether the parties should be allowed to independently determine which contracts should be enforceable without reference to some form of external standard to ensure equity and fairness when contracting.

²⁶ *Brisley* (note 7 above).

²⁷ *Brisley v Drotosky* 2002 (4) SA 1 (SCA); *Everfresh Market Virginia (PTY) LTD v Shoprite Checkers (PTY) LTD* 2012 (1) SA 256 (CC); *Mort No v Henry Shield-Chiat* 2001 (1) SA 464 (C).

Chapter five will contain an examination of whether this limited role which the *boni mores* plays in the law of contract meets the requirements of the Constitution; or whether the Constitution and the values which underlie it require some external standard to be imposed on the law of contract to ensure that it is in line with the demands of the Constitution. This chapter will contain a discussion of the various values which underlie the Constitution, which will be defined in chapter two, and what these values require (for example, the constitutional value of Ubuntu and the value system of communitarianism, both of which require there to be a level of mutual respect between individuals). This chapter will also contain a discussion of the *Brisley* case in the context of the Constitution. This will include a discussion of whether this judgment is in line with the Constitution. Reference will be made to academic writings which have discussed the finding of this SCA judgment, and those judgments which have followed its approach. Finally, chapter six will contain a summary of the key findings of the preceding chapters will be set out and the final conclusions of the study.

Chapter 2:

Concepts and definitions:

2.1. Introduction:

In this chapter the concepts which are central to this dissertation will be set out, to create a general understanding of these terms and how they fit into the law of contract. Firstly the *boni mores* will be discussed, starting with the basic definition, moving on to the history and then a detailed definition of the *boni mores* will be set out. The concepts of freedom and sanctity of contract will be discussed; as these concepts form the foundational principles for the law of contract and have been invoked by the SCA as a ground to justify the limitation of the role of normative values in contract law. Thereafter, the notions of communitarianism and Ubuntu will be defined; these notions hold an important role in South African law since the advent of the Constitution and could provide an appropriate portal for the use of the *boni mores* in contract law. The concept of public policy will be discussed; this term has been used in the law of contract as a form of control over the operation of the principles of freedom and sanctity of contract. This term is closely related to the *boni mores*, a relationship which will be discussed in chapter three. The final concept to be discussed is that of the classical liberal model of contract law. Our modern model of contract law has been heavily influenced by the classical liberal model, and emphasises many of the same characteristics, such as freedom and sanctity of contract.

2.2. The *boni mores*:

The *boni mores* in its most basic form can be defined as good morals,¹ and as good moral standards.² As an introduction, a brief discussion of the history of the *boni mores* will be undertaken. In Rome, 150 AD, adult men enjoyed absolute freedom and power over their actions, but had to act within certain boundaries.³ One such boundary was the *boni mores*; they could not act in a manner that was contrary to the *boni mores* of their community.⁴ The

¹ Online Library of Liberty website- available at: <http://oll.libertyfund.org/pages/a-legal-glossary-by-roscoe-pound> (Accessed 12 April 2014).

² D Hutchison ... *et al* *The law of contract in South Africa* (2009) 447.

³ J Plescia 'The development of the doctrine of *boni mores* in Roman Law' (1987) 34 *RIDA* 269.

⁴ *Ibid* 269.

boni mores was said to mean the local legal customs as well as the morals of the community.⁵ At this time law, religion and morality were all intertwined.⁶ During this time any transactions which were deemed to be contrary to the *boni mores* were void; as such these transactions did not give rise to any contractual obligations and therefore could not be enforced by the courts.⁷

The *boni mores* was said to refer to the well-being of the public which involved public morals, health and safety.⁸ The *boni mores* were determined by the written law as well as the unwritten laws of long standing customs reflecting a community's morality, but were ultimately determined by the judges' 'sense of equity and logic' (whose main concern is of the public interest as opposed to the interests of the individual).⁹ Mayer-Maly explains that in Rome the edicts which mentioned the *boni mores*, saw the *boni mores* as an 'ought proposition', which embodied 'standards whose binding force was unquestioned and self-evident' even though they were not changed into law.¹⁰ The *boni mores* were not seen as being part of the law, but were 'legally relevant' in specific cases and in such cases the *boni mores* would be regarded as a legal source.¹¹

Aquilius stated that morals have always influenced the law and became crystallised into legal principles.¹² As a result, contracts which were contrary to the morals of the community would not be enforced on the ground that the contract is immoral, even if such contract did not violate any known law.¹³ Aquilius stated further that 'what is immoral is a question of fact not a legal problem'.¹⁴

In most modern legal systems there is some sort of limitation on freedom of contract. Zimmerman stated that:

⁵ Ibid 269.

⁶ Ibid 276.

⁷ Ibid 278.

⁸ Ibid 285.

⁹ Ibid 285.

¹⁰ T Mayer-Maly 'The *boni mores* in historical perspective' (1987) 50 *THRHR* 76.

¹¹ Ibid 76 – 77.

¹² Aquilius 'Immorality and illegality in contract' (1941) 58 *SALJ* 344 – 345.

¹³ Ibid 345.

¹⁴ Ibid 346.

‘If a contract is at variance with the sense of decency of all just and fair-thinking people, if it carries a visible stamp of eccentricity so as to scandalize the reasonable man, it cannot possibly be upheld.’¹⁵

The courts would not have wanted to enforce such contracts, as this could have been seen as assisting the wrongful contract, thus adversely affecting the repute of the law.¹⁶

European countries are examples of those which have incorporated the *boni mores* as a mechanism to prevent the enforcement of a contract which offends the legal convictions of the community.¹⁷ Many European countries have enacted legislation which states that contracts which are contrary to the *boni mores* are invalid and unenforceable.¹⁸ However, in South Africa the incorporation of the *boni mores* was less significant. In South Africa the *boni mores* plays its most significant role in the law of delict, but it can be argued that it has a virtually non-existent role in the law of contract.

The definition of the *boni mores* will now be set out. In Germany the courts have defined the *boni mores* as ‘the sense of decency of all fair and just-thinking people’.¹⁹ Mayer-Maly has stated that one would prefer that the *boni mores* be an ‘expression of legal ethics, inherent in the ruling economic and social system’.²⁰ Mayer-Maly states further that one cannot construe the *boni mores* from a specific moral code, but rather that the *boni mores* stem from the ‘minimum of common evaluations which no legal community can dispense with’, in other words he proposes that the *boni mores* are based on ‘everyday ethics’.²¹ Mayer-Maly sets out the three main areas in which the *boni mores* has functioned, these being:²²

- a. The law of delict, to define injuries;
- b. The law of contract, as a limitation to freedom of contract; and
- c. Family law.

¹⁵ R Zimmerman *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1992) 706.

¹⁶ *Ibid* 706.

¹⁷ Trans-lex website ‘Invalidity of contract that violates good morals (boni mores)’ <http://www.trans-lex.org/937000> (accessed 25 July 2014).

¹⁸ Zimmerman (note 15 above) 706.

¹⁹ Mayer-Maly (note 10 above) 61.

²⁰ Mayer-Maly (note 10 above) 62.

²¹ Mayer-Maly (note 10 above) 62.

²² Mayer-Maly (note 10 above) 64.

Roscoe Pound defined the *boni mores* as that which ‘accorded with the settled custom of men, resting in tradition and sanctioned by social pressure’.²³ In the case of *Ismail v Ismail*²⁴ the South African Appellate Division (as it then was) stated that the *boni mores*, ‘morals’ or ‘morality’ in English, can be defined as:²⁵

‘the accepted customs and usages of a particular social group that are usually morally binding upon all members of the group and are regarded as essential to its welfare and preservation’

In the case of *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd*²⁶ Van Zyl J stated that the *boni mores* is closely related to the notion of good faith, and is associated with society’s ‘perception of justice, equity and reasonableness’.²⁷ Wille has stated that a contract is said to be contrary to the *boni mores* where it offend our conscience or our sense of what is right.²⁸

One internet source describes the *boni mores* as relating to:²⁹

‘fundamental values of society and is not of a purely legal nature. It includes basic legal, as well as economic, ethical, moral, and social values that the individuals of the relevant community generally consider binding and crucial for their peaceful coexistence in that community. Such fundamental values of morality and justice arise from and are based on a broad social consensus and thus shape the morality of a community. Good morals, therefore, involve a broad and objective standard. They relate to the social morality of a community, not to the individual morality of the judge or arbitrator who decides a given case.’

From the above discussion one can broadly describe the *boni mores* as the ‘legal, economic, ethical, moral, and social values’ of society, which takes the society’s ideas of ‘justice, equity and reasonableness’ into consideration, which requires a minimum standard of conduct in line with such standards and which the people of that society consider to be binding. The *boni mores* is seen as standards that every society needs for its continued peaceful existence.

²³ R Pound ‘The End of Law as Developed in Legal Rules and Doctrines’ (1914) 27 (3) *Harvard Law Review* 201.

²⁴ *Ismail v Ismail* 1983 (1) SA 1006 (A).

²⁵ *Ibid* 1025G-H.

²⁶ *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W).

²⁷ *Ibid* 528-9.

²⁸ G Bradfield ... *et al* *Wille’s Principles of South African law* (2007) 768.

²⁹ Trans-lex website ‘Invalidity of contract that violates good morals (*boni mores*)’ <http://www.trans-lex.org/937000> (accessed 25 July 2014)- Trans-lex is an online database containing transnational law, in terms of such transnational law, contracts which are contrary to the *boni mores* are deemed to be invalid and the courts have no discretion in such matter, the contract must be declared invalid regardless of the intentions of the parties. This definition is a helpful guide as to the content of the *boni mores*.

2.3. Freedom and Sanctity of contract:

‘Freedom of contract, for instance, means that an individual is free to decide whether, with whom, and on what terms to contract.’³⁰

Freedom of contract allows parties to agree to anything which is ‘possible and lawful’.³¹ Freedom of contract forms a ‘central tenet’ of the law of contract.³² Freedom of contract is a very liberal and individualist concept emerging from the classical model of contract law, which states that every person is free to enter into a contract on any terms and with any person they deem fit.³³ Freedom of contract is premised on the idea that the contracting parties have equal bargaining power and thus have equal power to impose and reject contractual terms.³⁴ In terms of the principle of freedom of contract a contract is created as a result of ‘free choice, without external interference’ where the parties to the contract are sovereign.³⁵ Freedom of contract is linked to the concept of *pacta sunt servanda*, i.e. sanctity of contract,³⁶ which requires that all contracts, voluntarily entered into, be honoured.³⁷ The concepts of freedom and sanctity of contract are the expressions of contractual autonomy.³⁸

The concepts of freedom and sanctity of contract form the cornerstones of the South African law of contract; these concepts inform the law of contract and set out its ‘ideological underpinnings’.³⁹ These being such fundamental principles in the law of contract, judicial interference in contractual relationships is generally viewed with scepticism.⁴⁰

³⁰ S W J Van Der Merwe ... *et al Contract: General principles* (2012) 9.

³¹ Hutchison ... *et al* (note 2 above) 7.

³² H De Villiers ‘Limitations on party autonomy in the context of cross-border consumer contracts: The South African position’ (2013) 3 *TSAR* 478.

³³ D Bhana, M Pieterse ‘Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited’ (2005) 122 4 *SALJ* 867; see also Hutchison ... *et al* (note 2 above) 23.

³⁴ K J Chrysostome ‘The future of standard form contracts in South Africa with particular reference to recent developments in the law’ (unpublished LLM thesis, University of KwaZulu-Natal, 2009) 5.

³⁵ Hutchison ... *et al* (note 2 above) 24.

³⁶ To be discussed in greater detail in a further on in this chapter.

³⁷ Hutchison ... *et al* (note 2 above) 21.

³⁸ D Bhana ‘Constitutionalising contract law: Ideology, judicial method and contractual autonomy’ (unpublished PhD thesis, University of the Witwatersrand, 2013) 44.

³⁹ Hutchison ... *et al* (note 2 above) 21.

⁴⁰ Bhana & Pieterse (note 33 above) 867.

In terms of our common law the principles of freedom and sanctity of contract will prevail, with the conclusion of the contract said to signify that all the parties have understood and agreed to all the terms of the contract.⁴¹ The hegemony of the freedom of contract principle is reinforced by the courts; an example of this is the case of *Sasfin (Pty) Ltd v Beukes*⁴² in which Smalberger JA stated that ‘public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by the restrictions on that freedom’.⁴³ It also appears that freedom of contract has been elevated to the status of a constitutional value by the SCA,⁴⁴ a value which requires contracts to be strictly enforced.⁴⁵ The Constitutional Court has stated that ‘the ability to regulate one’s own affairs, even to your own detriment’, is an essential part of freedom and dignity.⁴⁶ Freedom of contract, however, despite being one of the dominating principles of our law of contract, has certain limitations. The main limitation to freedom of contract is public policy.⁴⁷

Sanctity of contract requires that all contracts ‘freely and seriously entered into must be honoured’ and enforced.⁴⁸ Ngcobo J has stated that sanctity of contract is a ‘profoundly moral principle’.⁴⁹ The reason for the principle of sanctity of contract is to facilitate agreements, as people would be less willing to enter into contracts if they knew contracts would not be honoured, so sanctity of contract serves as a guarantee that free and voluntary contracts are enforced.⁵⁰ However this guarantee does not apply to contracts which violate public policy.⁵¹ This principle is said to serve a ‘diverse policy of expediency’ called for by principles such as public policy and the *boni mores*:⁵² ‘it is a rule of ethics that one should keep one's promise;

⁴¹ C Posthumus ‘Freedom of Contract and the Consumer Protection Act’ *The Moneyweb* 11 March 2011 available at <http://www.moneyweb.co.za/moneyweb-soapbox/freedom-of-contract-and-the-consumer-protection-ac?sn=2009+Detail+no+image> accessed 28 June 2014.

⁴² *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

⁴³ *Ibid* 9E.

⁴⁴ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) 497D - F: Malan JA explained that the court must have regard to two principles, the first is *pacta sunt servanda*; the second is freedom of contract. The judge explains that these principles reflect the common law as well as constitutional values, they form part of freedom which informs the constitutional value of dignity.

⁴⁵ G Lubbe ‘Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law’ (2004) 121 *SALJ* 415; see also Bhana (note 38 above) 70.

⁴⁶ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 57.

⁴⁷ *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (AD) 891.

⁴⁸ *Hutchison ... et al* (note 2 above) 21.

⁴⁹ *Barkhuizen* (note 46 above) 87.

⁵⁰ M Kruger ‘The role of public policy in the law of contract, revisited’ (2011) 128 (4) *SALJ* 737 – 738.

⁵¹ *Barkhuizen* (note 46 above) 87.

⁵² O Kahn-Freund ‘Pacta sunt servanda-a principle and its limits: some thoughts prompted by comparative labour law’ (1973) 48 *Tul. L. Rev.* 894.

it is a question of expediency whether the machinery of legal enforcement should be available to give it effect.’⁵³

2.4. Ubuntu:

‘I am, because we are; and since we are therefore I am’⁵⁴

Ubuntu is a notion which emerges from African jurisprudence. It is a difficult term to define and is constantly changing.⁵⁵ Some have translated the word Ubuntu to mean “humanity”, “personhood” or “humaneness”.⁵⁶ However, Bennett has stated that these translations are not of any use as they fail to express all which the notion of Ubuntu encompasses.⁵⁷ Mokgoro has stated that defining Ubuntu with precision is an unattainable goal.⁵⁸ Mokgoro states that a literal translation of one of the fundamental beliefs under Ubuntu means that ‘a person can only be a person through others’.⁵⁹ Despite the difficulty of defining the exact meaning of the notion of Ubuntu, it is still used in many fields of law and has formed one of the underlying values of our Constitution.

The notion of Ubuntu was first referred to by the Constitutional Court in case of *S v Makwanyane*.⁶⁰ Mokgoro J set out what the notion of Ubuntu encompasses, stating that it shows the importance of group solidarity, and includes values such as ‘compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation’⁶¹

Mokgoro J also stated that the Bill of Rights was facilitated by Ubuntu, which underlies the Bill of Rights.⁶² Langa J, in the same case, declared that Ubuntu emphasises the idea of everyone being dependent on each other and recognises that everyone as human beings have

⁵³ Ibid 894.

⁵⁴ J Mbiti *African Religion and Philosophy* (1969) 108-109.

⁵⁵ T W Bennett ‘Ubuntu: An African equity’ (2011) 14 (4) *PELJ* 31.

⁵⁶ Ibid 30.

⁵⁷ Ibid 31.

⁵⁸ YM Mokgoro ‘Ubuntu and the law in South Africa’ (1998) 1 (1) *PER/PELJ* 16.

⁵⁹ Ibid 16.

⁶⁰ *S v Makwanyane* 1995 3 SA 391 (CC).

⁶¹ Ibid 308.

⁶² Bennett (note 55 above) 51.

the right to ‘respect, dignity, value and acceptance’ from the community.⁶³ Langa J states further that Ubuntu also regulates the exercise of these rights, requiring that everyone have ‘mutual enjoyment’ of the rights.⁶⁴

The notion of Ubuntu has been said to be ‘based on the notion of interrelatedness of cultural affinity and kinship’ and is ‘used to describe the quality or essence of being a person’.⁶⁵ It is a notion which means that a person’s humanity depends on the ‘appreciation, preservation and affirmation’ of the humanity of others.⁶⁶ It is an essential ideology under the notion of Ubuntu that:

‘I am a friend to myself because others in my community have already been friends to me, making me someone who could survive at all, and therefore be in the community. It is only because I have always been together with others and they with me that I am gathered together as a person and sustained in that self-gathering.’⁶⁷

Thus this means that the existence of humanity is dependent on your relation with those around you, as people cannot live in isolation as you owe your existence to those around you, and as such each person is part of a whole which is the community.⁶⁸ Ubuntu requires all of us to recognise the humanness of others and to respect that humanness as an ‘object worthy of dignity and respect’.⁶⁹ According to this notion, if you depreciate and disrespect others; you are depreciating and disrespecting yourself.⁷⁰

Mokgoro states that the African values which Ubuntu embodies are compatible with the Constitution.⁷¹ Ubuntu is communitarian by nature.⁷² In terms of the notion of Ubuntu people

⁶³ *S v Makwanyane* (note 60 above) 224.

⁶⁴ *S v Makwanyane* (note 60 above) 224.

⁶⁵ M Eze ‘What is African Communitarianism? Against Consensus as a regulative ideal’ (2008) 27 (4) *SAJ.Philos.* 387.

⁶⁶ *Ibid* 387.

⁶⁷ Barnard-Naude, AJ ‘Oh what a tangled web we weave ...’ hegemony, freedom of contract, good faith and transformation- towards a politics of friendship in the politics of contract’ (2008) 1 *Constitutional Court Review* 202.

⁶⁸ Eze (note 65 above) 387.

⁶⁹ Eze (note 65 above) 390.

⁷⁰ Eze (note 65 above) 390.

⁷¹ Mokgoro (note 58 above) 25.

⁷² K Mofuoa ‘On liberal individualism, communitarianism and ubuntu society in South Africa’ (2012) 2 (2) *International Journal of Sudan Research* 190.

are ‘intertwined in a world of ethical relations and obligations’.⁷³ In the case of *Port Elizabeth Municipality v Various Occupiers*⁷⁴ Sachs J explains that the notion of Ubuntu is part of our Constitution and has influenced our new constitutional order, explaining further that it ‘combines individual rights with a communitarian philosophy’ and that Ubuntu performs a vital function ‘in our evolving new society’ which is in need of ideals calling for ‘human interdependence, respect and concern.’⁷⁵

Even though Ubuntu is a constitutional value it has not been received well into some areas of private law.⁷⁶ The law of contract is one such area which has proven impervious to the infusion of the notion of Ubuntu. Although the law of contract does have concepts in place that can achieve similar outcomes as Ubuntu would, such as public policy, the impact of these concepts are limited as they do not have an ‘unlimited scope of operation’.⁷⁷ Bennett recognises that the courts have been conservative when using the notion of Ubuntu in areas of private law such as the law of contract and are hesitant to infuse new ideas into the law.⁷⁸ However the significance of the notion of Ubuntu, in relation to the law of contract, was bolstered by the Constitutional Court in the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*⁷⁹ in which the Constitutional Court stated that it is necessary to infuse constitutional values, such as Ubuntu, into the law of contract.⁸⁰ The Constitutional Court declared further, per Yacoob J, that the notion of Ubuntu is relevant especially when developing the common law.⁸¹

2.5. Public Policy:

‘A contract against public policy is one stipulating a performance which is not per se illegal or immoral but which the courts, on the ground of expedience, will not enforce, because performance will detrimentally affect the interests of the community’⁸²

⁷³ Ibid 191.

⁷⁴ *Port Elizabeth Municipality v Various Occupiers* (2004) 12 BCLR 1268 (CC).

⁷⁵ Ibid 37.

⁷⁶ Bennett (note 55 above) 40.

⁷⁷ Bennett (note 55 above) 45.

⁷⁸ Bennett (note 55 above) 45.

⁷⁹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

⁸⁰ Ibid 71.

⁸¹ Ibid 23.

⁸² Aquilius (note 12 above) 346.

Before looking at the definition and content of the concept of public policy, a brief discussion of the development of public policy in the law of contract will be undertaken. Public policy was seen as an alternative to the substantive defence of the *exceptio doli generalis*. In the case of *Bank of Lisbon and South Africa Ltd v De Ornelas and another*,⁸³ Jansen JA held that the *exceptio doli generalis* was closely related to defences which were founded on the concepts of public policy and the *boni mores* and in some instances they overlap.⁸⁴ The use of public policy in cases relating to unreasonable contracts was a new approach.⁸⁵

The use of public policy in such a manner was adopted by the (then) Appellate Division in the case of *Sasfin (Pty) Ltd v Beukes*⁸⁶ where Smalberger JA confirmed that public policy is a vague expression.⁸⁷ Smalberger JA stated that a contract is contrary to public policy where it is contrary to the interests of the public.⁸⁸ The judge advised that no court should be reluctant to perform its duty to declare certain contracts void for being contrary to public policy.⁸⁹ However, the judge warned that this power should be used cautiously, as the improper and arbitrary use of such power would potentially lead to uncertainty.⁹⁰ He suggested further that a judge must not declare a contract void merely because it offends that individual judge's sense of justice and fairness, but only where the harm that will be caused to the public if the contract were to be enforced is 'substantially incontestable'.⁹¹

The finding of Smalberger JA in respect of the role of public policy in the law of contract, has led to rather unpleasant results, with those without a defence or a proper case frequently attempting to use the defence of public policy to salvage their hopeless case. As a result, an enquiry was instituted by the South African Law Commission which investigated whether the courts should be allowed to interfere in contractual relationships where the contract, or a term thereof, is unjust or unconscionable.⁹² This commission came to the conclusion that reform

⁸³ *Bank of Lisbon and South Africa Ltd v De Ornelas and another* 1988 (3) SA 580 (A).

⁸⁴ *Ibid* 1025F – 1026C.

⁸⁵ FDJ Brand 'The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the constitution' (2009) *SALJ* 75.

⁸⁶ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

⁸⁷ *Ibid* 7.

⁸⁸ *Ibid* 8.

⁸⁹ *Ibid* 9.

⁹⁰ *Ibid* 9.

⁹¹ *Ibid* 9.

⁹² South African Law Commission Paper 65 *Unreasonable stipulations in contracts and the rectification of contracts*, Project 47 (April 1998) 5.

was needed, and recommended that legislation be enacted which would address ‘contractual unfairness, unreasonableness, unconscionableness or oppressiveness’.⁹³

The Commission put forward a preliminary Bill which purported to control unreasonable, unconscionable and oppressive contractual terms by setting out the powers the court would have in cases where it was of the opinion that a contractual term was unreasonable, unconscionable or oppressive.⁹⁴ However this legislation was met with great opposition.⁹⁵ The main thrust of the opposition was that providing the courts with such power would lead to legal uncertainty, which would in turn cause an increase in litigation.⁹⁶ Ultimately, this proposed bill has not been enacted to date.⁹⁷

As can be seen from the above discussion of the use of public policy in the South African law of contract, public policy has for a long time been recognised as a mechanism to avoid the enforcement of certain contracts which the courts deem to be inappropriate to enforce. This position was crystallised by the Constitutional Court in the case of *Barkhuizen v Napier*,⁹⁸ in which the Constitutional Court set out the approach in cases in which a contractual term is subjected to a constitutional challenge.⁹⁹ The Constitutional Court, per Ngcobo J, stated that a constitutional challenge will give rise to the question of whether the contract or a term thereof is contrary to public policy.¹⁰⁰ Ngcobo J stated that public policy embodies the legal convictions of the community, the values which society holds dear and is ‘deeply rooted in our Constitution and the values that underlie it’.¹⁰¹

Ngcobo J stated that when determining the content of public policy reference must be made to the Constitution, i.e. if the contract is in conflict with values enshrined in the Constitution it will be deemed contrary to public policy and as a result will be unenforceable.¹⁰² However when giving the judgment on the facts of the case; Ngcobo J stated that the mere fact that a

⁹³ Ibid xiv.

⁹⁴ Ibid 208- The Commission’s proposed Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms- Annexure A.

⁹⁵ Ibid 221- A list of respondents is listed in Annexure C of the Commission’s report .

⁹⁶ Brand (note 85 above) 77.

⁹⁷ Brand (note 85 above) 77.

⁹⁸ *Barkhuizen* (note 46 above).

⁹⁹ *Barkhuizen* (note 46 above) 22.

¹⁰⁰ *Barkhuizen* (note 46 above) 28.

¹⁰¹ *Barkhuizen* (note 46 above) 28.

¹⁰² *Barkhuizen* (note 46 above) 29.

clause limits a constitutional right does not mean that it is automatically contrary to public policy, rather what is required is for a two part test to be undertaken.¹⁰³ The first part requires a determination of whether the clause is unreasonable, and the second part, if the clause is reasonable, is to determine whether the clause should be enforced.¹⁰⁴ The Constitutional Court stated that this position accommodates sanctity of contract while still giving the courts the power to invalidate contracts on the ground that they are contrary to constitutional values.¹⁰⁵

The definition and content of public policy will now be discussed. Southwood AJA in the case of *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*¹⁰⁶ acknowledged that public policy is a difficult concept to define stating that public policy is constantly evolving.¹⁰⁷ Kruger has stated that public policy is a mechanism which gives society, through the courts, some control over the contractual relationships of individuals.¹⁰⁸ It is not a rigid concept; it evolves, changing with society.¹⁰⁹ Ngcobo J views public policy as being inseparable from the values of 'fairness, justice and equity, and reasonableness'; it is informed by the notion of Ubuntu, rooted in the Constitution and acknowledges the need for 'simple justice between individuals'.¹¹⁰

Wille states that a contract is contrary to public policy where it is contrary to the interests of the state, justice or the public.¹¹¹ He declares further that the public interest is the principal concern to public policy.¹¹² Where the contract is contrary to public policy it will not be enforced.¹¹³ Thus public policy can be seen as a limitation on the contractual principle of freedom of contract.¹¹⁴ When determining whether a contract is contrary to public policy one needs to look at the tendency of the agreement rather than the proved result.¹¹⁵ In the case of

¹⁰³ *Barkhuizen* (note 46 above) 56.

¹⁰⁴ *Barkhuizen* (note 46 above) 56.

¹⁰⁵ *Barkhuizen* (note 46 above) 56.

¹⁰⁶ *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004(6) SA 66 (SCA).

¹⁰⁷ *Ibid* 24.

¹⁰⁸ Kruger (note 50 above) 715.

¹⁰⁹ *Ibid* 715; see also Bradfield ... *et al* (note 28 above) 763.

¹¹⁰ *Barkhuizen* (note 46 above) 51.

¹¹¹ Bradfield ... *et al* (note 27 above) 763.

¹¹² *Ibid* 763.

¹¹³ *Ibid* 763.

¹¹⁴ M Marella 'The Old and the New Limits to Freedom of Contract in Europe' (2006) 2 *ERCL* 258.

¹¹⁵ Bradfield ... *et al* (note 27 above) 763.

*Juglal and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*¹¹⁶ Heher JA held that a contract will be declared void for being contrary to public policy where the effect of the enforcement of the contract will lead to a ‘probability that unconscionable, immoral or illegal conduct’ will occur.¹¹⁷ Southwood AJA in the case of *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*¹¹⁸ stated that ‘an agreement will be regarded as contrary to public policy when it is clearly inimical to these constitutional values, or the interests of the community, whether it be contrary to law or morality or runs counter to social or economic expedience’¹¹⁹

Public policy is dependent on the context in which it is applied and it is likely to change over time and in respect of its sphere of application.¹²⁰ This characteristic makes it difficult to apply the concept mechanically, meaning that there are no structures or processes set out to assist in the application of the principle.¹²¹ Also there is no list of considerations to be taken into account when applying the concept of public policy to a set of facts, judges are required to identify considerations which are relevant to the case when determining whether the contract should be enforced.¹²² Kruger, after surveying a number of cases, has identified a number of considerations which have been said to be relevant to the question of whether the contractual term is contrary to public policy.¹²³ These include the following:¹²⁴

- morality;
- the administration of justice;
- the interests of the community and social or economic expedience;
- the necessity for doing simple justice between contracting parties;
- the interests of the state, or of justice, or of the public;
- the free exercise by persons of their common law rights; and
- the concept of Ubuntu.

¹¹⁶ *Juglal and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004(5) SA 248 (SCA).

¹¹⁷ Ibid 12.

¹¹⁸ *Price Waterhouse Coopers Inc* (note 106 above).

¹¹⁹ Ibid 24.

¹²⁰ Kruger (note 50 above) 713 – 714.

¹²¹ Kruger (note 50 above) 713 – 714.

¹²² Kruger (note 50 above) 716.

¹²³ Kruger (note 50 above) 721.

¹²⁴ Kruger (note 50 above) 721.

Kruger states further that with each new case it would be necessary to identify new considerations that would be relevant to that particular case.¹²⁵ He opines that there are no restrictions on what the court can consider when applying public policy.¹²⁶ Public policy generally favours the freedom of contract, however it also takes into account the need for 'simple justice between man and man'.¹²⁷

This concept has also been subjected to a great deal of criticism. This is because the use of public policy requires a court to take into account broad concepts such as equity, fairness and justice, which, it is often believed, can lead to the consequence of legal uncertainty.¹²⁸ Some have described public policy as an 'unruly horse' which is difficult to control and often you do not know where it is taking you to.¹²⁹ This fear of uncertainty is not assisted by the fact that there is little guidance of how this concept is to be applied.¹³⁰ This fear of uncertainty exists despite the fact that the Constitutional Court stated that since the introduction of the Constitution the content of public policy is clear.¹³¹ The test set out in *Barkhuizen v Napier*¹³² does not provide much guidance, it sets out that reasonableness and fairness are relevant considerations, but the Constitutional Court fails to qualify what this entails.¹³³ However, Kruger argues that the uncertainty caused by the use of public policy is not as fatal as some make it out to seem. Kruger explains that legal certainty is not the only consideration to be taken into account, as our Constitution has placed a greater emphasis on fairness, justice and equity. Arguing further he states that the adverse impact on legal certainty is outweighed by benefits gained through the use of public policy.¹³⁴ This echoes the sentiments of Olivier J as

¹²⁵ Kruger (note 50 above) 721.

¹²⁶ Kruger (note 50 above) 722.

¹²⁷ *Price Waterhouse Coopers* (note 106 above) 23.

¹²⁸ Kruger (note 50 above) 712.

¹²⁹ Kruger (note 50 above) 712.

¹³⁰ Kruger (note 50 above) 713.

¹³¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 28:

'Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'.'

¹³² *Barkhuizen* (note 46 above).

¹³³ Kruger (note 50 above) 724 – 725.

¹³⁴ *Ibid* 739 – 740.

expressed in *Eerste Nasionale Bank v Saayman*,¹³⁵ which case will be referred to elsewhere.¹³⁶

2.6. Communitarianism:

Communitarianism gives priority to the community as a whole, rather than to the individual.¹³⁷ Thus it is similar to the notion of Ubuntu, by focusing on the community. This ideal entails that ‘human identity is constituted through the social realm’.¹³⁸ It holds that people cannot achieve fulfilment in isolation, but rather it must be done with the community.¹³⁹ This idea is focused on the achievement of common good.¹⁴⁰

McCann defines communitarianism as a ‘social philosophy that identifies the individual as socially constituted’.¹⁴¹ Communitarians are opposed to the idea of humans as ‘individualised, solitary and “atomistic” beings’ who are unrestricted by ‘social identity or communal ethics’, believing that people obtain their identity from their participation in the community.¹⁴² Communitarianism is opposed to individualism as it is believed that where individual rights are supreme, the common good can possibly be side-lined.¹⁴³

2.7. Classical liberal model:

The South African law of contract is mainly founded upon the classical liberal model.¹⁴⁴ The classical liberal model emerged during the industrial revolution, during which there was a shift in the structure of society, and the freedom of the individual became paramount.¹⁴⁵ This required that all people be allowed to exercise free will and be able to govern their own lives, in respect of private matters.¹⁴⁶ Under this model state intervention in the private affairs of

¹³⁵ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA).

¹³⁶ Bhana & Pieterse (note 33 above) 873.

¹³⁷ Eze (note 65 above) 386.

¹³⁸ C Christians ‘Ubuntu and communitarianism in media ethics’ (2004) 25(2) *Ecquid Novi* 237.

¹³⁹ *Ibid* 237.

¹⁴⁰ *Ibid* 237.

¹⁴¹ C R McCann ‘F.A. Hayek: The Liberal as Communitarian’ (2002) 15 (1) *The Review of Austrian Economics* 24.

¹⁴² Mofuoa (note 72 above) 189.

¹⁴³ Christians (note 138 above) 237.

¹⁴⁴ Bhana (note 38 above) 32.

¹⁴⁵ Bhana (note 38 above) 47.

¹⁴⁶ Bhana (note 38 above) 47.

individuals is only allowed where such intervention is called for by the ‘superior moral authority’ and if the intervention is limited to a very ‘narrow ambit’.¹⁴⁷

Bhana has described the classical liberal model as being a model in which ‘a strongly individualist concept of autonomy thus prevailed, with the values of self-interest, self-reliance and self-determination paramount, and collectivist concerns minimal’.¹⁴⁸

The classical liberal model of contract law places emphasis on autonomy, requiring a ‘non-interventionist and individualistic approach’ to contract law.¹⁴⁹ Freedom of contract constitutes one of the foundational principles under the classical model of contract law.¹⁵⁰ Bhana states that the classical model ‘embraces a laissez faire approach that generally respects the contracting parties’ freedom to arrange their affairs as they see fit, by way of the terms of their contract.’¹⁵¹ Barnard-Naude also explains that under this model individualism is emphasised, stating as follows:

‘Individualism accepts as given a world of independent individuals who are encouraged to prefer the pursuit of self-interest rigorously. A consideration or sensitivity for the interests of others falls outside of the aims of this way of life, although one should be prepared to obey the rules that make it possible to co-exist with other self-interested individuals.’¹⁵²

This means that this model has the potential to enable people to pursue their own self-interest, while giving little consideration to the other party.¹⁵³

Under the classical model of contract law the court will focus on the formal validity of the contract, i.e. where all the formal requirements for a valid contract are present the contract will be enforced, and the courts will resolve disputes through the application of archaic contractual rules.¹⁵⁴ Bhana states that the role of the judiciary under the classical liberal model is limited to the function of a referee, which is a very procedural role.¹⁵⁵ The courts

¹⁴⁷ Marella (note 114 above) 261.

¹⁴⁸ Bhana (note 38 above) 47.

¹⁴⁹ Bhana (note 38 above) 48.

¹⁵⁰ L Hawthorne ‘Justice Albie Sachs’ contribution to the law of contract: Recognition of relational contract theory’ (2010) 25 *SAPL* 83

¹⁵¹ Bhana (note 38 above) 48.

¹⁵² AJ Barnard-Naude (note 67 above) 164.

¹⁵³ AJ Barnard-Naude (note 67 above) 164.

¹⁵⁴ Bhana (note 38 above) 49.

¹⁵⁵ Bhana (note 38 above) 49.

have very limited power to declare contracts invalid, only being able to do so in extreme cases.¹⁵⁶ Also under the classical liberal model the circumstances of the parties are rarely a concern when considering the enforceability of the contract.¹⁵⁷ This model ensures legal certainty, predictability and expediency, while placing little emphasis on contractual justice, as under this model it is presumed that all contracts are entered into in good faith, and thus it is assumed that all contracts are 'inherently equitable'.¹⁵⁸

Bhana has identified how the modern model of contract law shows many of the characteristics of the classical liberal model, with a focus on contractual autonomy, with the principles of freedom and sanctity of contract remaining unaffected.¹⁵⁹ However the modern conception of the proper nature and role of our law of contract pays more attention to contractual justice; this requires the use of normative values which can often lead to uncertainty, and as a result the courts have arguably been conservative when using such values.¹⁶⁰

2.8. Conclusion:

From the above discussion one can see that the concepts of public policy and the *boni mores* could be used to ensure contractual justice by enabling the courts to strike down contracts which are contrary to public policy and/or the *boni mores*, and that such concepts are informed and supported by the notion of Ubuntu and the values which underlie it. However, despite the communitarian nature of the Constitution one can see that the law of contract has maintained its classical liberal roots focusing on freedom and sanctity of contract, while normative values continue to have a very limited scope of operation. A discussion of the role of the *boni mores* in the law of contract as well as in the law of delict will be undertaken in the following chapter. Furthermore, the correctness and constitutionality of this current position in contract law will be discussed in the chapters to follow.

¹⁵⁶ Bhana (note 38 above) 50.

¹⁵⁷ Bhana (note 38 above) 49.

¹⁵⁸ Bhana (note 38 above) 50 - 51.

¹⁵⁹ Bhana (note 38 above) 60 - 61.

¹⁶⁰ Bhana (note 38 above) 60 - 63.

Chapter 3:

The role of the *Boni mores* in South Africa:

3.1. The *boni mores* and the South African law of contract:

The *boni mores* has formed part of South Africa's common law for many years, but it has featured most prominently in the law of delict. It has however formed a part of the common law of contract under the legality doctrine. Under the legality doctrine a contract could be deemed illegal for being contrary to good morals.¹ However, Van Der Merwe has stated that this does not mean that an extra criterion is introduced which takes the 'notion of illegality outside the realms of the law', stating further that the *boni mores* is only pertinent where it provides the 'basis upon which a decision on the question of illegality is made in law'.² Therefore a contract will only be found to be *contra boni mores* where the contract is contrary to established rules, rather than wrongs which have not been established as such for the purposes of the law of contract. Thus the *boni mores* has a limited role under the legality doctrine.

The courts have also considered the potential of providing the *boni mores* with a greater role in the law of contract when determining the enforceability of a contract. A discussion of the cases which deal with the use of the *boni mores* and other normative values in the South African law of contract will follow. In the case of *Bank of Lisbon and South Africa Ltd v De Ornelas and another*³ Jansen JA held that contracts which offend the *boni mores* must be subjected to judicial control.⁴ Jansen JA held further that because there is no closed list of wrongs, reference must be made to the 'prevailing mores' and the community's sense of justice as a norm.⁵

Later, in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*⁶ (hereafter referred to as '*Saayman*') Olivier J, in his minority judgment, concluded that a contract of

¹ S W J Van Der Merwe ... *et al Contract: General principles* (2012) 166.

² *Ibid* 166.

³ *Bank of Lisbon and South Africa Ltd v De Ornelas and another* 1988 (3) SA 580 (A).

⁴ *Ibid* 615.

⁵ *Ibid* 615.

⁶ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA).

surety should not be enforced as in the circumstances the normative values of good faith, equity and fairness were against the strict application of the established rules of contract law.⁷ The judgment of Olivier J, albeit as the minority, shows the movement towards a more just and equitable system of contract law through the use of normative values. This inspiration was drawn on in the case of *Janse Van Rensburg v Grieve Trust CC*⁸ where Van Zyl J, relying on the reasoning of Olivier J in the *Saayman* case,⁹ stated that the common law must be developed because the normative values inherent in our law of contract require such development, and that public policy, or the *boni mores*, demands that the common law 'be extended and adapted to meet the needs of modern commercial practice'.¹⁰

This notion was followed by Davis J in the case of *Mort v Henry Shields-Chiat*,¹¹ in which it was confirmed that the *boni mores* is shaped by the legal convictions of the community.¹² Davis J held that the content of the law depends on the legal convictions of the community, which requires a consideration of our constitutional community which is based on the values of freedom, dignity and equity.¹³ Davis J stated further that, although the value of freedom supports freedom and sanctity of contract, one must take cognisance of the other constitutional values of dignity and equality which requires the parties to a contract to observe,¹⁴ 'a minimum threshold of mutual respect in which 'the unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts'¹⁵ Davis J states that the courts are given a constitutional mandate to ensure that the law of contract is in line with the Constitution and the values which underlie it.¹⁶

From these judgments one can see that there has been a gradual movement towards the promotion of greater contractual justice, but this movement was short lived in light of a host

⁷ Brand FDJ 'The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the constitution' (2009) *SALJ* 77.

⁸ *Janse Van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C).

⁹ *Saayman* (note 6 above).

¹⁰ *Janse Van Rensburg* (note 8 above) 325B – C.

¹¹ *Mort v Henry Shields-Chiat* 2001 (1) SA 404 (C).

¹² *Ibid* 474 .

¹³ *Ibid* 475.

¹⁴ *Ibid* 475.

¹⁵ *Ibid* 475.

¹⁶ *Ibid* 475.

of SCA judgments in which the use of normative values as independent principles in the South African law of contract was unequivocally rejected.

In the case of *Brisley v Drotzky*¹⁷ the SCA stated that the enforceability of a contract cannot be made dependent on the *boni mores* as this would cause ‘unacceptable chaos and uncertainty’;¹⁸ and stated further that even though the *boni mores* are used in the law of delict without this concern of uncertainty, it cannot be used in the law of contract as there are significant differences between the two areas of law.¹⁹ The SCA stated further that normative values play a very limited role in the law of contract, stating that normative values are not independent rules which can be used to interfere in contractual relationships, as allowing courts to make decisions based on their own ‘sense of fairness and equity’ would cause ‘intolerable legal and commercial uncertainty’.²⁰ The finding of the SCA in the *Brisley* case has resulted in a long line of cases which confirm the views of the SCA regarding the limited role of normative values in the law of contract.

The next case to consider such role was *Afrox Healthcare Bpk v Strydom*,²¹ in which the SCA supported the conclusion arrived at in the *Brisley* case. The SCA stated that where a pre-constitutional judgment was contrary to the Constitution and the *boni mores* the courts were allowed to depart from that decision,²² however it was held that normative values do not constitute an ‘independent or free-floating basis for interfering with contractual relationships’.²³ The SCA stated that the courts have no discretion when it comes to the enforcement of a contract, and the courts must not rely on abstract values but rather established legal rules.²⁴ Another SCA judgment following the same path is the case of *South African Forestry Co Ltd v York Timbers Ltd*.²⁵ In this case Brand JA acknowledged the fact that normative values are fundamental to the law of contract, however stated further that these values are not independent rules which a court can use to interfere in contractual

¹⁷ *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

¹⁸ *Ibid* 21.

¹⁹ *Ibid* 21.

²⁰ Brand (note 7 above) 81.

²¹ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

²² *Ibid* 27 – 29.

²³ Brand (note 7 above) 81 – 82.

²⁴ *Afrox* (note 21 above) 32.

²⁵ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).

relationships.²⁶ Brand JA held further that these values merely ‘perform creative, informative and controlling functions through established rules of the law of contract’ and that a court cannot refuse to enforce a contract based on its own notion of fairness and equity.²⁷

Another case dealing with this question is *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*²⁸ in which the SCA again confirmed that the values of fairness and reasonableness do not constitute independent rules allowing the court to interfere in contractual relationships.²⁹ Relying on the findings of the above mentioned cases, the SCA in the case of *Potgieter v Potgieter*³⁰ again reiterated the point that normative values do not form independent rules allowing the courts to interfere in contractual relationships.³¹ Brand JA held further that, until the Constitutional Court finds to the contrary, this position will be maintained.³²

From the above discussion; one can see that most normative values have been afforded an extremely limited role in the law of contract. Some of the normative values have been completely rejected, such as the *boni mores*, while others have been reduced to merely constituting an underlying factor to be considered by the courts. From the above mentioned cases one can deduce that the *boni mores* no longer have an active role in the law of contract, with the SCA stating that it has no place in the determination of the enforceability of a contract.³³ The SCA has made this position abundantly clear, even in the midst of vociferous academic criticism (which will be examined later). As a result there are few mechanisms present in the law of contract which can be employed to achieve substantive fairness and equity. As Bhana and Pieterse have identified, the courts have mainly concerned themselves with the formal validity of contracts, while ignoring substantive equity and fairness, in the

²⁶ Ibid 27.

²⁷ Ibid 27.

²⁸ *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA).

²⁹ Ibid 23.

³⁰ *Potgieter v Potgieter* (629/2010) [2011] ZASCA 181 (30 September 2011).

³¹ Ibid 32.

³² Ibid 34.

³³ One can see this position in the finding of other courts, such as in the case of *Africa v Standard Bank of South Africa Limited* (40658/2005) [2007] ZAGPHC 42 (29 May 2007) the High Court stated that the validity of a contract is no longer determined in terms of the *boni mores* but rather on a constitutional standard (paragraph 5). As authority for this statement Van Rooyen AJ cited the *Brisley* case, stating that Cameron JA was correct in stating that the *boni mores* should be replaced by public policy, which is informed by the Constitution.

stated belief that this achieves consistency, predictability and expediency; this, however, has been at the expense of equity and fairness.³⁴

3.2. The *boni mores* and public policy:

Constantly the terms *boni mores* and public policy are used; they are sometimes said to be different concepts- some declare that the *boni mores* have been replaced by public policy, while others use the two terms interchangeably with no cognisance of the possible difference between the two concepts. In order to attempt elucidation in this regard, this part of the study will consider the different views on the relationship between the *boni mores* and public policy.

The distinction between contracts which are contrary to public policy and contracts which are contrary to the *boni mores* is not clear, and in some cases the contract can be defined as being both contrary to public policy as well as the *boni mores*.³⁵ Plescia has stated that the *boni mores* and public policy are one and the same, stating that both refer to public well-being, in particular the standard of conduct required of the reasonable man.³⁶ Wille states that the distinction is not definite, stating further that there is no real value in the distinction.³⁷ This sentiment is shared by Hutchison who stated that there is no inherent value in the distinction as they often overlap, stating further that both 'relate to society's view of morality'.³⁸ Joubert has stated that distinguishing between public policy and the *boni mores* is a difficult task as both are concerned with the public interest.³⁹

Aquilius declared that public policy, the *boni mores* and illegality are all related as, illegalities are immoral and all immoralities are considered to be contrary to public policy.⁴⁰ Some courts have referred to the *boni mores* as being part of public policy. The Constitutional Court has stated that the *boni mores* is part of public policy, i.e. public policy

³⁴ D Bhana, M Pieterse 'Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited' (2005) 122 4 *SALJ* 867.

³⁵ Van Der Merwe ... *et al* (note 1 above) 167.

³⁶ J Plescia 'The development of the doctrine of boni mores in Roman Law' (1987) 34 *RIDA* 285.

³⁷ G Bradfield ... *et al*. *Wille's Principles of South African Law* (2007) 768.

³⁸ D Hutchison ... *et al* *The law of contract in South Africa* (2009) 174;

³⁹ L Hawthorne 'Public policy: the origin of a general clause in the South African law of contract' (2013) 19 (2) *Fundamina* 306

⁴⁰ Aquilius 'Immorality and illegality in contract' (1941) 58 *SALJ* 344

is given meaning by, among other things, the *boni mores*.⁴¹ Therefore these courts have merged the two concepts.

In the case of *Africa v Standard Bank of South Africa Limited*⁴² Van Rooyen AJ, following the decision of the SCA in the *Brisley* case, stated that the validity of a contract must not be determined in terms of the *boni mores*, stating that the *boni mores* has now been replaced by public policy which is informed by the Constitution.⁴³ In the case of *Janse Van Rensburg v Grieve Trust CC*⁴⁴ the court makes reference to public policy, stating that it is the modern version of the ancient concept of good morals or the *boni mores*.⁴⁵

The court in the landmark case of *Sasfin (Pty) Ltd v Beukes*⁴⁶ (per Smalberger JA) stated that illegality can arise through the contravention of public policy or the *boni mores*. Johnson believes that this can be read as meaning that the terms can be used interchangeably.⁴⁷ Christie has also stated that there is no purpose in distinguishing between the different types of illegality as they can all be used interchangeably.⁴⁸

Hawthorne refers to the fact that Wessels had undertaken an analysis of public policy and divided illegal contracts into different categories, i.e. contracts prohibited by legislation; contracts contrary to common law; contracts which have an objective that is contrary to public policy; contracts *contra bonos mores*; and miscellaneous illegal contracts.⁴⁹ Wessels states that there are some contracts that would not be considered contrary to legislation, the common law or the *boni mores*, stating that this is where public policy comes in by covering contracts not covered by the other categories.⁵⁰ Wessels stated further that public policy is

⁴¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 73; see also *Atlas Organic Fertilizer (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 188- 'I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in public opinion.'; and *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) at 528-529- 'public policy, in the sense of *boni mores*, cannot be separated from concepts such as justice, equity, good faith and reasonableness.'

⁴² *Africa v Standard Bank of South Africa Limited* (40658/2005) [2007] ZAGPHC 42 (29 May 2007).

⁴³ *Ibid* 4 – 5.

⁴⁴ *Janse Van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C).

⁴⁵ *Ibid* 325B – C.

⁴⁶ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

⁴⁷ J Johnson 'South African common law requirements for a valid contract. Chapter 4' (2005) 37 *Transactions of the Centre for Business Law : The legal consequences of Internet contracts* 31.

⁴⁸ Hawthorne (note 39 above) 306.

⁴⁹ Hawthorne (note 39 above) 304.

⁵⁰ Hawthorne (note 39 above) 305.

reflected in, among other things, good morals. Therefore, from Wessel's division of illegal contracts, one can see that public policy and the *boni mores* are to be regarded as being separate concepts but which could be used interchangeably as there was little value in the distinction.⁵¹

Van der Merwe states that the distinction between public policy and the *boni mores* is not clear. However, the author sets out the differences, stating that the *boni mores* will generally be invoked where the illegality relates to 'everyday morals or standards of conduct set by a society', for example norms which govern 'honest and proper conduct'.⁵² Whereas public policy will be invoked where the contract is to the 'detriment of the state, which obstruct or defeat the administration of justice, or which restrict someone's freedom to act or to be economically active'.⁵³

Hawthorne states that the interchangeable use of the *boni mores* and public policy is 'historically as well as dogmatically incorrect', stating further that '[it] either stretches sound morals beyond recognition or risks turning public policy into moralising paternalism'.⁵⁴ Hawthorne stated that public policy is rooted in the *boni mores*, although declaring that these are two very different concepts which should not be used as if they are one and the same.⁵⁵

Kroeze holds the same view as Hawthorne. Kroeze explains that in the *Brisley* case the minority judgment of Olivier J merely equates the concepts of public policy and the *boni mores*.⁵⁶ However, she believes, that there should be more than simple equating of the two concepts.⁵⁷ She explains that to her understanding public policy refers to policy considerations set by 'democratic institutions'; while the *boni mores* refers to a shared value system or 'notions of justness and reasonableness'.⁵⁸

From the above one can see that there are many varied views as to the relationship between the *boni mores* and public policy. It is submitted that the two concepts are in fact different

⁵¹ Hawthorne (note 39 above) 307.

⁵² Van Der Merwe ... *et al* (note 1 above) 167.

⁵³ Van Der Merwe ... *et al* (note 1 above) 167.

⁵⁴ Hawthorne (note 39 above) 318.

⁵⁵ Hawthorne (note 39 above) 319.

⁵⁶ I Kroeze 'Contract, constitution and confusion: the case of *Brisley v Drotsky*' (2006) 47 1 *Codicillus* 20

⁵⁷ *Ibid* 20.

⁵⁸ *Ibid* 20.

and as such should not be merely equated or used interchangeably. Both concepts are concerned with public interest and the morals of society, however public policy appears to be a broader concept which encompasses many normative values, (the *boni mores* included), and which applies to a more vast variety of cases. Whereas the *boni mores* appears to be a more limited concept, which would apply to less cases than public policy would. Public policy is concerned with the interests of the state, simple justice between individuals, the administration of justice, and the ability of the parties to exercise their legal rights.⁵⁹ Therefore if a contract is contrary to the interests of the state, undermines justice or the administration thereof or interferes with the exercise of a person's legal rights, it will be deemed to be contrary to public policy. A contract need not be immoral for it to be deemed contrary to public policy.⁶⁰

If one were to consider the definition of the *boni mores* set out in chapter two as well as the above discussion of the *boni mores*, one can come to the following conclusion. The *boni mores*, it would appear, can more aptly be described as encompassing the fundamental values held by a society setting out a minimum standard of conduct which must be in line with the community's sense of justice, reasonableness and equity. The *boni mores* are required for the continued welfare and preservation of the society.⁶¹ Therefore, the *boni mores* have a limited scope of application to specific cases, which infringe upon the fundamental morals of a society and its sense of reasonableness, justice and equity.⁶²

3.3. The *boni mores* and the South African law of delict:

In the South African law of delict the wrongfulness of a person's conduct is determined in terms of the *boni mores*, i.e. whether such conduct is in line with the legal convictions of the community.⁶³ The *boni mores* can be described as an objective test which uses the criterion of reasonableness as a foundation.⁶⁴ The test is whether the conduct was reasonable, taking into

⁵⁹ Hutchison ... *et al* (note 38 above) 174 – 175.

⁶⁰ Van Der Merwe ... *et al* (note 1 above) 167; see also Aquilius (note 40 above) 346.

⁶¹ Trans-lex website 'Invalidity of contract that violates good morals (*boni mores*)' <http://www.trans-lex.org/937000> (accessed 25 July 2014)

⁶² Van Der Merwe ... *et al* (note 1 above) 167; see also Trans-lex website 'Invalidity of contract that violates good morals (*boni mores*)' <http://www.trans-lex.org/937000> (accessed 25 July 2014); *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) 528-9.

⁶³ Bradfield ... *et al* (note 37 above) 1100.

⁶⁴ J Neethling ... *et al* *Law of delict* (2010) 34

account all the circumstances of the case and the legal convictions of the community.⁶⁵ In doing so the court is required to balance the interests of the parties to the case.⁶⁶ In the case of *Atlas Organic Fertilizer (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*⁶⁷ Van Dijkhorst J stated that the court must also take into account ‘the morals of the market place, the business ethics of that section of the community where the norm is to be applied’.⁶⁸

Neethling describes the *boni mores* as a standard which allows the courts to adapt the law to ensure it is in line with the values of society which are constantly evolving.⁶⁹ It was stated in the case of *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)*,⁷⁰ that the court must make a value judgment when determining the reasonableness of conduct.⁷¹ The SCA in this matter stated further that this value-judgment must be based on ‘its perception of the legal convictions of the community and on considerations of policy’.⁷² The SCA stated that this test is very open-ended and flexible.⁷³

When making such determination the court does not test the legal convictions of the community, as there is no appropriate method of doing so in a reliable manner and the community would not have convictions on all matters to be decided by the courts.⁷⁴ The courts do not look at evidence of what the *boni mores* consist of in each particular case; this is because the *boni mores* acts as a guide when the court must make the value judgment. It was stated in the case of *Atlas Organic Fertilizer (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*⁷⁵ that the standard for determining wrongfulness provides a ‘legal standard firm enough to afford guidance to the court, yet flexible enough to permit the influence of an inherent sense of fair play.’⁷⁶

⁶⁵ Ibid 34

⁶⁶ Ibid 34; see also A Mukheibir ... *et al* Law of Delict in South Africa (2012) 145.

⁶⁷ *Atlas Organic Fertilizer (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T)

⁶⁸ Ibid 189.

⁶⁹ Neethling ... *et al* (note 64 above) 37.

⁷⁰ *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA).

⁷¹ Ibid 9.

⁷² Ibid 9.

⁷³ Ibid 11.

⁷⁴ Bradfield ... *et al* (note 37 above) 1100.

⁷⁵ *Atlas Organic Fertilizer* (note 67 above).

⁷⁶ *Atlas Organic Fertilizer* (note 67 above) 188.

In *Van Eeden*, the SCA stated that ‘in applying the concept of the legal convictions of the community the Court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful.’⁷⁷ However the legal convictions of the community do reflect the values of society,⁷⁸ as the community’s legal convictions are shaped by the morals of society.⁷⁹ As a result, when determining wrongfulness, the court must take into account the ‘prevailing values of society’.⁸⁰ In the case of *Schultz v Butt*⁸¹ Nicholas AJA stated that the legal convictions of the community are the convictions of those of the legislature and of judges. However this must not be understood to mean that the personal opinion of the judge must be imposed to determine what conduct is wrongful.⁸² The personal opinions of the judge; the parties or part of the community is not the measure of what is wrongful.⁸³

The constitutional values are now playing a greater role in the determination of wrongfulness in the law of delict.⁸⁴ In the case of *Carmichele v The Minister of Safety and Security*⁸⁵ the Constitutional Court stated that the courts have a constitutional duty in terms of section 39 (2) to develop the common law.⁸⁶ This means that wrongfulness must be interpreted in such a way so as to provide greater protection to the values underpinning the Constitution.⁸⁷

In the case of *AB Ventures Ltd v Siemens Ltd*,⁸⁸ Nugent JA explained that there are various ways of expressing the enquiry- for example the *boni mores*, the legal convictions of the community, or the reasonableness criterion. The judge explained further that although these expressions are very wide; they are still helpful as they provide guidance as to the nature of the enquiry.⁸⁹ Nugent JA stated further that the cases over the past 30 years indicate that the enquiry is ‘whether contemporary social and legal policy calls for the law to be extended to

⁷⁷ *Van Eeden* (note 70 above) 10.

⁷⁸ A Mukheibir ... *et al Law of Delict in South Africa* (2012) 144.

⁷⁹ *Clarke v Hurst* 1992 4 SA 630 (D) 652.

⁸⁰ *Ibid* 652.

⁸¹ *Schultz v Butt* 1986 (3) SA 667 (A) 679.

⁸² Neethling ... *et al* (note 64 above) 39.

⁸³ Mukheibir ... *et al* (note 78 above) 145.

⁸⁴ Bradfield ... *et al* (note 37 above) 1101.

⁸⁵ *Carmichele v The Minister of Safety and Security* 2001 (4) SA 938 (CC).

⁸⁶ Bradfield ... *et al* (note 37 above) 1101.

⁸⁷ Neethling ... *et al* (note 64 above) 36.

⁸⁸ *AB Ventures Ltd v Siemens Ltd* 2011 (4) SA 614 (SCA).

⁸⁹ *Ibid* 7.

the exigencies of the particular case.’⁹⁰ Therefore one can see that the use of the *boni mores* in the law of delict is not absolutely certain, but relies on precedent set out in previous cases to provide some guidance as to how this principle is to be applied. Loubser believes that the use of the *boni mores* can lead to vague results and can be ‘difficult to analyse’, therefore states that what is required is ‘an open and structured process of reasoning with reference, inter alia, to:

- The specific rights and interests involved;
- The relationship between the parties;
- Relevant provisions of the Constitution and of other legislation; and
- Relevant policy considerations.’⁹¹

To sum up, the *boni mores* is a standard employed in the law of delict in terms of which the courts determine whether certain conduct is wrongful, and it consists of the prevailing legal morality of the community. It can be seen as a mechanism which enables courts in delictual cases to develop the common law in line with the prevailing morals of the community to ensure that the court is applying principles which are in line with the morals of the community at the time of the case (instead of rigid and outdated principles which will lead to unfair results in current times, because the *boni mores* changes and evolves with society). It provides the courts with the necessary flexibility to enable it to make just and equitable decisions.

3.4. Conclusion:

Bhana observes how the law of delict bases liability on a ‘collectivist policy-oriented concept of wrongfulness’, explaining that this approach makes ‘substantive fairness and justice’ of the utmost importance.⁹² She explains further that the law of delict ‘favours a balancing’ of the applicable constitutional values, in a manner which has been envisioned by the Bill of Rights.⁹³ Bhana argues that as a result of this fact, the law of delict has been positioned to be in line with the ‘substantively progressive and transformative rights, values and goals of the Constitution’, and that the further re-alignment of the law of delict with the Constitution

⁹⁰ Ibid 8.

⁹¹ Mukheibir ... *et al* (note 78 above) 146.

⁹² D Bhana ‘Constitutionalising contract law: Ideology, judicial method and contractual autonomy’ (unpublished PhD thesis, University of the Witwatersrand, 2013) 33.

⁹³ Ibid 33.

should not be a difficult task.⁹⁴ Bhana and Pieterse have also identified that in the law of delict, liability is determined through the use of the legal convictions of the community, a concept which fully embraces considerations which are reflected in the Constitution.⁹⁵ They argue that the law of contract is meant to follow the same path, and are puzzled by the fact that the SCA has placed legal certainty above this constitutional goal.⁹⁶

From this one can see that the law of delict has fully embraced the demands of our new constitutional dispensation, as was evidenced by the case of *Carmichele v Minister of Safety and Security*⁹⁷ where the Constitutional Court stated that all courts have a general obligation to develop the common law to ensure it is in line with the Constitution.⁹⁸ However, Bhana identifies how the law of contract has failed to do so, as it merely continues to be ruled by the single principle of contractual autonomy, which seems to trump all other values.⁹⁹ The failure to bring about constitutional infusion in the law of contract will be discussed in greater detail in chapter five of this study.

Barnard opines that the appropriate portal for the transformation of the common law of contract, lies within the legality doctrine, where the *boni mores* can 'operate as a tool' enabling the infusion of constitutional values into the law of contract.¹⁰⁰ However, he expresses doubt whether the courts will use this tool, observing that it is unlikely that the *boni mores* will be developed (citing the line of SCA judgments which are against the use of normative values).¹⁰¹ Another issue to be considered has been highlighted by Barnard, who has raised the very important question of why the legal convictions of the community can be used in the law of delict to determine liability, but cannot be used in a similar manner within the law of contract.¹⁰² This is a question which has been inadequately answered by the SCA. The SCA has set out reasons for this view, however, but these have been refuted by many, as will be discussed in the following chapter.

⁹⁴ Ibid 33.

⁹⁵ Ibid 894-895.

⁹⁶ Ibid 894-895.

⁹⁷ *Carmichele* (note 85 above).

⁹⁸ D Davis "Private law after 1994: progressive development or schizoid confusion?" (2008) *SAJHR* 320 – 321.

⁹⁹ Bhana (note 92 above) 33 - 34.

¹⁰⁰ A J Barnard 'A critical legal argument for contractual justice in the South African law of contract' (Unpublished LLD thesis, University of Pretoria, 2005) 192.

¹⁰¹ Ibid 192.

¹⁰² Ibid 172.

Chapter 4: Brisley v Drotsky:¹

4.1. Introduction:

The *Brisley* case is one of the most important cases for the purposes of this dissertation. It is one of the few cases which deal directly with the role of the *boni mores* in determining the enforceability of a contract. The *Brisley* case can be seen as the genesis of the SCA's conservative approach in respect of the application of normative values, such as the *boni mores*.² It has been the authority upon which SCA judges have relied in subsequent cases, which have been discussed in chapter three of this dissertation.

Bhana and Pieterse have observed how this case has caused the law of contract to revert back to its classical liberal roots and how it shows the SCA's apparent hostility towards concerns for equity and fairness.³ They observe how this case, as well as the *Afrox*⁴ judgment, has been received with a less than warm welcome.⁵ Many are unsure of the SCA's approach, namely to categorically exclude mechanisms which could possibly be used to control the effects of the operation of the classical liberal model.⁶ The authors further express concerns in respect of the SCA's reluctance to acknowledge the need for the law of contract to be developed under the new constitutional dispensation.⁷

Being such an important case, this chapter will set out the facts of this case, and will discuss the three separate judgments which originated from the SCA in respect of this case. A critical analysis of the judgment and the reasoning of the majority judgment will be undertaken. Finally, the SCA's preference for the use of the intention of the parties, as a determinant of the enforceability of a contract, will be discussed.

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

² D Bhana & M Pieterse 'Towards a reconciliation of the contract law and the constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 4 *SALJ* 872.

³ *Ibid* 865.

⁴ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁵ Bhana & Pieterse (note 2 above) 865.

⁶ Bhana & Pieterse (note 2 above) 865.

⁷ Bhana & Pieterse (note 2 above) 865.

4.2. Facts:

The appellant in this case entered into a contract of lease with the respondent for the amount of R3500 per month, by means of a contract document which was purchased from a CNA store.⁸ This contract contained the standard ‘*Shifren* clause’, which required that any changes to the contract be recorded in writing and be signed by both parties in order to be valid.⁹ The contract also contained a cancellation clause which allowed for the cancellation of the contract for breach of a party’s duty.¹⁰ The appellant failed to pay the rental timeously and had failed to pay the full amount on one occasion.¹¹ As a result the lessor attempted to cancel the contract in terms of the cancellation clause.¹² However the lessee relied on an alleged oral variation of the lease agreement, in terms of which the lessor had allegedly agreed to accept the rental payment late.¹³ The lessor countered this argument by relying on the *Shifren* principle, i.e. that the oral variation was not valid as it was not reduced to writing and signed by both the parties.¹⁴ The lessee attempted to argue that the application of the *Shifren* principle would lead to unreasonable and unfair results and was and contrary to the principles of good faith and as a result should not be applied.¹⁵

4.3. Finding of the Supreme Court of Appeal:

The majority of the SCA found for the lessor, stating that if the SCA were to overturn the *Shifren* principle it would cause uncertainty.¹⁶ It was held that the non-variation clause was freely entered into and that it protects both the weak and the strong parties to the contract.¹⁷ The majority acknowledged that courts are obliged to develop the common law in light of the spirit, purport and object of the Bill of Rights, however, opposed the idea of attacking the common law principles from ‘within the shadows of the Constitution’ and of departing from established principles in favour of normative values.¹⁸ The majority stated that such normative values do not constitute independent grounds for interfering in contractual relationships. More importantly, the SCA set out two main reasons why the *boni mores*

⁸ *Brisley* (note 1 above) 2 & 4.

⁹ *Brisley* (note 1 above) 4.

¹⁰ Bhana & Pieterse (note 2 above) 872.

¹¹ *Brisley* (note 1 above) 2.

¹² Bhana & Pieterse (note 2 above) 872.

¹³ Bhana & Pieterse (note 2 above) 872.

¹⁴ Bhana & Pieterse (note 2 above) 872.

¹⁵ *Brisley* (note 1 above) 11; see also Bhana & Pieterse (note 2 above) 872.

¹⁶ Bhana & Pieterse (note 2 above) 872.

¹⁷ Bhana & Pieterse (note 2 above) 872.

¹⁸ Bhana & Pieterse (note 2 above) 873.

cannot play a greater role in the law of contract to assist in determining the enforceability of a contract. When discussing the appellants arguments in respect of good faith, the SCA referred to the statement made by Davis J in the case of *Mort NO v Henry Shields-Chiat*¹⁹ in which he called for the greater incorporation of the *boni mores*. The SCA rejected the idea put forward by Davis J in respect of the *boni mores*, for two reasons. The first reason is that the use of the *boni mores* in the law of contract will cause ‘unacceptable chaos and uncertainty’.²⁰ The majority stated that allowing judges to reject contracts based on normative values would cause a disregard for the contractual principle of sanctity of contract and would make judicial decision-making too subjective.²¹ The second reason put forward is that the *boni mores* cannot be used in the law of contract the way in which it is used in the law of delict as these two areas of law have ‘material policy differences’.²² The SCA stated that the differences between the law of contract and the law of delict are that in the law of contract the parties to the contract voluntarily determine their own rights and responsibilities in terms of the contract, however in the law of delict the rights and responsibilities of the parties in the matter will be determined by the legal convictions of the community.²³ Thus, the *boni mores* was said to have no place in the law of contract.

Olivier J, in a concurring judgment, although agreeing that overturning the *Shifren* principle would lead to uncertainty, stated that normative values require greater recognition in terms of the Constitution, arguing that the question whether the *Shifren* principle should be upheld should depend on the *boni mores*.²⁴ Recognising the uncertainty that could result, Olivier J stated that such uncertainty is a ‘necessary price to pay’ to ensure fairness, emphasising the need to balance ‘legal continuity with social realities’.²⁵

Cameron JA, agreeing with the finding of the majority of the SCA, stated that he too agreed that the ‘over-hasty or unreflective importation’ of the *boni mores* into the law of contract

¹⁹ *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C).

²⁰ *Brisley* (note 1 above) 21- Translation obtained from: Bhana & Pieterse (note 2 above) 873.

²¹ Bhana & Pieterse (note 2 above) 873.

²² *Brisley* (note 1 above) 21- Translation obtained from: A Louw ‘Yet another call for a greater role for good faith in the South African law of contract: can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16 (5) *PER / PELJ* 70.

²³ *Brisley* (note 1 above) 21.

²⁴ Bhana & Pieterse (note 2 above) 873.

²⁵ Bhana & Pieterse (note 2 above) 873.

should not be allowed.²⁶ He held that the *boni mores* are ‘open to misinterpretation and misapplication’, and thus should be replaced with an objective standard informed by the Constitution.²⁷ He also held that the courts do not have the power to strike down contracts on the ‘basis of judicially perceived notions of unjustness’.²⁸ Cameron JA expressed the view that contractual autonomy is part of the constitutional value of freedom and gives effect to the value of dignity.²⁹

In effect, the consequence of the finding of the majority of the SCA is that the lessee and her dependants were evicted from their home, even though she was merely acting in accordance with the verbal agreement made with the lessor and had not taken the steps to reduce this verbal agreement to writing.³⁰ As Barnard has observed, the finding of the SCA in this case shows the adverse consequences which the principle of freedom of contract and the strict adherence to the principles of contract law can have, especially if applied without consideration of the social and economic circumstances of the parties.³¹ The author emphasises the growing gap between the law of contract and justice, with the claim that judges are apparently choosing to follow the law at the expense of contractual justice.³²

4.4. Analysis of the finding of the Supreme Court of Appeal:

On considering various cases which have been dealt with by the SCA in respect of the use of normative values in the South African law of contract, one can discern the courts emphasis on legal certainty as a motivation for preventing the use of normative values in the South African law of contract.

Brand JA is not the first to mention the uncertainty that would arise if judges were given the discretion to interfere in contractual relationships, using nothing but normative values such as the *boni mores*, good faith, fairness etc. This is a long standing argument, with many people

²⁶ *Brisley* (note 1 above) 93.

²⁷ *Brisley* (note 1 above) 93.

²⁸ *Brisley* (note 1 above) 93.

²⁹ *Brisley* (note 1 above) 94.

³⁰ A J Barnard ‘A critical legal argument for contractual justice in the South African law of contract’ (Unpublished LLD thesis, University of Pretoria, 2005) 2.

³¹ *Ibid* 2 - 3.

³² *Ibid* 3.

expressing the fear of the uncertainty this could bring about. In the year 1907, Rudolf Leonhard, a German jurist, published a book in which he stated the following:

‘There is something very alluring in the notion of elevating the judge to the position of custodian of morality and to let the Sword of Justice be guided by the voice of conscience. This may be appropriate to simple cultural stages, in which legal uncertainty is taken for granted.’³³

Schorer also opposed the idea of judges having the discretion to interfere in contractual relationships based on their sense of justice, stating that this idea is to be feared more than dogs and snakes.³⁴ Aquilius was of the same opinion stating that if left to the sense of justice of the judge it would cause uncertainty in affairs.³⁵ Aquilius stated that there is enough scope for a judge’s discretion; stating further that once this discretion is used in a manner which ‘usurps the rule of law’ it becomes nothing but arbitrary power.³⁶

Heusler stated that:

‘Without a doubt, our ancestors would not have tolerated a law which delivered them to the discretion of a judge. Before invoking the courts at all they desired to be able to measure and calculate exactly what was in store for them if they engaged in litigation ... an action of law should not be a lottery in which one is as likely to gamble away one’s suit as to win it’³⁷

Brand JA has stated that legal certainty is part of the principle of legality, which in turn forms part the rule of law, a founding value under the Constitution.³⁸ This echoes a notion which was expressed by Harms JA, who stated that ‘a constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.’³⁹

³³ Aquilius ‘Immorality and illegality in contract’ (1941) 58 SALJ 338.

³⁴ Ibid 338.

³⁵ Ibid 338.

³⁶ Ibid 339.

³⁷ Ibid 339.

³⁸ *Potgieter v Potgieter* (629/2010) [2011] ZASCA 181 (30 September 2011) 37.

³⁹ *Bredenkamp and others v Standard bank of South Africa Ltd* 2010 (4) SA 468 (SCA) 39.

This is said to be the reasoning behind the over-zealous protection of legal certainty, i.e. the SCA is protecting one of the founding values under the Constitution.⁴⁰ The importance of legal certainty is not be undervalued, and there is no flaw in the SCA's emphasis on the importance of upholding the rule of law,⁴¹ however, as Annor has stated, this is merely one of the many constitutional values which the courts are to consider, and the courts should not focus on this one value and completely disregard all the other constitutional values.⁴²

Kruger has identified that there is merit in the argument that legal certainty must be encouraged, however, stated that the argument that all commerce would be impossible without legal certainty is an exaggeration.⁴³ He states further that certainty is not a consideration that should prevail over all other policy considerations.⁴⁴ Kruger believes that if one looks past the exaggerations of uncertainty, there seems to be no other reason to refuse the application of normative values.⁴⁵ The author makes it clear that the importance of legal certainty cannot be refuted, as doing so would amount to an argument against the foundation of the legal system.⁴⁶ However, he argues that the sacrifice of some certainty, which will result from the use of normative values, is more than made up for by the substantive fairness that will be achieved through the use of the normative values.⁴⁷ This is in line with the views expressed by Olivier J in *Saayman*.⁴⁸

Kruger states that the risk of uncertainty is present whenever law is 'interpreted and applied', even when it is not done in terms of open-ended values such as public policy and the *boni mores*.⁴⁹ He states further that in other areas of law which employ such open-ended values, judicial steps are put in place to mitigate the degree of uncertainty caused by the use of such values, in order to ensure that it is within acceptable levels.⁵⁰ There is no reason why such

⁴⁰ A Louw 'Yet another call for a greater role for good faith in the South African law of contract: can we banish the law of the jungle, while avoiding the elephant in the room?' (2013) 16 (5) *PER / PELJ* 55.

⁴¹ E Annor 'Whose duty is it anyway' 2012 *Without Prejudice* 53.

⁴² *Ibid* 53.

⁴³ M Kruger 'The role of public policy in the law of contract, revisited' (2011) 128 (4) *SALJ* 738.

⁴⁴ *Ibid* 738.

⁴⁵ *Ibid* 738.

⁴⁶ *Ibid* 739.

⁴⁷ *Ibid* 739 – 740.

⁴⁸ Bhana & Pieterse (note 2 above) 873.

⁴⁹ Kruger (note 43 above) 714.

⁵⁰ Kruger (note 43 above) 714.

steps cannot be used to enable the use of the *boni mores* in the law of contract.⁵¹ Louw has also identified how the *boni mores* has been used in other areas of law, stating that the law of delict uses the *boni mores* to determine the outcome of a case which relies primarily on the facts of the case, therefore the finding of the court depends on the circumstances of each case, yet despite this, delictual cases are dealt with as efficiently as contractual cases without the issue of uncertainty causing any significant problems.⁵² Also, Louw argues that the law of contract can learn a few things from the law of delict.⁵³ As an example to illustrate this point one can look at the use of the *boni mores* in the South African law of delict as has been set out in chapter three of this dissertation.

Bhana and Pieterse have argued that although the classical liberal model of contract law (focused on sanctity of contract, crystallised rules and consensus), brings about ‘objective certainty, predictability and efficiency’, it is just as important for the law of contract to embrace normative values such as ‘fairness, dignity and social equality’.⁵⁴ The authors also argue that the uncertainty which will potentially be caused by the use of normative values has been exaggerated by the SCA, and they argue further that the uncertainty which will result can be mitigated by judicial precedent which will be developed by the courts and which will set out guidelines of how the principle will be applied, thereby giving a basic idea of how cases will go.⁵⁵

Lewis has stated that obtaining perfect certainty is not only an impossible achievement, but it is also an undesirable ideal.⁵⁶ Lewis argues that all that is needed is that there be a sufficient degree of certainty.⁵⁷ Pierre De Vos has argued that the fear of the courts regarding legal certainty is over-emphasised, stating that the idea that legal rules enable almost absolute certainty is in any event untrue and should not be allowed to stand.⁵⁸ He argues further that if these legal rules really created such certainty no one would ever need to approach the courts

⁵¹ Kruger (note 43 above) 714.

⁵² Louw (note 40 above) 79 – 80.

⁵³ Louw (note 40 above) 80.

⁵⁴ Bhana & Pieterse (note 2 above) 868.

⁵⁵ Bhana & Pieterse (note 2 above) 895.

⁵⁶ Lewis ‘Fairness in South African law of contract’ (2003) 120 *SALJ* 345.

⁵⁷ *Ibid* 345 - 346.

⁵⁸ Pierre De Vos, ‘About family fights and transformative Constitutionalism’ (13 October 2011)- available at: <http://constitutionallyspeaking.co.za/about-family-fights-and-transformative-constitutionalism/> (accessed 12 May 2014).

for their dispute to be heard, as the outcome could be easily determined by a legal expert.⁵⁹ He argues that this is not a reality; legal rules do not create such certainty.⁶⁰ On this argument one can see that the courts have over-emphasised certainty, where there is no need to do so as there will always be a degree of uncertainty in the law, and the legal system still functions effectively.

Louw has argued that once a proper understanding of the normative values, their nature and exact content has been developed it would reduce the fears of the legal uncertainty its application may cause.⁶¹ Bhana and Pieterse also cannot see the reasons why the courts have expressed such a need for certainty and why certainty has been given such an 'elevated status' in the law of contract.⁶² They argue this after observing that other fields of private law have completely incorporated social and economic considerations even though there has been a degree of uncertainty as a result.⁶³ They argue that these social and economic considerations are reflected in the Constitution, and they believe that the law of contract is also required to adapt and embrace such considerations, irrespective of the fears of uncertainty that may result.⁶⁴

Louw has argued that the reason for the elevated status of legal certainty is that the courts continuously over-emphasise the intention of the parties, while failing to sufficiently make use of the legal convictions of the community when determining the enforceability of a contract.⁶⁵ This position fails to take cognisance of the fact that the intention of the parties cannot and does not operate unrestrained. The intention of the parties must be lawful for the contract to be valid and enforceable.⁶⁶ The legality doctrine employs the standards of the *boni mores*, public policy and public interest to determine the lawfulness of a contract.⁶⁷ Where a contract is contrary to such standards, or is contrary to the provisions of a statute, it will be deemed to be unenforceable.⁶⁸ Therefore, as Louw has explained, it is the legal convictions of

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Louw (note 40 above) 49.

⁶² Bhana & Pieterse (note 2 above) 894-895.

⁶³ Bhana & Pieterse (note 2 above) 894-895.

⁶⁴ Bhana & Pieterse (note 2 above) 894-895.

⁶⁵ Louw (note 40 above) 81.

⁶⁶ S W J Van Der Merwe ... *et al Contract: General principles* (2012) 165 – 166.

⁶⁷ *Ibid.* 165 – 166.

⁶⁸ D Hutchison ... *et al The law of contract in South Africa* (2009) 173.

the community, under the legality doctrine, which should determine the protection provided to the intention of the parties and whether such intention should be enforced.⁶⁹ Therefore, it could be argued that whether one were to refer to the limitation placed on the intention of the parties as the *boni mores* or public policy, it may ultimately make little difference.

Lubbe has identified that the use of all normative values, including public policy, will involve a degree of evaluative judgment on the part of the judge.⁷⁰ He states further that by their nature these values do not set out strict and precise rules and do not dictate outcomes of the matter, rather these values allow judges to make value-judgments ‘with reference to pertinent considerations and broad guidelines’.⁷¹

Davis believes that the call for the incorporation of constitutional values is not a call for judges to have the power to make subjective decisions:⁷²

“An argument in favour of seeking a reconciliation between freedom of contract and power rendered accountable to core constitutional values, should not be taken as a plea for unrestrained judicial activism which sweeps away legal arrangements in a cavalier fashion and thus supplants the role of the legislature. It is, however, an invitation to take seriously the constitutional demand to interrogate background rules.”

This argument shows that even if normative values are incorporated into the law of contract in terms of the demands of the Constitution, no one is calling for judges to be allowed to make decisions based on their own notions of justice and fairness. Rather, section 39 (2) of the Constitution calls on the courts to interrogate the common law of contract in light of the Constitution and the values which underlie the Constitution.⁷³ The constitutional duty of the courts to develop the common law will be discussed further in chapter five of this dissertation.

Moseneke DCJ has acknowledged that the use of the Bill of Rights and constitutional values will lead to a degree of legal uncertainty in the law of contract; however, he continued: ‘I think that our courts are well-suited to ensure that the constitutionalisation of the common

⁶⁹ Louw (note 40 above) 81.

⁷⁰ G Lubbe ‘Taking fundamental rights seriously the Bill of Rights and its implications for the development of contract LAW’ (2004) 121 *SALJ* 418.

⁷¹ *Ibid* 418.

⁷² D Davis “Private law after 1994: progressive development or schizoid confusion?” (2008) *SAJHR* 328.

⁷³ *Ibid* 328.

law and of customary law occurs in an orderly and harmonious manner that would redound to the credit of our evolving and transformative constitutionalism.’⁷⁴ Therefore it can be argued that the courts are more than capable to deal with any adverse effects that could result from the use of any of the normative values, and thus legal uncertainty, on its own, is an insufficient justification for the rejection of the use of normative values.

The argument of the SCA that the *boni mores* cannot be used in the law of contract as it has been used in the law of delict because the two areas of law are too different, has been questioned by Alkema J. The judge in *Siyepu and others v Premier, Eastern Cape*⁷⁵ has questioned whether the differences between the law of contract and the law of delict are significant enough to warrant such a refusal to incorporate the *boni mores* into the law of contract, stating that the two fields of law have many similarities. The first similarity which was identified is that both areas of law form part of the private law and they are two of the main sources of legal obligations.⁷⁶ With both areas of law the performance or failure to perform an obligation can give rise to legal consequences, provided the requirements for each are established showing that such obligation is legally enforceable and protected.⁷⁷ Also both areas of law require that the law recognise the obligation as legally enforceable and protected before a claim can be established, i.e. not every obligation will be legally enforceable just as every negligent or intentional act will not attract delictual liability.⁷⁸ Alkema J does recognise the difference between the two areas of law, but states that these differences are not an issue as the enforceability of an obligation should depend on the wrongfulness, not intent, and that the differences do not affect the outcome of the enquiry.⁷⁹

Barnard-Naude has expressed dismay at the SCA’s line of reasoning in side-lining the normative value of good faith and emphasising the principle of freedom of contract. Barnard-Naude believes that the SCA has argued that good faith is an underlying value, and as such cannot be invoked directly by the courts, however it goes on to say that freedom of contract is

⁷⁴ D Moseneke ‘Transformative constitutionalism: its implications for the law of contract’ (2009) 1 *Stell LR* 13.

⁷⁵ *Siyepu and others v Premier, Eastern Cape* 2013 (2) SA 425 (ECB).

⁷⁶ *Ibid* 56.

⁷⁷ *Ibid* 56.

⁷⁸ *Ibid* 56.

⁷⁹ *Ibid* 60 – 61.

also an underlying value but the courts consistently invoke freedom of contract directly.⁸⁰ Barnard-Naude has questioned why the SCA has taken such inconsistent approaches when it comes to the use of underlying contractual principles, and why freedom of contract can be invoked directly, but the same sentiment does not apply to normative values such as good faith.⁸¹

Another issue which has been raised in respect of the approach of the SCA is the fact that it tried to limit the scope of operation of public policy. Lubbe has stated that the SCA appears to attempt to limit the application of public policy to contracts which are illegal, stating further that this means that public policy would only be applicable where the contract falls into categories which have already been established in the law of contract, not any other category which has not been established.⁸² Lubbe states further that the SCA even expressed doubts as to whether the principle set out in *Sasfin (Pty) Ltd v Beukes*,⁸³ that a contract is contrary to public policy on the ground of ‘extreme unconscionability’, can be extended to give the courts the power to strike down contracts which are not in themselves illegal.⁸⁴ This point goes back to the old argument that a judge should not be given the power to engage in subjective decision making, but rather that decisions should be based on the law.⁸⁵ Lubbe believes that this contention by the SCA is not correct, stating that one cannot limit the application of public policy to pre-existing categories of illegality.⁸⁶ Furthermore, he argues, that the idea that public policy can be applied to ‘analogous grounds is of crucial importance’.⁸⁷

The criticisms of the reasoning put forward by the SCA in the *Brisley* case raises doubts as to its correctness. It is clear that the emphasis put on legal certainty is misplaced, as is the argument that the law of delict and the law of contract are too different to allow the use of a principle used in the law of delict within the law of contract. Thus, this provides hope for the

⁸⁰ Barnard-Naude, AJ ‘Oh what a tangled web we weave ...’ hegemony, freedom of contract, good faith and transformation- towards a politics of friendship in the politics of contract’ (2008) 1 *Constitutional Court Review* 184.

⁸¹ *Ibid* 184.

⁸² Lubbe (note 70 above) 417 – 418.

⁸³ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)

⁸⁴ Lubbe (note 70 above) 417 – 418.

⁸⁵ Lubbe (note 70 above) 418.

⁸⁶ Lubbe (note 70 above) 418.

⁸⁷ Lubbe (note 70 above) 418.

incorporation of the *boni mores* into the law of contract, for if the Constitutional Court were to find the *Brisley* approach to be incorrect and contrary to the Constitution, many arguments can be made to justify the incorporation of normative values, such as the *boni mores*.

However, for now it seems, as Davis has stated, that the classical liberal notions of legal certainty and private autonomy have triumphed over the ‘the constitutional imperative of transformation’ and ‘the core constitutional values of freedom, equality and dignity.’⁸⁸ This is a worrying fact, especially in a constitutional dispensation which has called for transformation of all laws, including the common law, to ensure that all laws are in line with the demands of the Constitution. Bennett has commented on how sad this position is, especially considering the levels of inequality within our society and the fact that the law of contract sets the rules for the economic structure of society.⁸⁹

4.5. The intention of the parties:

The courts use the concept of the intention of the parties to determine the enforceability of a contract. The parties to the contract must have the intention to be bound by the contract.⁹⁰ The intention of the parties is determined by examining the internal (i.e. the language and words used by the parties), and external context (i.e. the background to the contract and the surrounding circumstances).⁹¹ Therefore, the courts will attempt to identify the actual intention to contract, and then the court will consider the apparent intention to contract, this means that if one of the parties did not intend to contract, but merely created the reasonable impression that they had such intention, a contract will still come into effect.⁹² The impression could be created through words or conduct. Even where the parties have the requisite intention to enter into a contract, the contract will not be enforced where one of the parties were labouring under a reasonable mistake, or where the consensus was improperly obtained.⁹³

⁸⁸ Davis (note 72 above) 328.

⁸⁹ T W Bennett ‘Ubuntu: An African equity’ (2011) 14 (4) *PELJ* 46

⁹⁰ R H Christie & V McFarlane *The law of contract in South Africa* (2006) 29.

⁹¹ *Siyepu* (note 75 above) 33.

⁹² D Hutchison ... *et al* (note 68 above) 16 and 81- this is known as the reliance theory which protects a parties ‘reasonable expectation of a contract’ even where there was no actual consensus between the parties. This theory compliments the will theory, which is the primary theory in the South African law of contract. See also R H Christie & V McFarlane *The law of contract in South Africa* (2006) 1.

⁹³ Hutchison ... *et al* (note 68 above) 99 – 100 & 113 - 114; see also R H Christie & V McFarlane *The law of contract in South Africa* (2006) 271 & 309.

Louw has stated that it appears that the rejection of the use of the *boni mores* by the SCA in *Brisley* was not based on the idea of the ‘application of an externally-imposed, value-based benchmark of contractual liability’, but was rather based on the SCA’s predisposition to the intention of the parties as a primary determinant of the enforceability of the contract.⁹⁴

The use of the intention of the parties to determine the enforceability of a contract can, however, be problematic, as the intention will have been apparent at the time of contracting, not at the time of the enforcement of the contract, and often parties will deny that they had intention to contract or the intention to contract on such terms.⁹⁵ Therefore, it is difficult to determine what the intentions of the parties were at the time the contract was created.⁹⁶ Wessels has explained that even though a meeting of the minds is required for the creation of a contract, the courts can only examine the external evidence.⁹⁷ Therefore, Wessels explains further, that it is the ‘manifestation of their wills and not the unexpressed will which is of importance.’⁹⁸ This is a view which Christie believes is a ‘fundamental truth’; he observes that the existence of consensus is determined through the search for ‘evidence of such agreement’ rather than searching for ‘agreement by consent’.⁹⁹ These views basically mean that in determining the intention of the parties, the court does not know what the actual subjective intentions of the parties were at the time of contracting. Therefore, the court does not use the actual intention to determine the enforceability of the contract, but rather, the court will look at evidence and the surrounding circumstances which can provide proof of the intention.

Louw has stated that the SCA’s argument that in the law of contract the parties determine the legal relationships and obligations, cannot be seen as completely correct, as the parties themselves cannot enter into an agreement that the law would not tolerate.¹⁰⁰ Louw states further that the SCA has overemphasised the intention of the parties in determining the legal relationship between the parties, merely because the parties have a degree of influence on the

⁹⁴ Louw (note 40 above) 71.

⁹⁵ S Cornelius ‘Consensus and contracts’ (2011) *The Daily Mail-Legally speaking* 49.

⁹⁶ *Ibid* 49.

⁹⁷ R H Christie & V McFarlane *The law of contract in South Africa* (2006) 22.

⁹⁸ *Ibid* 22.

⁹⁹ *Ibid* 22.

¹⁰⁰ Louw (note 40 above) 71.

scope and nature of the legal relationship.¹⁰¹ Louw argues further that using the intention of the parties as a tool to determine the enforceability of the contract is not without difficulty as it too can be characterised by uncertainty and can cause inequity.¹⁰²

Bhana and Pieterse argue that consensus has become a generic principle, which the courts apply ‘indiscriminately’ without taking into account the circumstances and bargaining positions of the parties.¹⁰³ They observe that there are certain cases in which the outcome does not conform with the demands of the Constitution despite the fact that ‘legitimate consensus’ is present.¹⁰⁴ They argue that the role of consensus must be interrogated ‘in light of constitutional considerations of fairness, equality and human dignity.’¹⁰⁵ The authors argue that over time the indiscriminate application of established contractual principles have resulted in the law of contract becoming ‘insensitive to the context in which it operates’.¹⁰⁶ Bhana and Pieterse also note how this results in there being consensus ‘in form but not in substance’.¹⁰⁷ They recognise the fact that consensus is not always the result of negotiations of parties, who are on a more or less equal footing, but rather in situations where the one party is faced with the difficult decision of contracting on the terms set by the other party or to not contract at all.¹⁰⁸ They argue that even though this has a potential to have serious implications on existence of true consensus, it continues to be seen as an insignificant issue in the law of contract.¹⁰⁹

Alkema J has observed that the common intention of the parties as a device to determine the enforceability of a contract is not useful, stating that it is ‘neither helpful on the facts of all cases, and nor is it as a matter of legal principle in my respectful view the correct tool to use.’¹¹⁰ Alkema J states further that the problem with the use of the intention of the parties is that it is concerned with the creation of the contract and the obligation under such contract, it is based on theories which are not related to the enforceability of an obligation under a

¹⁰¹ Louw (note 40 above) 71.

¹⁰² Louw (note 40 above) 71.

¹⁰³ Bhana & Pieterse (note 2 above) 883.

¹⁰⁴ Bhana & Pieterse (note 2 above) 883 – 884.

¹⁰⁵ Bhana & Pieterse (note 2 above) 884.

¹⁰⁶ Bhana & Pieterse (note 2 above) 884.

¹⁰⁷ Bhana & Pieterse (note 2 above) 884.

¹⁰⁸ Bhana & Pieterse (note 2 above) 884.

¹⁰⁹ Bhana & Pieterse (note 2 above) 884.

¹¹⁰ *Siyepu* (note 75 above) 27.

contractual agreement, arguing further that the enforceability of a contract should rather depend on the element of wrongfulness. He states that relying on the intention of the parties to determine the enforceability of an obligation is ‘illusory and somewhat artificial’,¹¹¹ stating further that the use of the intention of the parties is ‘laborious’ and ‘circuitous’.¹¹² He believes that determining the intention of the parties depends on the parties’ legal convictions at the time of contracting, as well as their legal convictions at the time the contract is to be enforced.¹¹³ This requires the courts to undertake an objective enquiry to determine what the legal convictions of the community are at the time of enforcement and then applying those convictions to the subjective intention of the parties’.¹¹⁴ He states that such enquiry will eventually bring the courts back to the wrongfulness enquiry, and that the wrongfulness of a contract will depend on the legal convictions of the community at the time the obligation is being enforced.¹¹⁵ On this understanding, it is not hard to see the possible parallels between the law of contract and the law of delict in the context of the application (or potential role) of the *boni mores*.

Alkema J sets out an example of where the use of the intention of the parties to determine enforceability fails. The example is of a contract in which the one party agrees to buy illegal drugs manufactured by the other party; in such case both parties seriously intended to enter in to the contract but the contract would not be enforceable as it would fail to comply with the legality requirement.¹¹⁶ However, Alkema J takes the example further to question the circumstance in which the parties were not aware that their contract was illegal, but they fully intended to create the obligation- in such a case the intention of the parties will have no place and are completely irrelevant.¹¹⁷ It would still not affect the validity of an otherwise illegal agreement. He states that the wrongfulness enquiry goes further than merely actions which contravene legal principles, but includes conduct which would be regarded as ‘immoral, unethical and reprehensible’ in terms of the legal convictions of the community to such a degree that it requires judicial intervention.¹¹⁸ Thus it covers instances where the contract may be lawful, but where such contract is deemed wrongful and as such will not be

¹¹¹ *Siyepu* (note 75 above),30.

¹¹² *Siyepu* (note 75 above) 52.

¹¹³ *Siyepu* (note 75 above) 31.

¹¹⁴ *Siyepu* (note 75 above)31.

¹¹⁵ *Siyepu* (note 75 above) 31.

¹¹⁶ *Siyepu* (note 75 above) 53.

¹¹⁷ *Siyepu* (note 75 above) 53.

¹¹⁸ *Siyepu* (note 75 above) 54.

enforced.¹¹⁹ Alkema J acknowledges that the courts are bound by the precedent set by higher courts, i.e. the SCA, on the role of the intention of the parties in determining the enforceability of a contract.¹²⁰ The judge himself states that the use of the wrongfulness element to determine the enforceability of a contract is a 'bridge too far' at the moment,¹²¹ although it is submitted that this view has much to commend itself and that the SCA would do well to consider it in future.

Van der Merwe has stated that "simple justice between man and man" in the parties' individual capacities cannot alone determine the public interest, because the idea is too simplistic and could lead to arbitrary decisions.'¹²² Therefore one can argue that the intention of the parties at the time of contracting may be lawful, but might not always be in line with the public interest, and thus the intention of the parties should not be the sole determinant of enforceability of a contract.

The intention of the parties also has the potential to be uncertain. Thus its usefulness, in determining the enforceability of the contract, is limited. Its usefulness is also limited because where the intention of the parties is determined and is deemed to be lawful the contract will be enforced, therefore certain wrongful contracts could possibly be enforced. This can be contrasted to the use of the *boni mores* and the wrongfulness enquiry; which would have any contracts which are 'immoral, unethical and reprehensible' declared as unenforceable; irrespective of its lawfulness. Thus, it is submitted, that the use of the *boni mores* could be of great assistance in preventing the enforcement of unjust, unreasonable or unfair contracts which our community would not approve of. Therefore, it is submitted further, that the intention of the parties should not be the sole determinant of the enforceability of a contract, but should rather form part of the enquiry into the enforceability of the contract, along with the *boni mores*.

4.6. Conclusion:

It is clear from the above discussion, that the SCA's over-emphasis on legal certainty is misplaced, and that the alleged potential consequences of the use of normative values has

¹¹⁹ *Siyepu* (note 75 above) 54.

¹²⁰ *Siyepu* (note 75 above) 32.

¹²¹ *Siyepu* (note 75 above) 62.

¹²² Van Der Merwe ... *et al* (note 66 above) 189.

been seriously over-exaggerated. It is clear that the SCA has placed its focus on freedom of contract and the intention of the parties, while, to a large extent, it has ignored the normative values.

Legal uncertainty has been feared for a long time, and has been cited by the SCA religiously to prevent the direct use of normative values in the South African law of contract. This position, despite the rigorous criticism it has received, has been maintained by the SCA in the cases which have been discussed in chapter three of this dissertation. Although, none of the commentators have denied the importance of legal certainty, it has been made clear by various academics that absolute legal certainty is not possible and that the legal uncertainty which will be caused by the use of normative values, would be outweighed by the benefits of substantive fairness and contractual justice which would be achieved through the use of such normative values.

Many academics and certain judges have also identified how normative values, such as the *boni mores*, are used in other areas of law without any significant issues or implications for legal certainty. It has been made clear that the differences between the law of contract and the law of delict are of too insignificant a nature to qualify as a justification for the refusal to use the *boni mores* in the law of contract. Also, academics have argued that the courts would, over time, develop judicial precedent which would set out how the normative values are to be applied, thus reducing the legal uncertainty that would result from the use of normative values.

The intention of the parties, although it is an important factor in the determination of the enforceability of a contract, should not be the only or predominant tool used to determine enforceability. It is also susceptible to uncertainty. The use of the intention of the parties alone is of little help. This is because if the intention of the parties is determined, provided it is lawful, it will be enforced. This allows space for wrongful and inequitable contracts to be enforced, especially since the *boni mores* is currently not available as a mechanism to refuse the enforcement of such contract. On considering the criticisms of the *Brisley* judgment, and the SCA's excessive reliance on the intention of the parties and the principles of freedom and sanctity of contract, one can question whether the approach of the SCA is in line with the demand of the Constitution. This question will be discussed in the following chapter.

Chapter 5:

The South African law of contract and the Constitution of the Republic of South Africa:

‘I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law... There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.’¹

5.1. Introduction:

The Constitution is the supreme law in South Africa,² and as such all law must be interpreted, applied and developed in a manner which gives effect to the Constitution and the values which underlie it.³ Section 39 (2) of the Constitution requires the courts to develop the common law where it is inconsistent with the Constitution.

Bhana has stated that ‘[t]he Constitution embodies the substantively progressive and transformative, socio-economic goals of post-apartheid South African society, and furthermore, expressly subjects all law, including the common law of contract, to this vision.’⁴ Therefore it is clear that the law of contract is subject to constitutional scrutiny, and if found to be contrary to the Constitution or any of the values which underlie it, the common law of contract must be developed so as to bring it in line with the Constitution. Bhana also states that the Constitution has started the movement ‘away from liberalism toward a more substantive recognition of “human dignity, the achievement of equality and the advancement of human rights and freedoms”.’⁵

¹ *Pharmaceutical Manufacturers Association of South Africa In re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) para 44.

² The Constitution of the Republic of South Africa, 1996- section 2.

³ L Hawthorne ‘Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism’ (2006) 12 (2) *Fundamina* 83.

⁴ Bhana D, ‘Constitutionalising contract law: Ideology, judicial method and contractual autonomy’ ((unpublished PhD thesis, University of the Witwatersrand, 2013) 73.

⁵ *Ibid* 36.

As Louw has argued, the new constitutional dispensation, comprising of the Bill of Rights and underlying values, provides one of the greatest motivations for adapting the common law of contract by providing normative values with a greater role in the law of contract.⁶

In this chapter a discussion will be undertaken of the duty of the courts to develop the common law, and an investigation into whether or not the courts have fulfilled this duty in light of cases which have been dealt with by the SCA. Lastly a discussion will be undertaken to determine whether or not the law of contract in its current form in respect of the issues under investigation here is in line with the Constitution.

5.2. Duty of the courts to develop the common law:

‘Courts have not only the right but also the duty to develop the common law, taking into account the interests of justice and at the same time to promote the spirit, purport and objects of the Bill of Rights.’⁷

The courts have the constitutional obligation to develop the common law in terms of section 39 (2) of the Constitution to ensure that such common law is in line with the Constitution. The Constitutional Court, in the case of *Barkhuizen v Napier*,⁸ has stated that no law is immune to constitutional scrutiny, and that the common law of contract is no exception to this.⁹ As a result the courts have a duty to develop the common law to bring all laws in line with the spirit, purport and objects of the Bill of Rights.¹⁰ The leading case dealing with the development of the common law in light of the Constitution is the case of *Carmichele v Minister of Safety and Security*¹¹(a case on the law of delict), in which Ackermann and Goldstone JJ stated that:

‘the obligation of courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary it is implicit in s39(2) read with s 173 that where

⁶ A Louw ‘Yet another call for a greater role for good faith in the South African law of contract: can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16 (5) *PER / PELJ* 46 – 47.

⁷ *Van Jaarsveld v Bridges* (344/09) [2010] ZASCA 76 (27 May 2010) 3.

⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁹ *Ibid* 35.

¹⁰ *Ibid* 35.

¹¹ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

the common law as it stands is deficient in promoting the s39(2) objective, the Courts are under a general obligation to develop it appropriately.’¹²

Hawthorne has stated that the Constitution requires:

‘a reappraisal of traditional ideas of the judicial function and of legal interpretation. It requires judges to engage in substantive legal reasoning, to articulate the values upon which their decisions are based and to engage with the social, historical and legislative context. Judges themselves are thus made subject to the demand for justification: rather than simply relying on a pre-existing rule or precedent, they are required to engage in value-based, contextual reasoning.’¹³

In other words, under the new constitutional dispensation, the courts are required to re-evaluate the manner in which they decide cases so as to ensure that such decision making is in line with the Constitution. They cannot merely continue to follow the principles and precedent which existed before the emergence of the Constitution. In the case of *Du Plessis and Others v De Klerk and Another*¹⁴ Kentridge AJ, relying on a Canadian case, stated that ‘judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared.’¹⁵

Davis has stated that the rules that ‘underpin social and economic life need to be interrogated to ensure that they are congruent with the constitutional values of the text.’¹⁶ Davis states further that the courts have been given substantial power and responsibility to ‘interrogate the law and, if necessary, change principles of common and customary law so as to promote the values expressed in the Bill of Rights.’¹⁷ Davis argues that the development clause in the Constitution¹⁸ requires the courts to interrogate and develop the common law to promote the spirit and object of the Bill of Rights and to ‘establish a society based on social justice’, which can be achieved through the infusion of normative values.¹⁹

¹² Ibid 39.

¹³ Hawthorne (note 3 above) 84.

¹⁴ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

¹⁵ Ibid 61.

¹⁶ D Davis "Private law after 1994: progressive development or schizoid confusion?" (2008) *SAJHR* 319.

¹⁷ D Davis 'Where is the map to guide common-law development?' (2014) 1 *STELL LR* 4.

¹⁸ The Constitution of the Republic of South Africa- Section 39.

¹⁹ Davis (note 16 above) 319.

Davis has noted how there is always a need to develop the common law to enable it to correspond with the needs of society.²⁰ This development also requires that the existing common law principle be applied in a different way.²¹ Frank Michelman has stated that the Constitution is progressive and is striving for a just society, a goal which is to be achieved through 'political and other means under the Constitution's guidance and control'.²²

Mokgoro has stated that the constitutional value of Ubuntu should be used in the process of developing the common law.²³ Yacoob J has held that the notion of Ubuntu is relevant when developing the common law, while Moseneke J has held that the law of contract must be infused with constitutional values, such as Ubuntu.²⁴ From the above discussion it is more than clear that the courts have a positive obligation to develop the common law in light of the spirit, object and purport of the Bill of Rights. The courts are tasked with developing the common law, having regard to the Bill of Rights, the prevailing morals of society and the notion of Ubuntu.

5.3. Approach of the courts to the development of the common law:

It has been made clear on various occasions that the court is under an obligation to develop the common law to ensure that it embraces the Constitution and the values which underlie it. Despite this obligation the law of contract has remained somewhat resistant to the calls for transformation under the new constitutional dispensation. This position has been maintained by the SCA, whose unwavering devotion to freedom of contract and legal certainty and its steadfast opposition to the use of normative values to interfere in contractual relationships, has resulted in the lack of a substantive defence which is based upon equity.²⁵

²⁰ Davis (note 17 above) 3.

²¹ Davis (note 17 above) 3.

²² FI Michelman "Expropriation, Eviction, and the Gravity of the Common Law" (2013) 24 *Stell LR* 245.

²³ YM Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 (1) *PER/PELJ* 25

²⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) 23 & 71.

²⁵ Louw (note 6 above) 47; see also P Du Plessis 'Mort NO v Henry Shields-Chiat 2001 1 SA 464 (C)' (2002) 2 *De Jure* 385.

In the *Brisley* case the SCA ‘situated the existing common law of contract within the constitutional context’,²⁶ with Cameron JA stating that the common law of contract is subject to the Bill of Rights and must be developed where necessary, and recognising public policy as the appropriate mechanism to bring the common law of contract in line with the Constitution.²⁷ Cameron JA stated that freedom of contract is a part of the constitutional value of freedom and gives effect to the value of dignity by allowing people to control their lives.²⁸ Cameron JA stated further that in the absence of ‘obscene excess’ contractual autonomy must be upheld.²⁹ Barnard-Naude has identified how the judgment of Cameron JA is founded on individualism and assumes that the enforcement of the common law principles of freedom and sanctity of contract is ‘in service of the constitutional values of dignity, equality and freedom.’³⁰ Barnard-Naude states that this judgment is not in line with the ideals of the Constitution,³¹ arguing further that the standpoint taken in the *Brisley* case ‘represents a static, closed view of a legal system’.³²

Following suit, the SCA in the case of *Afrox Healthcare Bpk v Strydom*³³ again gave preference to freedom of contract by placing this principle in a privileged position.³⁴ The SCA stated that the constitutional value of equality is seldom relevant as the contracting parties are assumed to be in equal bargaining positions, and that only where evidence of unequal bargaining is presented, would the court consider this as a factor in determining the enforceability of the contract.³⁵

Bhana believes that the SCA has undoubtedly shown its allegiance to the ideas under the classical liberal model of contract law, giving preference to ‘self-interest, self-reliance and self-determination’.³⁶ Bhana states that:

²⁶ Bhana (note 4 above) 3.

²⁷ *Ibid* 3.

²⁸ *Ibid* 4.

²⁹ *Ibid* 4.

³⁰ Barnard-Naude, AJ ‘Oh what a tangled web we weave ...’ hegemony, freedom of contract, good faith and transformation- towards a politics of friendship in the politics of contract’ (2008) 1 *Constitutional Court Review* 197.

³¹ *Ibid* 197.

³² *Ibid* 186.

³³ 2002 (6) SA 21 (SCA).

³⁴ Barnard-Naude (note 30 above) 185.

³⁵ Bhana (note 4 above) 4 - 5.

³⁶ *Ibid* 5.

“The cases, despite ostensibly aligning the common law of contract with the Bill of Rights, seem to leave contract law largely intact and unaffected by the Bill of Rights, often with results that appear to be patently unfair to individual contractants and inimical to the transformative aspirations of the Constitution.”³⁷

She believes further that the law of contract has remained unreceptive to the demands of the Constitution, and has consistently failed to engage with the Bill of Rights.³⁸ Bhana states further that the policy considerations employed by the courts strengthen the classical liberal model in the South African law of contract.³⁹

Bhana has noted that even when considering the constitutional values of equality, freedom and dignity the courts continue to follow a classical liberal interpretation, and explains that even the public policy enquiry is very individualised.⁴⁰ Bhana states that the underlying ideas of the law of contract must be interrogated as they are now required to operate within the confines of the Constitution.⁴¹ As was stated in chapter two of this dissertation, our modern model of contract law is heavily influenced by the classical liberal model. It is primarily focused on freedom and sanctity of contract, meaning that the courts will generally enforce contracts in most cases, apart from those which are deemed to be contrary to public policy.⁴² However, even the use of public policy, as a mechanism to control the operation of freedom and sanctity of contract, can in many cases be insufficient to provide for the substantive fairness which the Constitution calls for, a clear example being the *Brisley* and *Afrox* cases. This is because public policy has a limited scope of operation.⁴³ Naude and Lubbe have observed how the principle emerging from the *Sasfin* judgment has been so restricted by the SCA in the *Brisley* case that one could say that public policy is not of much use to control unfair contracts ‘beyond its well-established application in respect of wilful wrongdoing.’⁴⁴ Therefore, it could be argued that many people will find no protection from unfair contracts in the law of contract, in its undeveloped form.

³⁷ Ibid 5.

³⁸ Ibid 6.

³⁹ Ibid 33.

⁴⁰ Ibid 98 - 99.

⁴¹ Ibid 36.

⁴² Ibid 50 – 51 & 60 – 61; see also *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9.

⁴³ T W Bennett ‘Ubuntu: An African equity’ (2011) 14 (4) *PELJ* 45.

⁴⁴ T Naude & G Lubbe ‘Exemption clauses — A rethink occasioned by *Afrox Healthcare Bpk V Strydom*’ (2002) 122 *SALJ* 442.

In the case of *Barkhuizen v Napier*⁴⁵ the majority of the Constitutional Court stated that the test for the validity of a contract is that of public policy, stating that ‘public policy represents the legal convictions of the community; it represents those values that are held most dear by the society...public policy is now deeply rooted in our Constitution and the values that underlie it’.⁴⁶ Therefore, whether a contract is contrary to public policy must be determined with reference to the constitutional values.⁴⁷ The Constitutional Court stated further that it was unsure whether the limited role of the normative value of good faith in contract law is acceptable under the new constitutional dispensation, and stated (with apparent relief) that it was not necessary to make a pronouncement on the issue.⁴⁸ This shows that there is doubt as to whether the limited role played by normative values is consistent with the demands of the Constitution, but the Constitutional Court failed to take positive steps to settle the issue but rather left it for the next court to deal with. However, the judgment was not without issue. Davis has stated that the Constitutional Court failed to interrogate the current understanding of freedom of contract, and as a result contractual autonomy continues to be the primary focus for the law of contract.⁴⁹

Davis declares that ‘having taken us to the constitutional door, the Court refused to enter the new venue’, but he expresses relief that the Constitutional Court has at least opened the opportunity for the further incorporation of normative values into the law of contract.⁵⁰ Kerr observes that, because of the finding of the Constitutional Court in *Barkhuizen v Napier*⁵¹ the finding of the SCA in the *Brisley* case must be taken as being wrongly decided as the Constitution has given the courts a more prominent role with a wider ‘field of operation’ than it had in the pre-constitutional era.⁵²

However the more recent case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,⁵³ gives us a glimmer of hope that the courts are beginning to embrace the demands

⁴⁵ *Barkhuizen v Napier* 2007 5 SA 323 (CC).

⁴⁶ *Ibid* 28 - 29.

⁴⁷ *Ibid* 28 - 29.

⁴⁸ *Ibid* 82.

⁴⁹ Davis DM "Developing the Common Law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution" (2011) *Stell LR* 854.

⁵⁰ Davis (note 16 above) 327.

⁵¹ *Barkhuizen v Napier* (note 45 above).

⁵² AJ Kerr 'The defence of unfair conduct on the part of the plaintiff at the time action is brought: The *exceptio doli generalis* and the *replicatio doli* in modern law' (2008) 125 (2) *SALJ* 246

⁵³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

of the Constitution, calling for the use of constitutional values such as Ubuntu to assist in the transformation of the common law of contract. Yacoob J, in *Everfresh*,⁵⁴ stated that the values encompassed by the notion of Ubuntu are relevant in the development of the common law, as its development must acknowledge the values of the majority of people who will take part in it.⁵⁵ He expressed the view that the law of contract cannot be restricted solely to colonial traditions.⁵⁶ Yacoob J stated that the notion of Ubuntu is normally implicated in most contracts, as even when the contract is between two business entities, it is ultimately between individuals who are generally in different bargaining positions.⁵⁷ Yacoob J stated further that:

“a court should always be alive to the possibility of the development of the common law in the light of the spirit, purport and objects of the Bill of Rights. The development of the common law would otherwise be no more than a distant dream. A court should always be at pains to discover whether the development of the common law is implicit in a case.”⁵⁸

In the same case, Moseneke DCJ stated that ‘it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of Ubuntu, which inspire much of our constitutional compact.’⁵⁹ Moseneke DCJ stated further that the value of Ubuntu could sway the courts to find in favour of normative values, such as good faith, which was being considered in this case.

One can see the different approach taken by the Constitutional Court, with it emphasizing the use of the notion of Ubuntu, development of the common law and hinting towards the possibility of providing normative values with a greater role in the law of contract. This was identified by Barnard-Naude, who stated that the approaches taken in both the majority and minority judgments in *Everfresh* is in opposition to precedent which had been set by the SCA which has been opposed to the use of normative values as independent grounds to interfere in the contractual relationship.⁶⁰ He believes that the judgments show the possibility that the

⁵⁴ *Ibid.*

⁵⁵ *Ibid* 23.

⁵⁶ *Ibid* 23.

⁵⁷ *Ibid* 24.

⁵⁸ *Ibid* 34.

⁵⁹ *Ibid* 71.

⁶⁰ Barnard-Naude, J ‘Contract law, good faith and the Constitution’ 2 December 2011 *thought leader Blog*-available at: <http://www.thoughtleader.co.za/jacobarnardnaude/2011/12/02/contract-law-good-faith-and-the-constitution/>

role of normative values as set out by the SCA may be constitutionally inappropriate.⁶¹ Louw has also stated that *Everfresh* is in line with the movement which emphasises ‘fairness and the pursuit of contractual justice’.⁶² In the more recent case of *Botha and Another v Rich NO and Others*,⁶³ the Constitutional Court held that where the rigid application of the principle of reciprocity would result in an injustice, our law of contract, based on good faith, is sufficiently flexible to achieve fairness.⁶⁴ It held further that the ‘honouring’ of a contract cannot be focused on one’s own self-interest, while having no regard for the interests of the other party.⁶⁵ The Constitutional Court explained that this understanding of contract law is founded upon the normative value of good faith.⁶⁶ From this one can see the greater reliance on the normative value of good faith (and, in respect of the court’s sentiments regarding consideration of the interests of the counter-party, an indication of implicit support for what was said in *Everfresh* regarding the role of Ubuntu).

Thus a change could possibly be around the corner, all that is required is for the appropriate case, which has been pleaded correctly, to come before the Constitutional Court, which one can only hope will follow the approaches taken by Yacoob J and Moseneke DCJ in *Everfresh*,⁶⁷ as opposed to the approach of the SCA.

From this it can be argued that the SCA has continuously failed to fulfil its constitutional mandate to ensure that all areas of law embrace the constitutional values,⁶⁸ and as Barnard has stated, the SCA can even be said to be shying away from the Constitution.⁶⁹ Barnard has noted further that the SCA has merely continued the tradition of providing ‘individualistic rules’ with preference.⁷⁰ Davis has remarked how this ‘has produced islands of “private law purity” in a sea of constitutional transformation.’⁷¹ As stated by Davis, the courts ‘have been

⁶¹ Ibid

⁶² Louw (note 6 above) 67

⁶³ *Botha and Another v Rich NO and Others* [2014] ZACC 11.

⁶⁴ Ibid 45.

⁶⁵ Ibid 46.

⁶⁶ Ibid 46.

⁶⁷ *Everfresh* (note 53 above).

⁶⁸ Hawthorne (note 3 above) 84

⁶⁹ A J Barnard ‘A critical legal argument for contractual justice in the South African law of contract’ (Unpublished LLD thesis, University of Pretoria, 2005) 164.

⁷⁰ Ibid 165.

⁷¹ Davis (note 16 above) 328

overly cautious in addressing the tension between the value of certainty (which is central to the rule of law) and the constitutional imperative of transformation'.⁷²

Annor argues that although the courts must ensure legal certainty they must act in accordance with the constitutional obligation to develop the common law, an obligation which the courts cannot elude by 'passing the buck' from one court to another, as the SCA has done.⁷³ Just as the SCA has warned that the courts cannot hide behind the Constitution when overthrowing common law principles, Louw has stated that on the same notion the courts also cannot hide behind the common law principles to avoid its constitutional obligation to develop the common law and simply pass the task on to the next court.⁷⁴ Louw has argued that the approach of the SCA thus far has been too conservative and is not in line with the Constitution.⁷⁵

Davis argues that the *Brisley* case, and those which follow its findings, have only referred to the Constitution as an afterthought without attempting to engage the law of contract with constitutional values, arguing that the courts have failed to meet the challenge set by the Constitution and failed to fulfill the mandate set out in the case of *Carmichele v Minister of Safety and Security*⁷⁶ where the Constitutional Court stated that the courts have the duty to develop the common law to bring it in line with the Constitution.⁷⁷ He also argues that the courts have not given a reason as to why they believe the normative values are so vague that they cannot be used independently in the law of contract as compared to the concept of public policy.⁷⁸

As stated in earlier chapters, some commentators have noted how the law of contract can learn something from the law of delict. The law of delict has fully embraced the demands of the Constitution. In the law of delict 'substantive fairness and justice' is of the utmost

⁷² Davis (note 16 above) 328.

⁷³ E Annor 'Whose duty is it anyway' 2012 *Without Prejudice* 53- this is in reference to the statement made by Brand J in the case of *Potgieter v Potgieter* (629/2010) [2011] ZASCA 181 (30 September 2011) at para 34 where Brand J stated that until such time that the Constitutional Court finds to the contrary, the limited role which normative values play in the law of contract will be upheld.

⁷⁴ Louw (note 6 above) 67.

⁷⁵ *Ibid* 67.

⁷⁶ *Carmichele* (note 11 above).

⁷⁷ Davis (note 16 above) 325.

⁷⁸ Davis (note 16 above) 326.

importance, and it has been aligned with the Constitution.⁷⁹ Bhana and Pieterse have stated, in respect of the law of delict, that ‘it is in fact not uncommon in law for the policy objective of legal certainty to be relaxed in circumstances where competing social considerations and the development of the common law warrant it.’⁸⁰ Furthermore they set out the example of the test for wrongfulness, stating that this test is based on the *boni mores*, and they argue that this test completely embraces ‘competing social and economic considerations (including those reflected in the Constitution), notwithstanding the inevitable reduction in legal certainty.’⁸¹ Bhana and Pieterse argue that the law of contract is also supposed to embrace the normative and constitutional values, stating that this fact makes it difficult to understand why legal certainty has been elevated above the normative values.⁸²

However as Davis has argued, although the SCA has made its position abundantly clear, one must not make the mistake to believe that the door is forever closed.⁸³ This statement appears accurate in light of *Everfresh*,⁸⁴ where the Constitutional Court emphasised the need to infuse the law of contract with constitutional values and highlighted the fact that the courts must never be hesitant to develop the common law where it is deficient. This shows a movement from adherence to the classical liberal model, towards a new system of contract law, infused with the Constitution and the values which underlie it, and one which places an emphasis on fairness and equity and not merely the principles of legal certainty and freedom and sanctity of contract.

5.4. The role of the *boni mores* in light of the Constitution:

Barnard believes that the demands of the Constitution call for more than a ‘blind reliance on freedom of contract as the basis of contractual relationships’.⁸⁵ Barnard states further that what the Constitution requires is a ‘review, adaption, reinterpretation and expansion’ of the current role of the *boni mores*, and other normative values, in the law of contract, which will facilitate the alignment between the principles of the common law of contract and the ‘new

⁷⁹ Bhana (note 4 above) 33.

⁸⁰ D Bhana and M Pieterse ‘Towards a reconciliation of the contract law and the constitutional values: Brisley and Afrox revisited’ (2005) 122 4 *SALJ* 894-895

⁸¹ *Ibid* 894-895

⁸² *Ibid* 894-895.

⁸³ Davis (note 16 above) 318.

⁸⁴ *Everfresh* (note 53 above).

⁸⁵ A J Barnard ‘A critical legal argument for contractual justice in the South African law of contract’ (Unpublished LLD thesis, University of Pretoria, 2005) 144.

boni mores of the constitutional community'.⁸⁶ Barnard believes that what judges are now obliged to ask is whether the enforcement of freedom of contract is in line with the constitutional values.⁸⁷

Barnard-Naude has also argued that the notion of Ubuntu can be used to infuse constitutional values into the law of contract. According to the author, the Constitution, just like the notion of Ubuntu, requires parties to act with respect and consideration towards the other contracting party; he argues further that this requires the courts to provide normative values with further recognition in the law of contract.⁸⁸ This is where the concept of Ubuntu plays a role in calling for normative values to play a greater role, as Ubuntu requires people to treat each other with respect, and this is something that the *boni mores* can ensure in the law of contract by requiring the parties to treat each other with a minimum standard of respect and to act in a manner which is fair and reasonable.

As Louw has stated, the Constitution and its underlying values are the greatest motivations for incorporating normative values into the law of contract.⁸⁹ All courts have the duty to develop the common law where it is deficient to ensure that it is in line with the Constitution. As per this duty, the courts must develop the common law of contract. The law of contract in its current position does not embrace the demands of the Constitution and continues to perpetuate the individualistic ideology which has allowed serious injustices within the law of contract and has inhibited the infusion of constitutional values into the law of contract. The Constitution strives for the ideal of a 'civic friendship' which calls people to relate to each other with respect and consideration,⁹⁰ but, it is submitted, this is something which the law of contract presently does not provide for.

As can be seen from the definition of the *boni mores* in chapter two, it is a concept which encompasses the morals of a community and the values of justice, equity and reasonableness. It has also been said that the Bill of Rights is the embodiment of the *boni mores*.⁹¹ The *boni*

⁸⁶ Ibid 145.

⁸⁷ Ibid 145.

⁸⁸ Barnard-Naude (note 30 above)202.

⁸⁹ Louw (note 6 above) 46 – 47.

⁹⁰ Ibid 202.

⁹¹ Z Tanzer 'Social norms and constitutional transformation: tracing the decline of the application distinction in South Africa' (2010) 9 *Wash. U. Global Stud. L. Rev.* 460 – 461.

mores sets out an objective standard of conduct, based on the legal convictions of the community, which all contracting parties should comply with. Thus is it difficult to comprehend how the Constitution would not welcome a mechanism such as the *boni mores* which could bring the law of contract in line with the demands of the Constitution, by providing a substantive contractual defense to facilitate contractual justice, equity and fairness and which can be employed to enable the incorporation of other normative values, such as good faith.⁹² The fact that the Constitution calls for the transformation of all laws to reflect a society which is founded on the values of dignity, freedom and equity, makes the current role of the normative values even more puzzling, as one can ask what better to achieve such a society than the employment of values which require people to treat others with mutual respect and concern.

⁹² Louw (note 6 above) 79.

Chapter six:

Conclusion

6.1. Revision of the chapters:

The *boni mores* is a concept which reflects the morals of a society, and requires people to comply with the objective standard it sets out. It encompasses the community's ideas of justice, equity and reasonableness, as well as the 'legal... ethical, moral, and social values' of a community.¹ It represents minimum standards which are morally binding, standards which are required for the society to exist peacefully. Although this concept is similar to that of public policy, it is submitted that they are in fact separate concepts and as such should not be used interchangeably as this fails to take cognisance of the differences between the concepts. Public policy is more of an all-encompassing concept which consists of not only the *boni mores*, but also good faith, reasonableness, fairness and justice, thus applying to a wider scope of contracts and contracts which might not fit into other categories of invalidity. Whereas the *boni mores* have a limited scope of application merely to cases which infringe upon the fundamental morals of a society and its sense of reasonableness, justice and equity.² However, irrespective of the conclusion one comes to in relation to the relationship between the *boni mores* and public policy, it would not impact upon the underlying argument of this study, namely that an equity mechanism is needed in the law of contract, as the common law of contract in its current state is deficient and requires development to enable it to meet the demands of the Constitution as well as to be able to address the vast number of issues which plague South African societies and may be ameliorated through a more fair law of contract.³

From the discussion in the preceding chapters, it is clear that the current role of the *boni mores* in the South African law of contract is virtually non-existent, as it is apparently believed that the importation of the *boni mores* into the law of contract will cause too much uncertainty. The fear of uncertainty has been the primary – in fact, only - reason advanced so

¹ Trans-lex website 'Invalidity of contract that violates good morals (boni mores)' <http://www.trans-lex.org/937000> (accessed 25 July 2014); and *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W).

² Van Der Merwe ... *et al* (note 1 above) 167; see also Trans-lex website 'Invalidity of contract that violates good morals (boni mores)' <http://www.trans-lex.org/937000> (accessed 25 July 2014); *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) 528-9.

³ A few examples being, the high rate of illiteracy and low levels of education of many South Africans, the extremely high rates of unemployment and poverty. These issues lead to the exploitation of people who are disadvantaged or uneducated.

often by the SCA for its constant rejection of the use of normative values in an attempt to achieve substantive fairness in the South African law of contract.

However the reasoning of the SCA has been subjected to a great deal of criticism. The contention by the SCA that the use of the *boni mores* in the law of contract will cause unacceptable uncertainty has been refuted by many academics and some judges. Although no one has denied the importance of legal certainty, many have noted how the fear of uncertainty and the alleged consequences thereof, advanced by the SCA, is an exaggeration. It is clear that in all areas of law there is always a degree of uncertainty, and as De Vos has recognised, if there was no uncertainty when it came to the law there would be no need for the courts as people would always know what the outcome of the case would be, thus it would be pointless to bring the case before a court. Also, many have argued that if the courts are given the opportunity, they could develop guidelines as to how such normative values are to be applied, thereby decreasing the uncertainty that would result. It has also been argued that the incorporation of normative values is not a call for judges to be given an unrestrained discretion to interfere in contractual relationships, but rather for judges to be given a degree of discretion that will enable them to address issues using the concept of the *boni mores* as is done in the law of delict. Another argument is that the *boni mores* is used in other areas of law and there is no significant difficulty when dealing with most cases or any severe consequence in relation to the uncertainty it may cause in hard cases.

Furthermore, the argument that the law of delict and law of contract are too different to allow the use of the *boni mores* in the law of contract has been addressed by Alkema J. The judge made it clear that the two areas of law are extremely similar and has shown how the slight differences between the two would make no difference to the application of the *boni mores* in relation to the law of contract and would not affect the outcome of the enquiry.

This study has also set out how the use the intention of the parties to determine the enforceability of a contract is not an appropriate determinant as it is too subjectively focused and prone to uncertainty, and because the intention of the parties cannot be the sole determinant as the parties cannot enter into a contract which would be regarded as illegal. This is a well-established principle of our law. In such cases the intention of the parties is completely irrelevant; even if they intended to enter into such a contract, the contract would

be invalid on the ground of illegality. Alkema J also highlighted how the use of the intention of the parties is pointless as one reaches the same conclusion using the wrongfulness enquiry, which is a far less onerous enquiry.

This study investigated the constitutional duty of the courts to develop the common law and set out how our courts have approached this duty to date. From the decisions of the SCA in certain judgments⁴ it is clear that the court has failed to fulfil its constitutional to develop the common law to ensure that it embraces the ideals and values of the Constitution. The courts have merely referred to the Constitution when discussing public policy as a determinant for the enforceability of a contract, and when justifying its predilection for the principles of freedom and sanctity of contract, arguing that freedom of contract has become a constitutional value and gives effect to the constitutional value of dignity. Beyond this reference to the Constitution the common law of contract has remained largely unaffected by the Constitution.

Lastly, the study examined whether the limited role of the *boni mores* is consistent with the Constitution. The calls by our Constitution for transformation have remained largely unanswered in the law of contract, with the modern model of contract being heavily influenced by the classical liberal model. The classical liberal model focused on individualism and procedural fairness, while relegating substantive fairness to an apparently negligible role. This is a position which cannot be allowed by the Constitution, thus the limited role of normative values which could address such issues, as currently ascribed to by the SCA, cannot be said to be in line with the Constitution.

6.2. Conclusion:

Although previously the law of contract was focused on freedom and sanctity of contract one can see a movement towards a more 'altruistic vision'.⁵ This is can be seen through the enactment of statutes such as the Consumer Protection Act⁶ and the findings of certain courts which have called for normative values to play a greater role in the law of contract. The

⁴ *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA); *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA); *Potgieter v Potgieter* (629/2010) [2011] ZASCA 181 (30 September 2011).

⁵ A Hutchison 'Reciprocity In Contract Law' (2013) 1 *STELL LR* 29

⁶ 68 of 2008

Consumer Protection Act is just one example which has shown a movement away from the strict application of common law principles, where such application would be contrary to the spirit, purport and objects of the Constitution.⁷ The Consumer Protection Act, and other legislation,⁸ can be seen as reflecting the ‘current legal convictions of the legislature’ in respect of the regulation of unfair contracts in specified areas, for example consumer contracts.⁹ Its purpose is to address unfair consumer contracts, and in fulfilling this purpose the Consumer Protection Act often limits the parties’ freedom to contract where the contract is in anyway inimical to the purposes of the Act.¹⁰

However this movement has been hindered by the SCA which has, while clinging to the ideals of the classical contract law, refused to acknowledge the need for the normative values to address issues of substantive fairness and contractual justice. It is argued that the stance that has been taken by the SCA seems to be incorrect and illogical, especially if one considers the reasons put forward as a justification for refusing to provide the *boni mores* more traction in this context.

One such reason, as has been stated previously, is the uncertainty it would cause. This reason is not only illogical on the ground that many have refuted it as being a severely exaggerated concern which is insufficient to justify the SCA’s refusal, but also because the courts have time and again stated that public policy is the test to be used to determine the enforceability of a contract. The problem with this reasoning is that, as was stated in chapter two of this study, public policy itself has not been free of criticism for causing legal uncertainty, with both values encompassing similar ideals and values. So this begs the question of how the SCA can justify its acceptance of one value over another where both have been subjected to the same criticism.¹¹ This issue was noted by Kroeze who states that the court’s contention

⁷ E Annor ‘Whose duty is it anyway’ 2012 *Without Prejudice* 53.

⁸ Such as the National Credit Act 34 of 2005.

⁹ A Louw ‘Yet another call for a greater role for good faith in the South African law of contract: can we banish the law of the jungle, while avoiding the elephant in the room?’ (2013) 16 (5) *PER / PELJ* 76.

¹⁰ C Posthumus ‘Freedom of Contract and the Consumer Protection Act’ *The Moneyweb* (11 March 2011) available at <http://www.moneyweb.co.za/moneyweb-soapbox/freedom-of-contract-and-the-consumer-protection-ac?sn=2009+Detail+no+image> accessed 28 June 2014

¹¹ A J Barnard-Naude ‘“Oh what a tangled web we weave ...” hegemony, freedom of contract, good faith and transformation- towards a politics of friendship in the politics of contract’ (2008) 1 *Constitutional Court Review* 195 - 196.

that public policy and the constitutional values are more real and precise than the *boni mores* is 'nonsense', as the constitutional values are no more real or precise than the *boni mores*.¹²

Another concern regarding the SCA's reasoning is its over-emphasis on the principle of freedom of contract and the use of the intention of the parties to determine the enforceability of a contract. This ideology fails to take into account the social circumstances in which people find themselves at the time of contracting; significantly, it leaves little room to address the widespread use of contracts to achieve abuse of private power (which, many would argue, is inimical to our constitutional value system and, especially, Ubuntu). Consider that, if a person has virtually no choice but to enter into a contract, and due to such necessity they are not in the position to bargain so they are forced to accept whatever terms and conditions are imposed by the other party, that person may still have entered into the contract not labouring under any form of mistake, misrepresentation or duress (and may well have the intention to enter into such a contract). But one must ask whether this contract was entered into freely.¹³ A common example of such a situation is contracts entered into between a patient and a hospital, if the patient is ill or injured and requires medical attention they are in no position to bargain in an attempt to alter the terms of the contract.¹⁴ If the patient refuses to accept the terms set by the hospital, the hospital could, in certain situations, refuse to contract with that patient.

The same issue is evident with many of the examples identified by the South African Law Commission in its discussion paper on unfair contract terms.¹⁵ This problem is amplified by the socio-economic circumstances in South Africa. Du Plessis has identified the need for a mechanism in the South African law of contract which can 'safeguard against inequity in contractual relationships'.¹⁶ Thus, as Louw has argued, it is in this context that one can argue that some kind of mechanism is needed in the law of contract which can subject freedom of

¹² I Kroeze 'Contract, constitution and confusion: the case of *Brisley v Drotzky*' (2006) 47 1 *Codicillus* 21.

¹³ Davis D "Private law after 1994: progressive development or schizoid confusion?" (2008) *SAJHR* 324 – 325- Davis sets out an example of this- 'An offeree consents to the bargain in order to avoid the negative consequences the offeror may inflict by withholding what she owns and that which the offeree desires or requires.'

¹⁴ H Lerm 'A critical analysis of exclusionary clauses in medical contracts' (unpublished LLD thesis, University of Pretoria, 2008) 944.

¹⁵ South African Law Commission Paper 65 *Unreasonable stipulations in contracts and the rectification of contracts* (April 1996)

¹⁶ P Du Plessis '*Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C)' (2002) 2 *De Jure* 386.

contract to a form of social control, and that the *boni mores*, being a ‘source for ethical standards’, is more than capable of performing such a task.¹⁷ This becomes more desirable especially since a number of commentators have commented on the fact that the courts appear to have recognised that the legal convictions of the community impose standards of fairness and reasonableness on contracting parties in the light of the constitutional values,¹⁸ with Alkema J remarking that the *boni mores* covers acts which are ‘immoral, unethical and reprehensible’,¹⁹ and Bhana and Pieterse remarking how it encompasses considerations reflected in the Constitution.²⁰

It is not suggested that judges should be given the discretion to make decisions on what they believe is morally correct or on their own sense of justice; as was stated by Sachs J, ‘the legal convictions of the community should not be equated with the convictions of the legal community’.²¹ As was highlighted in chapter four, Davis feels that the call for the incorporation of constitutional values is not a call for judges to have the power to make subjective decisions, but is rather a call for the re-evaluation of the contractual rules in accordance with the Constitution.²²

As Louw has noted, the courts should not emphasise ‘fairness in the circumstances of any given case’, and that rather the ‘emphasis should be on an objectively verifiable ethical standard of conduct in contracting’, therefore the enforceability of the contract will not be determined in terms of the judge’s idea of fairness, but would rather be based on whether the *boni mores* would tolerate such a contract.²³

Another objection to the approach of the SCA is that simply it fails to meet the demands of the Constitution. Barnard-Naude has stated that the Constitution has given us the chance to interrogate and challenge the common law of contract²⁴ - a task which the courts have failed to undertake. As Bhana and Pieterse have noted, the courts seem to assume that the common

¹⁷ Louw (note 11 above) 72.

¹⁸ See for example Louw (note 11 above) 73 – 74 (and the sources mentioned there).

¹⁹ *Siyepu and others v Premier, Eastern Cape* 2013 (2) SA 425 (ECB) 54.

²⁰ D Bhana, M Pieterse ‘Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited’ (2005) 122 4 *SALJ* 894.

²¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 141.

²² Davis (note 16 above) 328.

²³ Louw (note 11 above) 75.

²⁴ Barnard-Naude (note 14 above) 156.

law and legal certainty is sufficient to bring about contractual fairness and justice, and that as a result the law of contract need not be altered.²⁵

Upon considering the variety of criticisms set out against the SCA's decision in the *Brisley* case (and those that followed it as referred to above), it seems safe to assume that not only is this judgment (and the court's approach on these issues) seriously flawed, but it is probably incorrect. This is especially poignant if one considers recent judgments from other courts (including both the lower courts as well as the Constitutional Court), who have made statements which appear to be in opposition to the findings of the SCA. With certain judgments which have been passed recently, one can see that the movement toward substantive fairness and contractual justice, which had to a significant extent been halted by the SCA, seems to be re-emerging.²⁶

A last factor to consider is the question why, if the law of contract already possesses the mechanism of public policy, why would another mechanism be needed? This is a simple issue to address, irrespective of whether one considers the *boni mores* and public policy to be the same or separate and dissimilar concepts. The simple answer is that thus far the use of public policy, although proving to be an invaluable tool to determine the enforceability of a contract, has been inadequate to provide sufficiently for substantive equity and fairness as its scope of operation is also limited. As a result many unfair, unreasonable and harsh contracts may be falling through the cracks.²⁷ Barnard-Naude has noted that as a result of the judgment in the landmark case of *Sasfin (Pty) Ltd v Beukes*²⁸ public policy may only be used by the courts in the clearest of cases, Barnard-Naude has argued that as a further result only the 'worst features of the system can be held in check'.²⁹ Also Naude and Lubbe have observed how public policy, as it emerged from the *Sasfin* case,³⁰ has been so restricted by the SCA in

²⁵ Bhana & Pieterse (note 23 above) 894.

²⁶ For example: *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); and *Siyepu and others v Premier, Eastern Cape* 2013 (2) SA 425 (ECB).

²⁷ The cases of *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) and *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) serve as very good examples of this fact.

²⁸ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

²⁹ Barnard-Naude (note 14 above) 174

³⁰ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

Brisley, that public policy is not of much use as it can only be applied where such application is well-established, and not to unestablished applications.³¹

Van der Merwe has identified how even where a contract is unfair, unreasonable or operates harshly, this does not mean that a court will find the contract to be contrary to public policy.³² Davis has also identified how the courts have referred to public policy as ‘a ritual incantation of the existence of the Constitution before moving on to deal with the "real" law of contract.’³³ It is submitted that this shows that a different mechanism is needed to deal with the specific issues of unfair, unreasonable or harsh contracts that the Constitution and its underlying values would not tolerate, and it is submitted that the *boni mores* is the ideal mechanism to do so, as it calls for a moral standard to be followed by the contracting parties. No community would wish for such unfair, unreasonable or harsh contracts to be enforced, a view which would be reflected in the *boni mores*. This is even more true in the context of our society which is based on our transformational and developmental Constitution.

Our system of contract law, as it stands, has not met the transformative demands of our Constitution. As Louw has observed, as it currently stands the law of contract ‘in effect, places in the hands of the economically powerful in society a potential weapon of mass destruction.’³⁴ Louw has argued that it is unimaginable that our society would not strive towards a law of contract which is fairer and ‘in which mutual respect and mutual responsibility towards the other’ is of the utmost importance.³⁵ Barnard-Naude has acknowledged that the courts’ refusal to incorporate normative values into the law of contract and failure to ‘accept the ethical element to contract as a foundational value’ is a sign of a ‘deeper illness’.³⁶ This illness, it is submitted, may well be cured through the incorporation of the *boni mores* and the other normative values. As Bhana has noted, these values are the principal tools which may be used to ensure the ‘exercise of social control over contractual

³¹ T Naude & G Lubbe ‘Exemption clauses — A rethink occasioned by *Afrox Healthcare Bpk V Strydom*’ (2002) 122 *SALJ* 442.

³² S W J Van Der Merwe ... *et al* (note 2 above) 172; see also Barnard-Naude (note 14 above) 174- Barnard-Naude states that the fact that a contract is unreasonable, harsh or unconscionable may not be enough for the contract to be declared unenforceable.

³³ Davis DM "Developing the Common Law of Contract in the Light of Poverty and Illiteracy: The Challenge of the Constitution" (2011) *Stell LR* 847.

³⁴ Louw (note 11 above) 76

³⁵ Louw (note 11 above) 74

³⁶ Barnard-Naude (note 14 above) 175

autonomy’,³⁷ stating further that where the exercise of freedom of contract unreasonably or unjustifiably disregards the rights of another, then the principle of freedom of contract must be limited.³⁸ As has previously been identified, the Bill of Rights recognises that there is often a need to balance the interests of the parties, which may demand such limitation of the rights and freedoms of the individual in order to benefit the interests of the many. And those interests, as well as the legal convictions of ‘the many’, are reflected in the *boni mores*.

³⁷ D Bhana ‘Constitutionalising contract law: Ideology, judicial method and contractual autonomy’ (unpublished PhD thesis, University of the Witwatersrand, 2013) 62.

³⁸ *Ibid* 69.

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