

The Role of Unequal Bargaining Power in Challenging
the Validity of a Contract in South African
Contract Law

By

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Micosha Palanee

My deepest appreciation to

My Parents

Without whom I would not have found the courage to pursue my dreams.

Dr Louw

For his patience, guidance and generosity.

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1. BARGAINING POWER

1.1 Introduction

Contractual relationships are created every day, but often one party to the contract is in a more powerful position than the other. In some instances an inevitable result is the abuse of that power. South Africa is a country plagued with poverty and illiteracy; therefore it is not hard to believe that people are often left with no choice but to enter into a contract weighted unfavorably against them. It is apparent that society is racked with abuse of unequal bargaining power between contracting parties. Under our law of contract, the application of unequal bargaining power, as a factor in challenging the validity of a contract, has been inconsistent as the weight afforded to unequal bargaining power when challenging the validity of a contract is uncertain. The purpose of this dissertation is to provide an evaluation of the current position on the role of unequal bargaining power and to speculate regarding its potential role in the future, by critically analyzing both the limited role and, more recently, the development of what appears to be a self-standing role afforded unequal bargaining power in South African contract law.

1.2 The Definition of Bargaining Power

Upon an examination of the various ways in which English law deals with unfair contracts, Beale concluded that the inequality of bargaining power is different in each case. This means that whether or not a contract is unfair due to inequality of bargaining power will not be able to be determined using an objective tool such as a definition of bargaining power. In other words, the unfairness of a contract can only be determined from an analysis of each party's bargaining power separately, on the facts of each case.¹ The reason each party's bargaining power must be assessed separately is because a party's bargaining power is not necessarily dependent on the other party's bargaining power. In other words one party's weakness may not always be the other party's strength. To illustrate this point Sharrock provides the following example²:

¹ H Beale 'Inequality of Bargaining Power' 1986 6 *OJLS* 123 125

² R Sharrock 'Relative Bargaining Strength and Illegality Uniting Reformed Church, De Doorns v President of the Republic of South Africa 2013 (5) SA 205 (WCC): cases' (2014) 35 *Obiter* 136, 141.

A is in a strong bargaining position relative to B because A is under no pressure to make the contract in question with B and is able to offer B pre-formulated (standard) terms and tell him to “take it or leave it”. B may not need to make the contract with A and may be quite content to “leave it” and go elsewhere or do without. It is only if B needs to make the contract and does not have the option of going elsewhere (because there is not a reasonably competitive range of alternative parties available with whom he or she may make the contract) that A’s bargaining position is superior to B’s and, accordingly, there is bargaining inequality.

The fact that bargaining power is not yet defined in our law must not prevent academics from studying the conditions under which the courts or legislation does offer relief.³ Beale explains that inequality of bargaining power ‘can mean ignorance, vulnerability to persuasion, desperate need, lack of bargaining skill or simple lack of influence in the market place’⁴ while Barnhizer describes bargaining power as the ‘power to obtain a preferred outcome in a transaction’.⁵

Beale also commented on Lord Denning’s proposal, that inequality of bargaining power, unconscionability and reasonableness could be combined to form a general doctrine of inequality of bargaining power. Beale is of the opinion that even though the House of Lords deemed such a doctrine unnecessary the very essence or aim of the doctrine of inequality of bargaining power may persevere.⁶ Lord Denning explains that should English law recognise inequality of bargaining power, such a doctrine ‘gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs and desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other’.⁷

Thal states that the doctrine of inequality of bargaining power, which would include a standard of fairness, would limit the concept of freedom of contract as it prevents a person from validly entering into certain types of contracts, such as unfair contracts. He also suggests that the courts should not only be concerned with the enforcement of contracts but also the fairness of contracts.⁸ It is also important to note that freedom of contract and an

³ Beale (note 1 above) 125.

⁴ Ibid 125.

⁵ DD Barnhizer ‘Inequality of Bargaining Power’ (2005) 76 *U. Colo.L.Rev.* 139, 152.

⁶ Beale (note 1 above) 125.

⁷ *Lloyds Bank v Bundy* (1975) QB 326, 339.

⁸ SN Thal ‘The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness’ 1988 8 *OJLS* 17, 21.

equity principle such as a doctrine of inequality of bargaining power are not contrasting concepts, rather they are complementary. It is submitted that when both these concepts are realised, these concepts balance out the unwanted extremes of each concept.⁹ When two parties engage in bargaining, such conduct sanctifies the promise or contract that follows. Based on such a premise it follows that it is the act of bargaining that is the basis of the principle of freedom of contract and the reason why a bargain that is made must be upheld (*pacta sunt servanda*).¹⁰

When the bargaining power of the parties is analysed, this immediately calls for consideration of the fairness and equity of the contract. Although the ‘doctrine of inequality of bargaining power’ is not recognised in South African law, and there is no authoritative definition of bargaining power, it can be extrapolated from judgments that the courts will protect against certain situations of improper conduct in terms of contract law. The gist of bargaining power can be described as the capacity to influence the content of the contract.¹¹ In order to define the term ‘bargaining power’, Sharrock makes reference to several factors recognised in South African law that are improper and limit a person’s bargaining power.¹² These factors are:

- no realistic bargaining alternatives available;
- a lack of bargaining skill or inability to bargain due to a lack of education, lack of knowledge of the subject matter of the contract, inexperience in commercial or legal matters, or inability to read or understand the language of the contract (all factors that are prevalent in South Africa);
- a physical or mental illness, mental disability, impaired faculties perhaps due to old age;
- a lack of access to independent advice or material information concerning the transaction; and
- an emotional dependence on the other contracting party.¹³

⁹ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) 13.

¹⁰ Thal (note 8 above) 27.

¹¹ Sharrock (note 2 above) 140.

¹² *Ibid* 141.

¹³ *Ibid* 141.

1.3 The Importance of Equality

It is submitted that bargaining power is important in the context of a contract because an analysis of the bargaining power of each party will reveal whether or not the constitutional value of equality may have been implicated. The role of equality in a system of law is of immense value as it is aimed at neutralizing inequalities (something which, of course, is very prevalent in South Africa). Section 1(a) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) provides that equality is one of the values upon which our sovereign, democratic state is founded. The ideal of equality is further provided for in Section 9 of the Constitution, which provides that the right to equality includes the full and equal enjoyment of all rights and freedoms. By giving equality the strength to infuse itself in the law as both a right and a value, the Constitution seeks to protect against past injustices and the resultant inequalities.¹⁴

The importance of equality is apparent when one considers that it is both an entrenched fundamental right and a foundational value in terms of the Constitution. As a right, equality can be directly relied upon, as it is the source of constitutional entitlements and also imposes obligations. As a value, equality allows substantive principles to be the guiding force in determining the lawfulness of a matter, even if not directly evoked because equality plays an informative role as a standard which all law must meet in order to be in line with the Constitution.¹⁵

Section 39(2) of the Constitution provides that a court, when interpreting the Bill of Rights, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and is under a duty to develop the common law in line with the spirit, purport and objects of the Bill of Rights. This clearly means that the court may of its own accord raise the issue of equality, even if the parties have not done so. This emphasises the relevance of the founding values of the Constitution to anyone who comes into contact with the law.¹⁶

¹⁴ T Deane & R Brijmohanlall 'The Constitutional Court's approach to equality' (2003) 44 *Codicillus* 92, 93; S Jagwanth 'Expanding Equality' (2005) *Acta Juridica: Advancing Women's Rights: The first decade of democracy* 131, 133; C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253, 258.

¹⁵ Jagwanth (note 14 above) 313.

¹⁶ *Ibid* 142.

As it is illogical to expect everyone to be equal in every respect, the Constitution requires that equality must be applied in a substantive, rather than formal, manner. A formal consideration of the state of equality of a situation does not take into account that not all people are faced with the same social and economic realities.¹⁷ Substantive equality can be defined as an ideal that is ‘remedial, restitutionary, context-sensitive, historically self-conscious, and group-based in nature’.¹⁸ The concept of substantive equality forges ‘mutually supportive human relationships’¹⁹ at every level of society that centres on each person reaching their full potential as free citizens. This is how the value and right of equality promotes transformation from an individualistic, class conscious state to a more democratic, egalitarian state.²⁰ A substantive equality approach demands a consideration of the social and economic realities of the past that have resulted in the inequalities faced by people today, which also provides for the value of human dignity.²¹ Heralded as ‘a remedy to systemic and entrenched inequalities’ substantive equality demands of judges and lawyers to determine and understand the context of the matter at hand by interrogating the relationship between the vulnerable and the powerful to determine the parties’ social and economic situations.²² In light of the above description of substantive equality, it is submitted that substantive equality demands a consideration of the context of the matter, which includes the bargaining power of the parties.

1.4 The Effect of Substantive Equality on the Classical Liberal Theory of Contract Law

Contract law is founded on principles of *pacta sunt servanda* and freedom of contract. In other words, all contracts that are seriously entered into must be enforced because everyone has the freedom to contract.²³ South African contract law is characterized by a ‘*laissez-faire* economic liberalism’ and a ‘noninterventionist, individualistic approach’.²⁴ This ethos can be described as encouraging ‘the pursuit of self-interest’ to the exclusion of a consideration of

¹⁷ Deane & Brijmohanlall (note 14 above) 93-94

¹⁸ D Bhana, M Pieterse ‘Toward a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited’ 2005 *SALJ* 865, 880.

¹⁹ *Ibid*, 880.

²⁰ Albertyn (note 14 above) 255; Bhana & Pieterse (note 18 above) 880.

²¹ Deane & Brijmohanlall (note 14 above) 94; Jagwanth (note 14 above) 132.

²² Albertyn (note 14 above) 259; L Hawthorne ‘Legal Tradition and the Transformation of Orthodox Contract Theory: The Movement from Formalism to Realsim’ (2006) 12 *Fundamina: A Journal of Legal History* 71, 88.

²³ Bhana & Pieterse (note 18 above) 866; L Hawthorn ‘The ‘New Learning’ and Transformation of Contract Law: Reconciling the Rule of Law with the Constitutional Imperative to Social Transformation’ (2008) 23 *SA Publik-SA Public Law* 77, 80.

²⁴ Bhana & Pieterse (note 18 above) 867.

others' interests.²⁵ In the late 18th century the principle of freedom of contract incorporated a requirement of fairness in contractual dealings. However in the 19th century, with the rise of the commercial class, freedom of contract abandoned the role of ensuring good faith relations and equality considerations and focussed on ensuring performance of contracts.²⁶

In terms of this liberal theory of contract law, judicial intervention is generally viewed as disturbing the principle of freedom of contact. Therefore, the manner in which substantive equity is enforced in contract law is being neglected by the courts, who focus more on the formal validity and enforcement of contracts.²⁷ On this interpretation of *pacta sunt servanda* and freedom of contract, the law of contract can be said to be in line with the classical liberal theory.²⁸

In order to properly realise the value of substantive equality in contract law it is imperative for the courts to adopt a more normative approach,²⁹ involving a consideration of the realities faced by people, realities that may limit their bargaining power. Under a classical liberal understanding of the law, the protection of the freedom of an individual is likely to be favoured over issues of equality, which would rarely enter the equation. However, now that equality is considered in the context of a transformative tool under the Constitution, the freedom of an individual must be considered along with the demands of substantive equality. Therefore a proper consideration of equality would have a limiting effect on individualistic notions.³⁰ Based on this point it is submitted that upon a full realisation of the value of substantive equality, the negative aspects of the classical liberal theory of contract law can be neutralised.

Chapter 2 of this study will critically analyze the conservative manner in which courts have dealt with substantive equality to date, and by implication the relative bargaining power of contracting parties. This conservative stance has been criticized for not facilitating a proper realization of the constitutional values of freedom, dignity and equality.³¹ This study will

²⁵ AJ 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* 155, 164.

²⁶ Ibid 162.

²⁷ Bhana & Pieterse (note 18 above) 867.

²⁸ Ibid 868.

²⁹ Ibid 872.

³⁰ Ibid 880.

³¹ Ibid 865.

consider whether, upon a full realization of these values, unequal bargaining power will be afforded a different, and possibly more prominent role in contract law.

Chapter 3 will analyze the context in which contracts are entered into, and the many factors that limit a party's bargaining power. There are many limitations on bargaining power such as issues of time, effort and cost, psychological factors, the reality of competition in the market place and existence of monopolies. It is only upon an examination of the realities faced by each party in each case that a court can determine if there was improper conduct. This chapter will illustrate how contract law is in desperate need of scrutiny through the lens of substantive equality.

Contracts are concluded every day and such inequalities are prevalent in many of them. These unfair practices have been recognized by legislation, in the form of (for example) the Consumer Protection Act³² and Labour Relations Act,³³ which govern the relationship between certain contracting parties. This is indicative of the fact that often in contractual relationships there is an abuse of power, and without the strength of the law 'the strong' will continue to oppress 'the weak' and the state has taken protective measures by passing such legislation.³⁴

There are also measures in ordinary contract law to deal with improper conduct in terms of a contract, such as already defined concepts of duress, undue influence and misrepresentation. However, it is submitted that substantive equality can be more fully realized if these concepts are adapted to properly consider the reality of unequal bargaining power in each case. In this regard the focus of this study will be on what will be suggested are eminently suitable mechanisms for this purpose, namely the concepts of good faith, Ubuntu, public policy and the development of a doctrine of economic duress.

Chapter 4 will examine a number of judgments that were characterized by a cautious approach to the defense of public policy, even though the concept of public policy is still referred to by many judges as a fundamental concept in our society.³⁵ It would appear that

³²68 of 2008

³³66 of 1995

³⁴ Hawthorn (note 23 above) 81.

³⁵*Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* 2013 (5) SA 205 (WCC); *Brisley v Drotosky* 2002 (4) SA 1(SCA)

these concepts are still not sufficient to invalidate a contract characterized by unfairness, because the focus of the courts is on enforceability (judged predominantly on a formal level) rather than determining substantive fairness of the contract. However, upon an analysis of recent case law, it is possible to conclude that concepts such as public policy, good faith as well as Ubuntu are beginning to find a more solid footing in contract law. After considering such transformative progress from form to substance, this study examine whether the current role of unequal bargaining power is likely to persist in light of such developments.

Chapter 5 will suggest a doctrine of economic duress as a mechanism to better realize the inequalities faced by contracting parties. As is evident in South African society, there is an ever-increasing gap between the commercial class and the working class. When consideration is given to the prevalence of poverty and illiteracy, this results in an environment where instances of economic duress and undue influence may run rife in contractual transactions on a daily basis. This study will explore whether substantive equity and equality in contractual relations is actually realized by these two concepts.

The ultimate goal of this study is to shed light on the appropriate role to be played by unequal bargaining power in the future development of South African contract law.

To further illustrate the need for reform within contract law, the South African Law Reform Commission proposed a draft bill on unfair contracts and contract terms, which recommended that courts should be allowed to strike down a contract that is found to be unreasonable, unconscionable or oppressive. The Commission stated that South African law is out of step with foreign law, which has generally accepted measures to regulate the fairness of contracts. The Commission pointed out that this may discourage foreign investors from considering South Africa when our courts are unable to determine the substantive fairness of a contract.³⁶

However, Parliament has not yet considered the proposed draft bill, and Brand comments that it is unlikely that the legislature will promulgate such legislation as envisioned in the Law Reform Commission's proposed draft bill, given that the legislature has only promulgated

³⁶SA Law Commission Project 47 *Unreasonable Stipulation in Contracts and the Rectification of Contracts* (April 1998) 14.

legislation in terms of specific types of contracts³⁷ (such as consumer protection and labour legislation). However, as will be discussed in chapter 2, the courts are well equipped to remedy unreasonable, unconscionable and oppressive contracts by establishing a more normative approach under the common law.³⁸

³⁷ 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) 126 *SALJ* 71, 77.

³⁸ T Naude 'Unfair Contract Terms Legislation: The Implications of Why We Need it for its Formulation and Application' (2006) 3 *STELL LR* 361, 362; Bhana & Pieterse (note 18 above) 872.

2. THE COURTS TREATMENT OF UNEQUAL BARGAINING POWER

2.1 Introduction

In a society like ours founded in a largely capitalist environment,³⁹ a person can start a business, own it privately if they wish and keep all profits for themselves. Concepts such as autonomy, self-determination, and the freedom to contract with minimal state interference create an environment for private business to grow exponentially.

Any transaction that occurs in an economy or market is governed by a contract entered into by the parties to the transaction. In such a competitive environment it is not hard to imagine that contracts between private individuals may not exemplify perfect equality between the parties, as one party is often in a much more powerful bargaining position and each party, generally, wants to secure a deal that is in their best interests.

It is impossible to require that each person be on absolute equal standing for a contract to be valid,⁴⁰ because everyone has a different skill set, a different background, and often unequal access to resources. So it follows that these differences cannot always render a contract invalid. Ideally, a court will accept certain imbalances in bargaining power as being present, but will only see fit to intervene when one party has taken an unfair advantage of the other and acted contrary to good faith.⁴¹ It is submitted that this would entail a substantive approach to equality in contract law.

Many legal academics are of the opinion that the current interpretation and application of the law of contract (which lacks substantive equality considerations⁴²) favours the dominant class, by legitimising concepts and ideals that are in the interests of this dominant class, so that the dominated class accepts this domination as being the correct state of affairs.⁴³ The dominant classes comprise of the commercial class while the dominated class can be summarised as the working class.

³⁹ D Bhana 'The Law of Contract and the Constitution: *Barkhuizen v Napier* (SCA)' 2007 *SALJ* 269, 278.

⁴⁰ Graham Glover *The Doctrine of Duress in the Law of Contract and Unjustified Enrichment in South Africa* (PHD Thesis, Rhodes University, 2004) 155-156.

⁴¹ Glover (note 40 above) 155; MH Ogilve 'Economic Duress, Inequality of bargaining power and Threatened Breach of Contract' (1981) 26 *McGill Law Journal* 289, 311.

⁴² Barnard-Naude (note 25 above) 162- 163; Bhana & Pieterse (note 18 above) 872.

⁴³ Barnard-Naude (note 25 above) 160.

A close examination of earlier contract law cases will illustrate the sometimes blatant sidelining of the weak socio economic position of the dominated class to maintain the tyrannical reign of the oppressive commercial class.⁴⁴ This has been facilitated on occasion by the courts, who have not fully realised constitutional values due to a mechanical application of principles of contract law without considering the courts' transformative mandate⁴⁵. This distinctive treatment of constitutional values can be illustrated by the manner in which courts deal with substantive equality and thereby the abuse of superior bargaining power that occurs between most contracting parties.

An examination of the case law will further reveal a trend which favours the belief that judicial interference in terms of the substance of a contract is not in line with the value of freedom of contract.⁴⁶ This belief begs the question of whether other underlying values of contract law are shown the same measure of protection. It is submitted that values of equity and good faith are not,⁴⁷ and disparity in approach will be questioned.

Some academics are of the opinion that only the enactment of legislation can remedy the situation by giving the courts a mandate to examine the fairness and reasonableness of a contract.⁴⁸ However, it is respectfully submitted that the courts already are subject to a duty (and are well equipped) to ensure that contracts are substantively fair and equitable,⁴⁹ as will be revealed in the following discussion on recent contract case law.

The rest of this chapter will discuss the cases of *Brisley v Drotzky*,⁵⁰ *Afrox Healthcare Bpk v Strydom*,⁵¹ and *Napier v Barkhuizen*,⁵² to establish the manner in which the Supreme Court of Appeal (SCA) has dealt with constitutional values in contract law. This will be followed by consideration of the pivotal Constitutional Court (CC) judgement of *Barkhuizen v Napier*,⁵³ after which the focus will shift to distinctly different judgements by the lower courts in

⁴⁴ Barnard-Naude (note 25 above), 162.

⁴⁵ Hawthorne (note 22 above) 75.

⁴⁶ J Lewis 'Fairness in South African Contract Law' (2003) 120 *SALJ* 330, 330; Bhana & Pieterse (note 18 above) 867.

⁴⁷ Barnard-Naude (note 25 above), 184.

⁴⁸ Lewis (note 46 above) 362.

⁴⁹ Naude' (note 79 above) 362; Bhana & Pieterse (note 18 above) 872.

⁵⁰ *Brisley* (note 35 above).

⁵¹ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)

⁵² *Napier* (note 9 above) 14.

⁵³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

*Jordan v Farber*⁵⁴ and *Uniting Reformed Church, De Doorns v President of the Republic of South Africa*.⁵⁵

2.2 *Brisley v Drotsky*

The case of *Brisley v Drotsky*⁵⁶ is considered a landmark judgement in which the SCA banished the concepts of good faith, boni mores and fairness to the realm of ‘soft law’, as concepts lacking sufficient weight to affect the validity of a contract. The court explained that these concepts are not independent, substantive rules that can be directly applied by courts, rather they are abstract values that ‘perform creative, informative and controlling functions through established rules of contract law’⁵⁷. In terms of bargaining power, although the court did acknowledge that there is often an inconsistency in the levels of bargaining power between contracting parties, it surmised that in terms of the non-variation clause which was at issue in this case the relative bargaining positions did not come into issue. This case analysis will outline the harsh reality that if good faith, boni mores and fairness are afforded such content as they are given in this case, the result will have a domino effect on the manner in which bargaining power is dealt with by the courts. In other words the version of contract law that fully realises the concept of good faith, boni mores and fairness will more easily identify and effectively deal with abuses of bargaining power in contractual disputes.

The case of *Brisley v Drotsky* concerned a lease agreement which contained a non-variation clause. The lessee relied on an oral variation made to the contract, while the lessor relied on the *Shifren* principle, which states that, in terms of a non-variation clause in a contract, a variation will only be valid when it is reduced to writing and signed by both parties. In a counter argument the lessee put forward that Olivier J’s minority judgement in *Saayman*⁵⁸ showed that the courts could strike out a clause in a contract if it was found to be contrary to public policy. In the case of *Saayman* Olivier J argued that the concept of good faith is inherent in the concept of public policy and it is required that all contracts are entered into in good faith. Ultimately, Olivier J held that it was within the courts’ power to strike down a contract that is contrary to the concept of good faith, and therefore contrary to public policy.

⁵⁴ *Jordan v Farber* 1352/09 [2009] ZANHC 81 15 December 2009 (unreported) 2.

⁵⁵ *Uniting Reformed Church, De Doorns* (note 35 above).

⁵⁶ *Brisley* (note 35 above).

⁵⁷ Brand (note 37 above) 81.

⁵⁸ *Eerste Nationale Bank van Suidelike Africa Bpk v Saayman* 1997 (4) SA 302 (SCA).

The court in *Brisley* disagreed with the lessee and explained that the minority judgement in *Saayman* was characterised by a value judgement of one judge, with whom the other four judges on the bench in that case disagreed that such principles, if contravened, are sufficient for a court to interfere in contractual relations of private parties. The court warned that when judges use their own moral compass to determine if a contractual provision should be enforced or not, there is a real danger of legal and commercial uncertainty.⁵⁹ If the law was made by a value judgement in each case, the boundaries of what is right and wrong would change with every case and no one would know with accuracy, where those boundaries lie. The court therefore maintained that it does not have the power to invalidate an otherwise valid contract.

Olivier JA did concur with the majority in *Brisley*, that the *Shifren* principle should not be simply overturned because it would most definitely lead to uncertainty and a great measure of chaos. However in his judgement he emphasised an important point regarding the majority's foreboding prediction of legal uncertainty should principles like good faith be applied directly to contract law, which was not in line with the majority's opinion. Olivier JA is of the opinion that the principle of good faith, founded on constitutional values, should be more fully realised in contract law. As paraphrased by Bhana and Pieterse, Olivier JA surmises that a court should task itself with protecting those in a weaker bargaining position as such an approach will be in line with 'societal notions of contractual justice'⁶⁰ and that the resulting legal uncertainty was necessary to create a justice system that cherishes legal fairness as well as legal certainty. The clear message emanating from Olivier JA's judgement is that the next step for contract law is to reach a point where the need for legal certainty is not abandoned but the social realities of a person are equally taken into account.

Furthermore, the majority of the court reasoned that once the nature of the non-variation clause was considered (namely that it serves to ensure all variations to the contract are reduced to writing and signed by both parties), it becomes apparent that both the weak and strong party are equally protected by such a clause. The court also surmised that a non-variation clause (which is purported to protect both parties) is freely negotiated into a contract by both parties, and therefore discrepancies in bargaining power are not an issue in terms of

⁵⁹ Brand (note 37 above) 81.

⁶⁰ Bhana & Pieterse (note 18 above) 873.

non-variation clauses. Cameron JA, in a separate concurring judgement, considered the content of the values that underlie the Constitution. The judge demonstrated an interpretative approach as he acknowledged the court's duty to reconsider the *Shifren* principle, a common law principle, in light of its duty to develop the common law in line with constitutional values (which seemed to deviate from the usual positivist approach taken by the majority).⁶¹ Cameron JA reasoned that the *Shifren* principle has been an accepted part of contract law for four decades and has remained so because of the commercial and social certainty it has brought to contract law. He stated that '[c]onstitutional considerations of equality do not detract from it. On the contrary, they seem to me to enhance it', and he further agreed with the majority that a non-variation clause seeks to protect both weak and strong parties and perhaps it even protects the weaker party more.⁶²

The court did not consider the realities faced by each party and how these factors effected their bargaining power. In this case the lessor had purchased a standard form lease agreement from a shop. The terms of such an agreement are weighted in favour of the lessor as the lessor was protected by an exemption clause while the lessee was obligated to pay for any damages he caused to the property through negligence or otherwise. Additionally, the non-variation clause usually appears to be worded in favour of the lessor only and the lessor is permitted to cancel the contract for certain reasons while the lessee has no such right to cancellation.⁶³ In light of such realities it is unlikely that the lease agreement embodied substantive fairness from the perspective of the lessee.

It is apparent that this particular conclusion by the court, that the non-variation clause seeks to protect both parties, is based on the premise that the clause was in fact freely negotiated and agreed upon. The court here clearly favoured freedom of contract over any equality considerations.⁶⁴ As Bhana and Pieterse argue, there is a worrying version of freedom applied by the court in this case.⁶⁵ Freedom of contract can be described as the epitome of a non-interventionist and individualistic approach to contract law.⁶⁶ In other words a person is free to choose with whom they want to contract and on which terms they will contract, and any interference from forces outside of themselves is approached with caution. The rules of

⁶¹ Lewis (note 46 above) 337.

⁶² Brisley (note 35 above) 90.

⁶³ Bhana & Pieterse (note 18 above) 885.

⁶⁴ Hawthorne (note 22 above) 86.

⁶⁵ Bhana & Pieterse (note 18 above) 883.

⁶⁶ Ibid 867.

contract law became so defined that they could be applied mechanically in each situation because any interference by the judicial system is seen as inimical to the concept of individual autonomy.⁶⁷ This led to courts concentrating on the formal validity of a contract, and the importance of the enforcement of contracts rather than the substantive fairness of the contract.⁶⁸ An unfortunate result is that defined rules on concepts like fairness, good faith and the boni mores were not sufficiently established in contract law.

Academic critics believe that a version of contract law has emerged in which the interests of the commercial class trumps those of the non-commercial or working class.⁶⁹ Barnard-Naude describe this trend as the hegemonic nature of freedom of contract within contract law.⁷⁰ In other words, the current version of contract law favours the interests of the commercial class over those of the working class. To further elaborate, the courts seem to attach more weight to concepts such as the sanctity of contract and individual autonomy, which centres around enforcing contracts (which benefit the commercial class) rather than the courts concentrating on determining whether concepts of fairness, good faith and the boni mores are evident in the terms of, and circumstances surrounding, the contract. This version of contract law will be discussed in more detail in chapter 4.

This understanding of contract law supports a significantly lacking version of freedom of contract. Bhana and Pieterse allude to the fact that there is a reason why the Constitution does not explicitly entrench the freedom to contract. With reference to the global perspective of human rights lawyers, on such economic liberties such as freedom of contract being entrenched in international law and being awarded fundamental human rights status, perhaps our Constitution does not explicitly provide for a freedom to contract because of its bias towards the interests of the commercial class, thus leaving the working class in a vulnerable position.⁷¹

The CC, in the case of *Ferreira v Levin*⁷², was of the opinion that the freedom of a person would only in rare cases concern more than the physical integrity of a person, and that the court was not prepared to comment on the impact which a person's freedom may have on

⁶⁷ Bhana & Pieterse (note 18 above) 867; Hawthorne (note 22 above) 78.

⁶⁸ Hawthorne (note 22 above) 76.

⁶⁹ Ibid 75.

⁷⁰ Barnard-Naude (note 25 above), 159.

⁷¹ Bhana & Pieterse (note 18 above) 878.

⁷² 1996 (1) SA 984 (CC).

other liberty interests such as the freedom of contract. Bhana and Pieterse, with reference to Bronsword and Van der Walt, observe that a very narrow version of freedom is applied in our courts, and this version of freedom falls short of the classical liberal ideal of freedom, which includes the freedom of the person, freedom of economic activity and freedom of association and other rights based on the classical concept of liberty.⁷³

Most importantly, for the purposes of considering bargaining power, this version of freedom does not look past the physical integrity of a person, thereby circumventing the social realities that weigh on a person's freedom. At this point it is interesting to note how Barnard-Naude explains the oppression by the dominant commercial class, namely that it may be evident by a simple 'silencing of an alternative perspective'.⁷⁴ It becomes apparent that the court in *Brisley*, in stating that the issue of the bargaining power of the parties does not arise regarding the non-variation clause avoided considering the circumstances that may have weighed on the freedom of the weaker party to agree to the non-variation clause. In other words the court silenced this alternative perspective.

Ultimately it was the ominous prediction by the majority in *Brisley* of impending chaos should such abstract values of good faith, fairness and the boni mores be directly applied to a determination of a contract's validity, that spawned a string of cases which has cemented the individualistic and autonomous interests of the commercial class into contract law, thereby conveniently side-stepping the vital need to take into consideration the social realities that weigh on a party's freedom to contract, or in other words their bargaining power.

2.3 *Afrox Healthcare Bpk v Strydom*

Shortly after *Brisley* came the case of *Afrox Healthcare Bpk v Strydom*⁷⁵. In this case Strydom was a patient in a private hospital owned by Afrox. Strydom had signed a standard form contract which contained an exemption clause excusing the hospital from negligence committed by the hospital's nursing staff. Strydom sued Afrox for the negligence he suffered and Afrox relied on the exemption clause to escape liability. Strydom's defence was two-pronged: he first relied on section 27 of the Constitution (the right for every person to medical treatment) and secondly that the clause was simply contrary to good faith, public

⁷³ Bhana & Pieterse (note 18 above) 877; Barnard-Naude (note 25 above), 197.

⁷⁴ Barnard-Naude (note 25 above), 160.

⁷⁵ *Afrox* (note 51 above).

policy and the spirit of the Bill of Rights, which Bhana and Pieterse explain, would include the right to reasonable and professional care⁷⁶. Strydom further submitted that the clause was contrary to good faith, public policy and the spirit of the Bill of Rights because he had inferior bargaining power when he was confronted with the standard form contract at the hospital.

The SCA here held that bargaining power was a factor to be considered in the determination of whether a contract was contrary to public policy. However, even if a party was in a stronger bargaining position, it cannot be said that the contract favours that party and is therefore against public policy.⁷⁷ The court held that there was no evidence to prove that Strydom was actually in a weaker bargaining position when the contract was signed. However it is submitted that if the context of the contract was properly taken into consideration, the unequal bargaining positions of the parties would have been obvious. The reality facing many patients who sign the admission form may have already made arrangements⁷⁸ that would be impractical to cancel or postpone because of an exemption clause in the admission form.⁷⁹ The failure of the court to properly consider the realities of the parties is indicative of political and economic policies influence a formalistic application of contract principles over a context sensitive approach in line with substantive equality.⁸⁰

Furthermore the court held that since Strydom had not contended that the damages he suffered was due to the gross negligence of an employee of the hospital, therefore it would be irrelevant to consider whether the exemption clause runs afoul of principles of public policy. Immediately it would seem that the SCA is hesitant to develop the law on exemption clauses to include public policy considerations. This would further support the contention that the law is individualistic in nature.

Bhana and Pieterse believe that Brand JA's argument, which relies on Cameron JA's judgement in *Brisley*, is cause for concern stemming from the conclusion reached by Brand JA, that freedom of contract, and thereby sanctity of contract, is in fact a constitutional value. Furthermore Brandt JA reiterated the prediction of chaos and uncertainty should abstract

⁷⁶ Bhana & Pieterse (note 18 above) 875.

⁷⁷ *Afrox* (note 51 above).

⁷⁸ Such as taken leave from work, decided to have an operation with a specific doctor.

⁷⁹ Naude' (note 79 above) 368; T Naude, G Lubbe 'Exemption clauses- Occasioned by *Afrox Healthcare Bpk v Strydom*' 2005 SALJ 441, 461.

⁸⁰ Hawthorn (note 23 above) 88.

values such as public policy be directly applied to contract law.⁸¹ These findings held by Brand are described as erroneous, worrying and out of step with the constitutional ethos⁸².

Freedom of contract is not expressly provided for in the Constitution, perhaps there is a reason why this is so. Many human rights lawyers, on a global level, are against the idea of trade related rights such as freedom of contract being entrenched in international law, because of the version of law it created, namely a version of law that supports the interest of the commercial class.⁸³

From the above discussion of *Brisley* and *Afrox* it is clear that freedom of contract is applied in such a way that it has become a concept that is deeply entrenched in the common law, while the values of dignity and equality are denied the same application in order to temper freedom's undesirable excesses. The constitutional value of equality would demand an examination of the realities faced by each party, which includes the bargaining power of each party. The *Afrox* judgement has been described as illustrating 'the tension between adherence to the rule of law and application of norms, which promote substantive justice'.⁸⁴

In South Africa, given the social and economic reality, often the bargaining power of a person is restricted, if not totally absent. The reality that faced the parties in both these cases (the lease agreement in *Brisley* and the hospital admission form in *Afrox*) cannot be said to have been considered in light of the context-sensitive constitutional value of equality, and therefore the value of freedom of contract was given an undesirable status, which is not tempered with realities faced by the relevant contracting parties.

Naude and Lubbe propose that, if the facts of *Afrox* were viewed through the context-sensitive teleological approach, the courts' treatment of freedom of contract may have been different.⁸⁵ This approach will now be considered to illustrate a substantive approach to the facts in *Afrox*. The teleological approach is based on an 'essentialia-naturalia model' and requires a contract to be examined in its specific context to determine the nature and essence, or end purpose, of the contract. Once the nature and essence is determined, certain

⁸¹ Bhana & Pieterse (note 18 above) 883.

⁸² Ibid 883.

⁸³ Bhana & Pieterse (note 18 above) 877.

⁸⁴ Hawthorn (note 23 above) 88.

⁸⁵ Naude & Lubbe (note 79 above) 447.

obligations become apparent.⁸⁶ The difference between the essentialia and naturalia is described as follows:

The essentialia of a contract were regarded as the obligations entailed by its definition. They are included in or encompassed by 'the concepts used to formulate the definition'. The naturalia or natural terms of a contract were the means to the end expressed in the definition of the contract. That a party who desired the end would also desire the means, justified reading terms into the contract.⁸⁷

The teleological approach requires that the terms of the contract agreed to by the parties must not be contrary to the end purpose or essentialia of the contract. This places a limitation on what the parties could agree upon.⁸⁸ Although this approach had been side-lined due to the rise of the commercial class, and with it the classical liberal theory, this line of reasoning is in the process of being resurrected in modern legal theory and is still reflected in context-sensitive doctrines of contract law.⁸⁹

Evidence of such an ideology is present in the context of the rules regarding sale in contract law. As observed by Naude and Lubbe, the case of *Vrystaat Motors v Henry Blignaut Motors*⁹⁰ is illustrative of this approach. In this case it was found that even when a clause exempting liability in terms of eviction is present in a contract, a seller is duty bound to pay back the purchase price upon eviction of the purchaser. The reasoning is that the principle of reciprocity provides that the seller will give undisturbed possession of the property in exchange for the purchase price. It follows that if the seller is allowed to exclude that duty of reciprocity, because of an exemption clause excluding his liability in terms of an eviction, this exclusion clause will run contrary to the essence of the contract.⁹¹

It is important to note that this approach would not function without a consideration of the context of the contract and a recognition of the human virtues demanded as a result of concluding a contract. These virtues, such as promise keeping, liberality and commutative justice promote an ideal of a better life in which people maintain a moral standard in their transactions.⁹² Such an ethical approach which looks to the context of the matter, while demanding a standard of moral behaviour, is an important aspect of the law according to

⁸⁶ Naude & Lubbe (note 79 above) 446.

⁸⁷ Ibid 446.

⁸⁸ Ibid 447.

⁸⁹ Ibid 447-448.

⁹⁰ 1996 (2) SA 448 (A).

⁹¹ Naude & Lubbe (note 79 above) 449.

⁹² Ibid 450.

modern legal theory, as stated by Naude and Lubbe⁹³ and will be discussed further on in this study.

In *Afrox* the court held that a person is bound by a contract they have signed even if they had not read the contract. However if the assessor had failed to point out a certain provision where there was a legal duty to do so, then the contract could be avoided by a person who did not read the contract they had signed.⁹⁴ The court held that exemption clauses were the norm and are therefore not unexpected, so Strydom was bound by the clause as if he had expressly agreed to it.⁹⁵

Naude and Lubbe propose that where a clause runs contrary to the essence of a contract by displacing the reciprocity between contracting parties, such a clause is unexpected.⁹⁶ It is reasoned that a person, when confronted with a particular contract, may reasonably expect the contract to contain certain terms, none of which are contrary to the purpose of the contract. It follows, as established by the SCA in *Mercurius Motors v Lopez*,⁹⁷ that the assessor is under a duty to point out any clauses that run contrary to the purpose of the contract because those clauses are unexpected.

The aim of this context-sensitive approach of recognising an unexpected clause to be one that is contrary to the purpose of the contract stands to serve the greater purpose of encouraging communication between parties that use standard form contracts, regarding the content of the contract. This would not only afford a party the opportunity to negotiate an amendment or to look elsewhere for the desired product or service,⁹⁸ but it would also go some way in order to balance the bargaining power of each party by encouraging the divulgence of information to the less well-informed party.

Turning back to the facts of *Afrox*, it is submitted that the context of the matter was not properly taken into consideration. The contract was between the patient and a hospital or doctor (which amounts to the same thing). The essence of the contract is for the doctor to 'act with the degree of skill and care reasonably to be expected of an average practitioner in the field' in return for a fee.⁹⁹ It follows that by acting in a negligent manner the doctor is in

⁹³ Naude & Lubbe (note 79 above) 451.

⁹⁴ *Afrox* (note 51 above) 34-35.

⁹⁵ *Ibid* 36.

⁹⁶ Naude & Lubbe (note 79 above) 454.

⁹⁷ 2008 (3) SA 572 (SCA)

⁹⁸ Naude & Lubbe (note 79 above) 455.

⁹⁹ *Ibid* 456-457.

breach of a fundamental purpose of the contract. Therefore, permitting an exemption clause in terms of a medical service contract would run contrary to the essence of the contract:

To permit an exclusion of the liability for negligence and to water down the duty of the medical service provider to a mere duty to expend time and labour on the patient irrespective of the quality of the treatment, is to reduce the protection of the patient to a level that undermines the principle of reciprocity. By subverting the character of the transaction as an exchange, the exemption offends against the underlying principle of good faith and the dignity of the patient.¹⁰⁰

What is clear from Naude and Lubbe's informative study on a proposed approach to the issues that arose in *Afrox* is that there is a need for a context-sensitive analysis of the matter in which an exemption clause operates. The reason for this is that once the realities of the parties are brought to light, certain inconsistencies become obvious. One of the realities is that the contract cannot be categorised as a commercial transaction as this allows the court to conveniently side-step the issues surrounding the nature of a doctor/patient relationship, namely that a patient is in a vulnerable position because he is dependent on the care provided by the hospital.¹⁰¹

What becomes evident is that by enforcing the exemption clause the court favoured the commercial interests of the hospital at the expense of the interests of the patient, simply because the realities faced by the patient were not fully considered. It is submitted that there is a need for a context-sensitive approach to exemption clauses. This promotes an examination of the realities faced by each party when the contract was signed and this could reveal factors which may have inhibited the bargaining power of a party.¹⁰²

However, according to the teleological approach, rendering every contractual provision null and void that is contrary to the essence of a contract would lead to the harsh consequence, in some instances, of not giving effect to the will of the parties. For this reason Naude and Lubbe propose that:

[t]he proper approach would be to investigate the implications of Thomistic reasoning for the established approach to public policy as the general standard for the enforceability of contracts and contractual terms.¹⁰³

¹⁰⁰ Naude & Lubbe (note 79 above) 457.

¹⁰¹ Ibid 460.

¹⁰² Ibid 463.

¹⁰³ Ibid 454.

In this way, by identifying a clause that is contrary to the essence of a contract may show that one of the parties' autonomy or ability to negotiate is inhibited. Naude and Lubbe envisioned a requirement to consider the context of the matter along with a moral standard of expected behaviour to help inform the concept of public policy. The definition of the concept of public policy provided subsequently in the case of *Barkhuizen v Napier*¹⁰⁴ was not all that dissimilar to the concept envisioned by Naude and Lubbe.

2.4 *Napier v Barkhuizen*

In the case of *Barkhuizen v Napier*¹⁰⁵ the CC was called upon to determine the constitutionality of a time-limitation clause in a short-term insurance contract. This clause prevents the insured, who is making a claim, from instituting legal action if summons is not served on the insurance company within the time limit set out in the clause. It was contended that the clause violates the right to approach a court for redress as entrenched in section 34 of the Bill of Rights, and it is therefore unconstitutional.¹⁰⁶

The High Court had found in favour of the plaintiff's argument that upon a direct application of section 34 of the Constitution to these facts, the time bar clause is unconstitutional because it gave the insured an unreasonably short time to take action and served no legitimate purpose. Bhana is of the opinion that the High Court in this case had fully realised its constitutional duty to develop the law in line with the spirit purport and objects of the Bill of Rights, as clearly stated in section 39 of the Constitution.¹⁰⁷ This is described as a 'progressive normative engagement with constitutional values',¹⁰⁸ but the High Court judgement was overturned by the SCA.

The SCA judgment does acknowledge its duty in terms of section 39 of the Constitution, however the judgment also echoed the principles from *Brisley* and *Afrox*, namely that although a court is obliged to develop the common law to give life to the spirit, purport and objects of the Constitution, a judge cannot strike down a contract based on his or her own opinion of what is fair, just or in good faith.¹⁰⁹

¹⁰⁴ *Barkhuizen* (note 53 above).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* 1.

¹⁰⁷ Bhana (note 39 above) 270.

¹⁰⁸ *Ibid* 270.

¹⁰⁹ *Napier* (note 9 above) 6.

However the SCA further stated that:

Crucially, in this calculus 'public policy' now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.¹¹⁰

The SCA expressed that a contract may be declared invalid based on it being proved to be contrary to public policy, which comprises of constitutional values such as human dignity, equality and freedom among others.¹¹¹

The SCA's acknowledgement of the relative bargaining position of the parties, namely that it is a factor to be considered when determining whether a contract was invalid due to it being contrary to public policy,¹¹² is a welcome step¹¹³ towards the realisation of substantive equality in contract law. This acknowledgement shows that the unequal bargaining power of a party will be considered as a factor in determining if a contract is contrary to public policy and therefore void, and this is a definite step forward towards a balance between a formalistic version of contract law and a version that takes substantive equality into consideration.

The Court went further to state that the cases of *Brisley* and *Afrox* have 'opened the door to precisely such determinations'.¹¹⁴ With reference to *Afrox*, the court explained that the constitutional values of dignity and equality are affected by the parties relative bargaining positions.¹¹⁵ It clear that a consideration of the bargaining position of the parties must be taken into account by the courts, if the courts hope to fully realise its duty to develop the common law in tune with constitutional values.

The court held that due to a dearth of evidence, it could only speculate on what the plaintiff's bargaining position was in relation to the insurer. The court went further to explain that there was no evidence regarding the following:¹¹⁶

- the market in short-term insurance products;
- whether a variety of such products is available;
- the number of suppliers and their relative market share;
- whether all or most short-term insurers impose a time-bar;

¹¹⁰ Ibid 7.

¹¹¹ *Napier* (note 9 above) 14.

¹¹² Ibid 14.

¹¹³ *Bhana* (note 39 above) 271.

¹¹⁴ *Napier* (note 9 above) 14.

¹¹⁵ Ibid 14.

¹¹⁶ Ibid 15.

- whether a diversity of time-limits is available to those seeking short-term insurance cover, and over what range they fall;
- whether for a person in the plaintiff's position (who travels in a vehicle seemingly appurtenant to a reasonably affluent middle-class lifestyle) short-term vehicle insurance is an optional convenience, or an essential attribute of life.

The court explained that without such information the court could not address what it termed 'the broader constitutional challenge'.¹¹⁷ The court ultimately held that the time bar clause did not infringe the plaintiff's right of access to court, and there was no evidence to prove that the contract was not entered into freely or in violation of his constitutional rights to freedom, dignity and equality.¹¹⁸

However, the SCA did not actually consider the realities faced by people looking for short term insurance. The insured would have been presented with a lengthy contract of complex clauses, steeped in legalese, on a take-it-or-leave-it basis.¹¹⁹ The individual, who most likely does not have extensive product knowledge nor the time, money or energy to read the contract, let alone actually negotiate on the terms, is most likely to sign the contract as a direct result of being in a weaker bargaining position. This is so especially in light of the high levels of motor vehicle thefts and accidents, the high cost of buying a car, and the inadequate public transport system in South Africa.¹²⁰ In this way the insured agrees to the time limitation clause, which is buried in the complex contract and the insurer has the protection of such a clause to 'escape the very liability it undertook to cover'.¹²¹ It is interesting that if Naude and Lubbe's proposed context-sensitive, teleological approach¹²², which operates from the premise that a contract's terms must not run contrary to the purpose of a contract, is applied, one would most likely find, for the same reasons as mentioned above, that the insured's bargaining power was inhibited and this may therefore contribute towards proving the clause to be contrary to public policy. This further shows how considering the realities faced by the parties, in a substantive equality approach, is likely to yield a different result which is more in line with constitutional values.

¹¹⁷ *Napier* (note 9 above) 16.

¹¹⁸ *Ibid* 28.

¹¹⁹ See chapter 3 for a more comprehensive discussion on standard form contracts.

¹²⁰ *Bhana* (note 39 above) 276.

¹²¹ *Ibid* 276.

¹²² *Naude & Lubbe* (note 79 above) 454.

It is clear, after considering *Brisley* and *Afrox*, that the SCA tends to hold that because a person has the freedom to contract, judicial interference in contracts freely entered into may be a violation of that freedom. This is in line with a classical liberal understanding of freedom of contract.¹²³ A classical liberal or formalistic version of contract law in which the court reasons that each person is afforded the dignity and freedom to enter into a contract as they wish and therefore each contract is an expression of their will, and to protect the sanctity and stability of contract law such a contract must be enforced.¹²⁴

The manner in which the SCA dealt with the values of freedom, dignity and equality shows that such an approach was applied by the SCA in *Napier*. The SCA favours an empowerment-based version of dignity, which holds that a person's dignity is intertwined with their right to freely enter into a contract.¹²⁵ It follows that by not interfering in contracts that are freely entered into, the courts protect the dignity of an individual. The sister conception of dignity is the constraint-based version of dignity which recognises 'the intrinsic moral worth of all human beings, which is deserving of protection even if it places a constraint on freedom'¹²⁶ and ultimately this constraint-based dignity may demand judicial control.¹²⁷ Such an approach would look to the realities faced by the parties to determine if the exercise of freedom of contract does infringe on the dignity of the person, and given the transformative duty of the courts, such an approach would be appropriate.¹²⁸ In furtherance of pursuing its transformative duty, an analysis by the court of the realities faced by the parties would immediately implicate a consideration of whether substantive equality exists between the contracting parties.

However, the SCA considered the values of dignity and equality in terms of a classical liberal understanding and this has resulted in the undesirable excess of freedom of contract to prevail.¹²⁹ In other words, the application of freedom of contract in this way excludes 'constitutional standards of fairness, equality and human dignity'.¹³⁰ Therefore *Napier* ultimately results in a narrow realisation of freedom of contract that is not imbued with the full force of the concept of liberty.¹³¹ The practical result is that a person may be forced to

¹²³ Bhana (note 39 above) 273.

¹²⁴ Ibid 271; Hawthorne (note 22 above) 76.

¹²⁵ *Napier* (note 9 above) 12.

¹²⁶ Bhana (note 39 above) 274.

¹²⁷ Barnard- Naude (note 25 above) 197.

¹²⁸ Bhana (note 39 above) 274.

¹²⁹ Barnard-Naude (note 25 above), 197.

¹³⁰ Bhana (note 39 above) 274.

¹³¹ Barnard-Naude (note 25 above), 197; Bhana (note 39 above) 274; Bhana & Pieterse (note 18 above) 877.

contract out of a constitutional right, such as the right of access to court, as well as other fundamental rights. Allowing such a practice would only serve to further entrench the unequal bargaining power prevalent in South Africa today. Therefore it is submitted that there is a desperate need to reconsider the application of dignity and substantive equality,¹³² so that the bargaining realities faced by contracting parties can be fully appreciated and the constitutional duty of the courts to do so will be fulfilled. In this manner the constitutional values of freedom, dignity and equality operate in union, balancing each other out.¹³³

2.5 *Barkhuizen v Napier*

The CC ultimately confirmed the finding in the SCA, however, as will be discussed in Chapter 4 of this study, although the CC judgement did provide a light at the end of the classical liberal tunnel. This judgement has been described as important, because it highlights the role contract law has to play in creating a more equal and just society by recognising the horizontal application of human rights and constitutional values.¹³⁴

The CC first confirmed the meaning of public policy. The court held that public policy ‘represents the legal convictions of the community; it represents those values that are held most dear by the society’.¹³⁵ The CC further explained that public policy ‘is now deeply rooted in our Constitution and the values that underlie it’, values of ‘human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law’.¹³⁶ It follows that a contract term that runs contrary to the values underlying the Constitution will be contrary to public policy and ultimately unenforceable.¹³⁷

The CC broke down the public policy enquiry into two questions: Firstly the CC asked whether the clause was unreasonable and secondly, if the term was reasonable, and considering the circumstances that have prevented compliance with the time limitation clause, should the clause still be enforced.¹³⁸

The first question required the consideration of *pacta sunt servanda* on one hand, which the CC noted gives effect to freedom and dignity, and on the other hand the right of access to

¹³² Bhana (note 39 above) 275.

¹³³ Barnard-Naude (note 25 above), 197; Bhana & Pieterse (note 18 above) 879.

¹³⁴ Hawthorn (note 23 above) 77-78.

¹³⁵ *Barkhuizen* (note 53 above) 28.

¹³⁶ *Ibid* 28.

¹³⁷ *Ibid* 29.

¹³⁸ *Ibid* 56.

court. At this point the court again conformed to an empowerment-based definition of dignity, by stating that '[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity'.¹³⁹ This has been criticised as it ignores the version of dignity which protects a person from being used as a means to an end.¹⁴⁰ However the court did go further to say that the extent of the freedom and voluntariness is an important factor to determine the weight to be attached to the value of dignity and freedom.¹⁴¹ This shows the court's acknowledgement that the values of dignity and freedom may be limited by substantive equality considerations,¹⁴² namely the factors that have limited the capacity of a party to enter into a contract freely and voluntarily. This is an objective enquiry.

The second question requires a consideration of the factors or circumstances that have prevented compliance with the clause. This is a subjective enquiry. This means that even if a clause is not contrary to public policy, an insured still has an opportunity to provide a sound reason for non-compliance. This is clearly a reference to the bargaining power of the insured as an enquiry into the reasons for non-compliance would entail an examination into the realities faced by the insured.¹⁴³

The CC further explained that although the court in *Afrox* did not find evidence of unequal bargaining power on the facts, the principle that the relative bargaining positions of the parties is relevant to the enquiry of whether the term is contrary to public policy must not be overlooked.¹⁴⁴ This means that the CC acknowledges that in instances of unequal bargaining power there may be injustices that need to be brought to light. The fact that the unequal bargaining power of a party is a factor to be considered when determining if a contract is contrary to public policy was confirmed by the CC, and as the court held, this is a vitally important principle especially in 'a society as unequal as ours'.¹⁴⁵

The question remains, whether the recognition of the limiting effect of equality on freedom (thereby including considerations of the realities faced by people and allowing a measure of contractual certainty) will continue. The answer, it is submitted, depends on whether the

¹³⁹ *Barkhuizen* (note 53 above) 57.

¹⁴⁰ *Brand* (note 37 above) 85.

¹⁴¹ *Barkhuizen* (note 53 above) 57.

¹⁴² *Barnard-Naude* (note 25 above), 200.

¹⁴³ *Barkhuizen* (note 53 above) 59; *Barnard-Naude* (note 25 above), 200.

¹⁴⁴ *Barkhuizen* (note 53 above) 59.

¹⁴⁵ *Ibid* 59.

courts will continue on this transformative journey¹⁴⁶ to fully realise the content of the values of freedom, dignity and equality.

2.6 *Jordan v Farber*

In 2009 the case of *Jordan v Farber*¹⁴⁷ was heard in the Northern Cape High Court. The applicants, a couple married in community of property, were the co-owners of a farm. However they fell ill and could not continue to run the farm. This caused them to fall into arrears with instalments on a loan to the Land Development Bank.¹⁴⁸ The applicants then consulted the respondent, a practising attorney, to handle the Land Bank matter and another matter. The respondent informed the applicant that he had made an arrangement with the bank and asked them to leave the matter of the farm in his hands.¹⁴⁹ The respondent also agreed to rent the farm in his personal capacity as well as hire some of the cattle on the farm. The respondent and applicant agreed on a rental amount that was to be paid to the bank.¹⁵⁰

The respondent had drawn up all the contracts himself, even though the contracts directly involved him in his personal capacity. He abused his position of power as the contracts were drawn up in his best interests. When the bank sued the applicant for an escalated amount, it became obvious that the respondent had no agreement with the bank to pay off the arrear instalments.¹⁵¹

In determining whether the terms of the contract were contrary to the *boni mores* the court referred to *Barkhuizen*, namely that a court will not enforce a contract that is contrary to public policy, and in determining public policy consideration must be given to the Bill of Rights and the founding values of the Constitution.¹⁵²

With this in mind as well as reference to *Afrox*, the court expressly stated that in order to determine whether the contract was reasonable and not contrary to public policy, the bargaining power of the parties must be considered.¹⁵³

¹⁴⁶ Barnard-Naude (note 25 above), 201

¹⁴⁷ *Jordan* (note 54 above) 2.

¹⁴⁸ *Ibid* 2.

¹⁴⁹ *Ibid* 3.

¹⁵⁰ *Ibid* 4.

¹⁵¹ *Ibid* 9.

¹⁵² *Ibid* 12.

¹⁵³ *Ibid* 14.

In considering the relative bargaining positions of the parties the court commented on the relationship between the respondent and applicant (that of attorney and client). The court emphasised that an attorney has a tremendous amount of power over his client as a client comes to an attorney for advice in usually stressful circumstances. In other words the client is emotionally and often financially vulnerable so they cannot refuse or analyse advice given to them by their attorney. The court expressly noted that the respondent was in a much stronger bargaining position than the applicant¹⁵⁴ and that this was relevant in determining if the contract was contrary to public policy.¹⁵⁵

Additionally the court held that the contract was contrary to public policy due to the fact that the respondent had breached the standards of professional ethics that governed his professional conduct.¹⁵⁶ He had entered into an agreement in his personal capacity with his clients and did not comply with his duty to inform them to obtain independent legal advice.¹⁵⁷ The court stated that, as he had acted in a manner that was disgraceful, dishonest and unfair the contract was contrary to public policy and therefore void.¹⁵⁸ The court was satisfied that this was sufficient reason to render the contract contrary to public policy and therefore void.¹⁵⁹

However, ‘for the sake of completeness’¹⁶⁰ the judge went a step further to explain that even if he was wrong to come to such a conclusion, the fact that there was no meeting of the minds on the amount of rent to be paid per annum and how large the instalments should be, the contract would be void for the reason of a lack of consensus.¹⁶¹

In this case the court did acknowledge the fact that the applicant had freely and voluntarily entered into the agreement, but the court took into consideration the obvious imbalance of bargaining power and found this to be a factor to render the contract contrary to public policy.¹⁶² A further factor the court considered sufficient to render the contract contrary to public policy was the fact that the respondent was so grossly in breach of the standard of

¹⁵⁴ Jordan (note 54 above) 16.

¹⁵⁵ Ibid 15.

¹⁵⁶ Ibid 17.

¹⁵⁷ Ibid 17.

¹⁵⁸ Ibid 32.

¹⁵⁹ Ibid 25.

¹⁶⁰ Ibid 25.

¹⁶¹ Ibid 33.

¹⁶² Ibid 16.

professional ethics.¹⁶³ This finding has been commendably described to be in line with the cautious SCA and CC approach, namely that:

Judges should use their power to intervene and declare contracts or contractual terms freely entered into void/unenforceable, sparingly, with perceptive restraint and only in the clearest of cases in which the impropriety of the transaction and public harm are manifest.¹⁶⁴

The finding was further described as having the effect of illustrating that the principle of sanctity of contract does not override consideration of dignity and equality and that contract terms that are contrary to the values of dignity and equality will be unconstitutional as they would be contrary to public policy.¹⁶⁵

However, it has also been said that the court was too quick to reach for public policy considerations to remedy the matter. The fact that the respondent acted in an unethical manner by the misrepresentation, and the abuse of his superior position over his client could have been argued to have improperly induced the consent given by the client in terms of the lease.¹⁶⁶ The reason for such a comment is that the contract would have been beneficial to both parties had the respondent held up his end of the bargain.¹⁶⁷ It was not the contract that was contrary to public policy but the manner in which the contract came about that was contrary to public policy. This more immediately concerns the consent obtained and whether such consent was improperly obtained.

It would appear that the court in this case had placed unnecessary emphasis on public policy when it, perhaps, should have more immediately considered the route of improperly obtained consensus. It is therefore clear that the instances when specific equity principles should apply to a matter is not yet crystallised in South African contract law. Therefore, based on such a comment, it is submitted that this case illustrates the need for the law on public policy, good faith and improperly obtained consensus to be developed to further a context-sensitive approach to contract law.

¹⁶³ Jordan (note 54 above) 17.

¹⁶⁴ J Barnard, C Nagel 'Jordan v Farber (1352/09) [2009] ZANHC 81 (15/12/2009)' (2010) PER / PELJ (13) 449, 456.

¹⁶⁵ Ibid 457.

¹⁶⁶ Ibid 457.

¹⁶⁷ Ibid 457.

2.7 *Uniting Reformed Church, De Doorns v President of the Republic of South Africa*

The case of *Uniting Reformed Church, De Doorns v President of the Republic of South Africa*¹⁶⁸ concerned a 20 year notarial lease agreement, which was entered into by the *Uniting Reformed Church* (hereafter referred to as the church) as lessor and the State¹⁶⁹ as the lessee.

In response to the inadequate educational facilities (in place in terms of apartheid policies) available to its members, the Uniting Reformed Church assumed the responsibility to provide decent educational facilities for the community.¹⁷⁰ This was in terms of its social and spiritual obligations and to fulfil these obligations, which included developing new and existing neglected school buildings, the church used its own financial resources and acquired loans.¹⁷¹ The State took over the running of the schools as required by legislation at that time. The church was experiencing financial difficulties which resulted in the schools becoming quite neglected by the time the State came to the assistance of the church.¹⁷² In return for a loan facilitated in favour of the church, registered against the security of the buildings mortgage bonds, the State required the notarial lease agreement to be signed in respect of the school buildings.¹⁷³ Clause 16 of the contract required the church to transfer the property to the state free of charge once 20 years had passed.

The notarial lease and the mortgage bond were registered against the title deeds of the properties and only then the funds were made available to the State which it used to renovate the neglected schools.¹⁷⁴ The State paid rent to the church, and the church was responsible for the maintenance of the school buildings and for maintaining the insurance for the properties as well as for paying the municipal rates and taxes as well as other relevant levies.¹⁷⁵

The issue before the court was whether clause 16 was valid. The church argued that clause 16 was contrary to public policy firstly because it was in a weaker bargaining position when it agreed to the lease, which was weighted heavily against the church. Secondly the church claimed that the clause was invalid because it was a violation of section 25 of the Constitution, which prohibits the arbitrary deprivation of property.

¹⁶⁸ *Uniting Reformed Church, De Doorns* (note 35 above).

¹⁶⁹ The former House of Representatives whose responsibilities were later taken over by an organ of state responsible for the administration of public schools in the Western Cape Province.

¹⁷⁰ *Uniting Reformed Church, De Doorns* (note 35 above) 13.

¹⁷¹ *Ibid* 13.

¹⁷² *Ibid* 15.

¹⁷³ *Ibid* 15.

¹⁷⁴ *Ibid* 16.

¹⁷⁵ *Ibid* 18.

The church stated that it was in a ‘precarious financial situation’¹⁷⁶ therefore it entered into the lease agreement in order to keep its hold on the immovable property. The court agreed with the applicant that they had no choice but to enter into the contract and ultimately found that the clause in question was contrary to public policy and therefore invalid. Zondi J stated:

The question is whether the applicant has established facts which objectively demonstrate that at the time of the conclusion of the lease agreements it was in a weaker bargaining position than the Department and that the effect of inequality in bargaining position was harmful to public interest. I am satisfied from the applicant's papers that the applicant has succeeded in meeting the requisite threshold.¹⁷⁷

This seems to indicate that the court was satisfied that a mere inequality of bargaining power existed, and did not look further for an abuse of such inequality. Whether or not the court intended the abuse of bargaining power to not be considered, it must be noted that it is illogical to expect contracting parties to have equal standing and the courts’ intervention should only become relevant when there is an abuse of unequal bargaining power.

In the court’s determination of whether clause 16 was contrary to public policy and therefore unconstitutional, Zondi J first acknowledged (with reference to *Sasfin v Beukes*¹⁷⁸), that the interests of the community is of great importance to the consideration of public policy and that a contract that offends public policy will not be enforced. However Zondi J did caution that the court’s discretion to declare contracts contrary to public policy must be used sparingly so as to avoid uncertainty in the law of contract.¹⁷⁹

The judge went further to explain that, according to the case of *Napier v Barkhuizen*, public policy is informed by the founding constitutional values and that contracts must be in line with the Constitution.¹⁸⁰ The judge acknowledged the principle of *pacta sunt servanda*¹⁸¹ as well as the need for the contract to be in tune with constitutional values of freedom dignity and equality.¹⁸²

¹⁷⁶ *Uniting Reformed Church, De Doorns* (note 35 above) 21.

¹⁷⁷ *Ibid* 35.

¹⁷⁸ *Sasfin* (note 178 above).

¹⁷⁹ *Uniting Reformed Church, De Doorns* (note 35 above) 26.

¹⁸⁰ *Ibid* 27.

¹⁸¹ *Ibid* 32.

¹⁸² *Ibid* 33.

The judge also acknowledged that the purpose of the courts is not to ‘merely enforce contracts’ but to apply a minimum standard of fairness that includes a consideration of the relative bargaining powers of the parties.

In support of the submission that clause 16 was contrary to public policy, the church argued that at the time the agreement was entered into the church had no choice but to accept the terms of the agreement due to its dire financial situation.¹⁸³ The church provided no further evidence or argument to illustrate that it was in a weaker bargaining position, or that there was abuse of that weaker bargaining position, such that it was contrary to public policy.

Furthermore the court only considered the bargaining position of the church, without considering what may have pressured the hand of the State. Sharrock explains that the court did not consider whether the respondent, being a government department, was under pressure from its own policy, the law or the government to spend its budget on developing schools.¹⁸⁴

Sharrock is of the opinion that the court ‘glossed over’ several important facts. He explains that the court did not consider the economic realities of the situation. The respondent had agreed to take over the responsibility of paying for the insurance for the property and had undertaken the cost of all of the maintenance and development of the schools and therefore there was nothing unusual or disproportionate about ownership being transferred on such terms. Additionally the school, in order to achieve its goal of continuing to provide a school for the community had knowingly given up its right to ownership to achieve its goals.¹⁸⁵

Sharrock comments that Zondi J’s description of clause 16 as a ‘disguised expropriation’ is inaccurate as the respondent did pay for the loan required to develop the school and that both parties had actually agreed to the transfer of ownership, regardless of whether the applicant had no alternative.

As concluded by Sharrock, the court’s evaluation of the parties’ relative bargaining power was insufficiently analysed.¹⁸⁶

Zondi J stated¹⁸⁷:

In my view the provisions of clause 16 sanction arbitrary deprivation of property and are contrary to the provisions of s 25 ... there is no sufficient reason to warrant the deprivation of

¹⁸³ *Uniting Reformed Church, De Doorns* (note 35 above) 21.

¹⁸⁴ Sharrock (note 2 above) 141.

¹⁸⁵ *Ibid* 140.

¹⁸⁶ Sharrock (note 2 above) 142.

¹⁸⁷ *Uniting Reformed Church, De Doorns* (note 35 above) 40.

the applicant's properties. To the extent that clause 16 of the lease seeks to deprive the applicant of its properties without creating an obligation on the third respondent to pay compensation, it is, in my view, unfair and therefore contrary to public policy.

From this extract it becomes unclear as to whether the contract is contrary to public policy because it is contrary to section 25 of the Constitution or because the applicant was in a weaker bargaining position. This is because it can be argued that the clause can either be unconstitutional because it is a violation of section 25 of the Constitution (which would attract an enquiry into whether such a limitation of the right is reasonable and justifiable with a consideration of the constitutional values of equality, dignity and freedom) or it is unconstitutional because it offends public policy (which as determined by *Barkhuizen* entails, among other factors, a consideration of the bargaining powers of the parties and the constitutional values of equity, dignity and freedom). It is respectfully submitted that this case illustrates the under-developed manner in which courts enforce equity in South African contract law. The apparent lack of distinction between direct and indirect application of the Bill of Rights to such a contract is probably a result of the lack of clarity regarding the proper approach caused by the CC judgment in *Barkhuizen* (and the criticism of that case). At least it can probably be said that the court's judgment in *Uniting Reformed Church* is lacking in clarity, and rather vague in its treatment of the legal impact of the parties' bargaining power in the relevant scenario.

The most obvious problematic aspect of the judgement for present purposes is the possible deviation from the fact that bargaining power has been held by the SCA to be only a factor in determining whether a contract is contrary to public policy. Surely such a deviation merits a clear and well-reasoned explanation, however, as surmised by Sharrock, Zondi J did not explain how his conclusions of unequal bargaining power had impacted on the outcome of the judgement. Sharrock concludes by stating that this judgement creates uncertainty as to the weight to be attached to bargaining power when considering the validity of a contract.¹⁸⁸ Additionally, Sharrock explains that while this judgment does not provide clarity, it does throw into sharp focus the need for the weight of unequal bargaining power to be defined in contract law, and if such definition is not achieved then the sanctity of contract may well be undermined.¹⁸⁹

¹⁸⁸ Sharrock (note 2 above) 142.

¹⁸⁹ Ibid 144.

2.8 Conclusion

The case of *Brisley* saw the SCA favouring a classical liberal understanding of freedom and dignity, to the exclusion of substantive equality considerations, even though the realities faced by the parties could arguably show a great discrepancy of bargaining power. A similar favouring of a classical liberal understanding of freedom of contract was shown in *Afrox*, however the SCA had taken a small transformative step by acknowledging that the bargaining power of a party was a factor relevant in determining whether the contract was contrary to public policy. This principle was subsequently relied upon by the SCA and later the CC in the case of *Barkhuizen*. The case of *Barkhuizen* furthered the transformation by including a context-sensitive step in its test for determining whether a term of a contract ran afoul of public policy, thereby rendering it unconstitutional. Evidently, upon an examination of the above cases, a clear trend does emerge, namely that the bargaining power of the parties to a contract is slowly being accepted in a determination of whether or not a contract meets the standards of public policy and ultimately the Constitution. This entails a larger role to be played by substantive equality, as a more appropriate consideration of bargaining power results in the realities faced by contracting parties being more appropriately considered by the courts.

Although the best way to approach a consideration of the fact of unequal bargaining power is still in the process of being defined, and there is still some uncertainty, as evidenced in the judgments of some lower courts, as to the correct manner of dealing with unequal bargaining power. In *Jordan*, the fact that the court decided to consider the yardstick of public policy (and within that, bargaining power) rather than whether the consensus was improperly obtained shows that the court has, perhaps, ignored a more appropriate route to remedy the matter. This is, however, not to say that the court was incorrect in its decision, rather that the concepts of public policy, good faith and improperly obtained consensus should be developed according to the renewed interest in developing a context-sensitive approach to substantive fairness in contract law. The *Uniting Reformed Church* case does not provide firm ground from which to develop the future of unequal bargaining power, as the court appears to have found the mere existence of unequal bargaining power sufficient to invalidate a contract, which is out of step with the approach of the SCA (which prefers to use the evidence of unequal bargaining power along with other factors when determining the validity of a contract). It is also out of step with logic, in respect of its focus on the reality of parties' respective bargaining powers rather than a possible abuse of a discrepancy in such powers.

However there is no clear definition as to whether the bargaining power of the parties should be a mere factor to consider when determining the validity of a contract or not. What is clear is that there is a need for the realisation of substantive equality in contract law¹⁹⁰ and the manner in which the courts deal with bargaining power in the future will be relevant to the realisation of substantive equality. The concepts of good faith and unequal bargaining power are now considered under the test for public policy, as established in *Barkhuizen*. However there is a pervasive presence of a classical liberal understanding of values, which are now imbued with constitutional status as foundational values which underlie the Bill of Rights that is slowly being eroded. Brand is of the view that the manner in which the SCA has dealt with reasonableness, fairness and good faith is appropriate, and not in conflict with constitutional values.¹⁹¹ However, he does clarify that the bargaining power of a party should be of some concern to the courts and that the overarching concept of public policy is still in need of some development,¹⁹² which he explains is achievable without causing legal and commercial uncertainty, given the ability of our law to adapt to ‘changing needs and values of society’. It is therefore submitted that it is apparent that the needs and values of society have changed, and demand a context-sensitive or substantive approach to equality in contract law rather than the formalistic approach previously adopted by the courts. Contract law needs to be further developed in regard to the weight to be attached to the presence of unequal bargaining power and in what circumstances the abuse of unequal bargaining power occurs.

¹⁹⁰ Hawthorne (note 22 above) 88.

¹⁹¹ Brand (note 37 above) 86.

¹⁹² Brand (note 37 above) 87.

3. THE FACTORS THAT LIMIT BARGAINING POWER

3.1 Introduction

Consumer law and labour law were once aspects of society fraught with oppression and injustice. Now legislation has been promulgated that governs specifically these aspects of society and commercial dealings and as a result these injustices have been greatly limited and a healthier environment for these contractual parties is slowly forming. However by only addressing these obvious injustices, such legislation is only treating the symptoms without providing relief from the source. Based on the discussions in chapters 2 and 3 above the culture and attitude surrounding the formation, enforcement and dispute resolution of contractual matters leaves much to be desired. It is clear that a baseline comprising of morals, fairness, dignity, good faith and a standard of treating people with respect, needs to be instilled.

The need for an infusion of such morals into the law is encapsulated in the concept of Ubuntu and the concept of good faith. The court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*¹⁹³ emphasised that contracts are entered into on a daily basis, and with every contract comes the potential for a party to not act in good faith. The court further emphasised the desirability of infusing contract law with constitutional values, like Ubuntu.¹⁹⁴ The value of Ubuntu would throw light on the fact that we all live in a community and therefore the manner in which we treat one another is of vital relevance to building a better south Africa that practices 'humaneness, social justice and fairness' as well as 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'.¹⁹⁵

The Constitution seeks to infuse the law with values of freedom, dignity and equality. Although these values have not yet been fully realised in contract law, they would appear to demand this baseline of morals in every transaction. Barnard-Naude likens these constitutional aspirations to an ideal of a 'civic friendship'.¹⁹⁶ Civic friendship is an ideal not that different from Ubuntu, as they both are defined by the common denominator of dignity. Civic friendship provides that a person is able to define their self-worth or dignity because they live in a community that has acknowledged and respected their dignity. In this way both

¹⁹³Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).

¹⁹⁴ Ibid 22.

¹⁹⁵ Ibid 71.

¹⁹⁶ Barnard-Naude (note 25 above) 202.

Ubuntu and a civic friendship centre on the interdependence of the members of a community and the respect that we each should have for one another. This respect should exist not necessarily because we like or admire every other person, but simply because they form part of our human community.

It is clear that the Constitution envisions the law of South Africa to be embedded with values that demand an unconditionally respectful and moral standard of behaviour. Such values require that when parties contract, it is done ‘with respect for and consideration of the other party’.¹⁹⁷ However those ideals are yet to be fully realised as there are many factors that limit the free negotiation of contracts and the relative abilities of contracting parties to achieve the realisation of such values.

3.2 Factors that Limit a Party’s Bargaining Power.

In an article considering the limits of judicial control in terms of the problematic issues that often face consumers who enter into contracts, Naude provides a comprehensive understanding of the many reasons why intervention is required in contract law. She explores the problems arising from non-negotiated contract terms as well as the implications rippling from such contract terms.¹⁹⁸ Although this article was written before the promulgation of the Consumer Protection Act,¹⁹⁹ the author succinctly analysed the need for intervention as well as factors that inhibit a party’s ability to bargain on the terms of the contract.

Additionally, there are some contracts that fall outside the protection provided by the Consumer Protection Act,²⁰⁰ yet they are subject to the same potential problems which the Act was intended to address, therefore parties to these contracts are uniquely vulnerable. These contracts are governed by the common law and judicial control. Although Naude states that judicial control is ineffective,²⁰¹ This study argues differently further on in this study.

Naude surmises that the main problem regarding non-negotiated contract terms is that the resulting contract does not express the actual will of the contracting parties.²⁰² The author quotes Zimmermann, expressing that a ‘proper evaluation and balancing of the consequences

¹⁹⁷ Barnard-Naude (note 25 above) 202.

¹⁹⁸ Naude’ (note 79 above) 364.

¹⁹⁹ 68 of 2008.

²⁰⁰ 68 of 2008.

²⁰¹ Naude’ (note 79 above) 362.

²⁰² See also Bhana & Pieterse (note 18 above) 885; Napier (note 9 above) 138.

of the transaction does not normally occur' for one of the parties to the contract. This is usually the party in the weaker bargaining position.²⁰³

The usual justification for upholding such contract, according to the classical liberal theory, is that everyone has the freedom to contract as they wish, therefore under this illusion of contractual autonomy a contract is seen to express the will of both parties. However given that these contract seldom express the actual will of both parties, this version of contractual autonomy is quite logically surmised by Naude to be formalistic, hollow and meaningless.²⁰⁴

Naude explains that this situation is in desperate need of legislative intervention. However, as this study explains, legislative change is the only possible answer as the courts are well equipped to effect the desired change. In order for any intervention or change to be effected, a proper understanding of the causes of the impaired contractual autonomy of a party is essential. The rest of this section will explore these causes as contemplated by Naude. It must also be noted that although the article by Naude is primarily concerned with consumers, the problems highlighted are consistent with the problems faced by those contracting parties who fall outside the definition of a consumer but are still in a weaker bargaining position. For the purposes of this section the word consumer must be understood to include the party in a weaker bargaining position.

3.2.1 Time, effort and cost

When we are presented with a contract to sign, it is safe to say that such a document is nearly always characterised by lengthy small print script that extends over several pages and, although a few clauses are made bold and outlined, the document still appears intimidating. Even for a 'relatively well informed and sophisticated consumer in a competitive market' such a contract would take a substantial amount of time and effort to read and fully understand.²⁰⁵ Judge Sachs explains, in terms of standard form contracts, that it is irrelevant that the consumer is well educated and rich. Standard form terms are often one sided and couched in complex legalese such that any consumer is likely to be unaware of its effect and even sometimes, its existence.²⁰⁶ In fact Barnhizer is of the opinion that middle class

²⁰³ Naude' (note 79 above) 366.

²⁰⁴ Ibid 366.

²⁰⁵ Ibid 367.

²⁰⁶ *Napier* (note 9 above) 149.

consumers and small businesses are the most obvious victims of an undefined doctrine of inequality.²⁰⁷

Furthermore, should the person fully understand the contract and work out the implications of each term, they are faced with another daunting task of finding and contacting a person in the counterparty organisation who is able to alter the terms of the agreement if there is a perceived need to negotiate terms. Even if such a person is found, with their superior product knowledge and with the might of their organisation behind them a single consumer is unlikely to expend considerable time and effort on bargaining on the terms of the contract, so much so that the consumer may simply surrender without attempting to bargain and accept the terms as they are. The costs of spending that much time and effort far outweigh the concern experienced by the consumer regarding the terms of the contract.²⁰⁸ This point is further supported by Sachs J, who explains in terms of insurance policies, that it would be impractical for the ordinary consumer to seek legal advice and shop around for the best insurance policy, as the cost of ensuring they get the best deal will outweigh any premium they would eventually have to pay.²⁰⁹

As a consumer is faced with the same problem with every contract they enter into, a reasonable consumer is unlikely to care to fully read any contract, let alone shop around for a better deal.²¹⁰

3.2.2 Psychological factors

There are many psychological factors at play when a person enters into a contract, which cannot be ignored when considering the imbalance of power between contracting parties. When a person is confronted with a contract, especially a standard form contract, given the length, complexity and characteristic legalese which the contract is drafted in, it would seem ‘official and invariable’, such that a consumer would not even contemplate bargaining on the terms of the contract. These contracts are drafted in advance, and in favour of the business,

²⁰⁷Barnhizer (note 5 above) 152.

²⁰⁸ Naude’ (note 79 above) 367; Beale (note 1 above) 133.

²⁰⁹ *Napier* (note 9 above) 163.

²¹⁰ Naude’ (note 79 above) 367.

nearly always on a take-it-or-leave-it-basis, which further limits a consumer from bargaining on the terms of the contract.²¹¹

Furthermore, the manner in which the person is alerted to the deal sets the tone for the manner in which the contract is concluded. For example, advertising plays a large role in the frame of mind a consumer has when contracting. Many advertisements give the impression that dealing with the company will be a pleasurable and positive experience, and by doing so consumers are ‘lulled into a false sense of security, so they feel as if they will be treated according to a standard of fair dealing’.

In a recent study on the effect of advertising on the sales of quick small loans conducted by Abdul Latif Jameel Poverty Action Lab, it was established that a vast amount of money is spent on creative advertising measures aimed at persuading consumers. The study found that advertising that elicits ‘an intuitive, or quick, effortless response’ is more effective opposed to advertising content that provokes ‘a deliberative, or conscious, reasoned response’.²¹² This shows that advertising plays on the emotions of a person as people respond to pictures and the feelings those pictures elicit.

Additionally, the environment in which a contract is signed has a psychological influence on the consumer. Contracts dealing with cars, cell phones, and even houses are often signed in a busy office or shop, where a consumer is surrounded by other shoppers and shop staff. A contract usually materialises towards the end of a meeting between a business and a consumer. At this point the sales person has already made a convincing pitch, or in other circumstances a consumer is already ‘sold’ on the product and the core terms of the contract which have been explained to the consumer. Additionally a consumer may have made plans that cannot be changed because of a term in a contract that they do not agree with. This is another factor that limits the consumer from bargaining on the terms of a contract.²¹³

Another example of such a situation, would be the instance where a person books a holiday in another country via email. After the family has spent a considerable amount of money preparing for the holiday, perhaps taken days off from work, traveling a great distance, only to find the hotel he has booked to be far below their expectations. It is not practical for him to

²¹¹ *Napier* (note 9 above) 135; *Naude* (note 79 above) 368.

²¹² Marianne Bertrand et al ‘Marketing Effects in a Consumer Credit Market in South Africa (Pricing the Effect of Psychological "Features")’ available at <http://www.povertyactionlab.org/evaluation/marketing-effects-consumer-credit-market-south-africa-pricing-effect-psychological-featur> accessed on 22 November 2014.

²¹³ *Naude* (note 79 above) 368.

sign an agreement exempting the hotel from liability for the duration of the family's stay, so more often than not such agreements are simply signed without another thought.

Furthermore, It is not difficult to imagine that any person, even those with a law degree, do not wish to come across, as Naude accurately describes it, as an eccentric, difficult person who insists on reading and understanding each clause and its implications while an often impatient sales person looks on.²¹⁴ That said, it is important to note that this is how the businesses that fuel our economy are run, however what cannot be simply accepted is the environment in which a contract is signed. There is no culture that exists which encourages a person to understand the contract they are signing or a company to take the time to explain it to them. It is this unhealthy culture that leaves consumers vulnerable and in a weak if not non-existent bargaining position.

3.2.3 Competition

The market is competitive in nature, as each provider strives to provide a better deal in an attempt to make more sales. Although this can be beneficial to a consumer, a competitive market has a dark side. Naude explains that businesses, while trying to lower prices, will shift more of the risk, hidden in the fine print, on to the unwitting consumer.²¹⁵ This results in contracts that weigh more heavily against the consumer.

This unsettling fact coupled with the fact that there are many providers offering the same product, with equally if not more complex contractual terms, clearly does not inspire consumers to shop around for a better deal. In fact, facing such circumstances, often consumer don't attempt to shop around and they merely accept the terms of the contract.²¹⁶ This is another factor inhibiting a consumer's power to bargain on the terms of the contract.

Such reasoning applies even when the contract is not between a consumer and a business. Consider the situation where Person A buys a car from Person B. Person A may not have as much knowledge about cars and there are many people selling different cars, in different degrees of road worthiness, so Person A is unlikely to shop around, may be under pressure to get a car, perhaps to get to work. Person B who knows Person A's vulnerable position

²¹⁴ Naude' (note 79 above) 368.

²¹⁵ Ibid 369.

²¹⁶ Ibid 369.

decides to take advantage of the situation, and does not act with good faith because he wants to quickly sell the car and get it off his hands for quick cash.

In other words the mere fact that Person A wanted that particular car from Person B, immediately placed Person A in a weaker bargaining position. It is accepted that there is usually an imbalance of power between contracting parties, however that must not detract from the chance of an abuse of the weaker party. This is why all contracts must be approached with a consideration of the circumstances in which the contract came about.

3.2.4 Education

A survey to assess the knowledge and understanding of financial systems in South Africa, commissioned by the Financial Services Board, revealed that 54% of South Africans are financially literate.²¹⁷ This means that 46% of South Africans are unable to fully understand their finances and therefore cannot make informed decisions about managing their money.²¹⁸ A shocking 50% of South Africans are not able to cover their expenses each month, and 56% revealed that they borrow food and money from family and friends to get through the month. When asked if they had certain savings or investment products 55% admitted that they do not, even though they were aware of such opportunities.²¹⁹

It becomes glaringly obvious that many South Africans do not have enough financial savvy to ensure they stay well out of the red. This inevitably creates a breeding ground for unnecessary spending and poor planning for emergencies and unforeseen financial liabilities. Such financial pressure is bound to leave people vulnerable and with a significantly limited bargaining power.

3.3 Conclusion

After considering the many factors that limit the bargaining power of a party, what becomes evident is that there is clearly a vulnerable group within society. Any business run on capitalist ideals looking to increase sales, as well as any person looking to make money in a

²¹⁷ Angelique Arde 'SA's first financial literacy survey' available at <http://www.iol.co.za/business/personal-finance/sa-s-first-financial-literacy-survey-1.1420710#.VFHknjxxmM8> accessed on 30 October 2014.

²¹⁸ Ibid.

²¹⁹ Ibid

capitalistic economy would take every advantage possible to achieve their goals. Naude surmises that those who use standard term contracts often bank on such factors as mentioned above to hasten the consumer to sign the contract and agree to its terms.²²⁰ These same factors would also be relied on by those not using standard terms contracts, in other words those looking to bind a party to an agreement not necessarily in their favour, in for example verbal agreements and even written contracts. Such opportunistic, unscrupulous and unprincipled individuals and businesses have harnessed the limited bargaining power of certain individuals to maximise their own interests.

Furthermore, Barnhizer points out that small businesses, their vendors and customers suffer as much if not more as typically vulnerable groups, such as the poor or uneducated. It is clear that given the important role of small businesses in the economy it is of vital importance for the status of inequality of bargaining power to be defined.²²¹

In all fairness, users of standard form contracts cannot be painted as the devil incarnate because standard form contracts do form a vital component of the economy. Standard form contracts are a simple and quick means of carrying out a business transaction when dealing with complex products and complex organisational structures. Standard form contracts also limit legal and managerial costs by allowing a sales person, who is significantly less costly, to conduct the transaction.²²² This way people are able to buy and sell much more quickly, thereby fuelling our economy. Such standard form contracts are justified only because it is in the public's interests that the economy continues to thrive.²²³

Naude suggests that only those terms that are in the public interest should be enforced and those terms that are weighted unjustifiably against the consumer should not be enforced. In support of such a submission, reference is made to Rakoff's reasoning that businesses should prove that non-core terms, or 'invisible terms' and that are a deviation from the background law must be proved to be fair and reasonable and that the terms are ultimately contributing to the maintenance of civic freedom.²²⁴

When contractual disputes arise parties often end up in court hoping for just remediation. However after considering that in terms of a classical liberal theory of contract law which prefers the value of freedom of contract, it is submitted that these realities that consumers

²²⁰ Naude' (note 79 above) 369.

²²¹ Barnhizer (note 5 above) 151-152.

²²² Naude' (note 79 above) 370; *Napier* (note 9 above) 137.

²²³ Naude' (note 79 above) 370.

²²⁴ Naude' (note 79 above), 370.

face when signing a contract should be considered because these realities limit the exercise of a person's freedom. In other words, although a person has the freedom to contract, their freedom must be considered in the context of the realities of certain limiting factors that are at play.

However as discussed in chapter 2, the value of equality, or the realisation of substantive equality has been side-lined in South African contract law. The following two chapters of this study will delve into two possible mechanisms that may be used to more appropriately address the realities faced by contracting parties, or their relative bargaining power, in order for it to be considered more fully as a factor that may affect the validity of a contract, thus promoting a greater degree of substantive equality in contract law.

4. THE ROLE OF GOOD FAITH IN FULLY REALISING THE FACTOR OF UNEQUAL BARGAINING POWER

4.1 Introduction

In an article proposing a more robust good faith doctrine, Louw begins by explaining the current CC-approved definition of good faith.²²⁵ With reference to Brand J, Louw explains that the parameters of good faith fall far beyond simple concepts of honesty and the absence of bad faith; rather good faith includes more objective concepts namely ‘justice, reasonableness fairness and equity’.²²⁶

To provide a more comprehensive understanding of the concept of good faith, Louw refers to Hutchinson, whose view is that good faith can be described as ‘an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract’. Hutchinson goes further to clarify that the manner in which good faith is present in the law, is that it provides the moral and theoretical foundation of technical rules and doctrines, therefore its function is to legitimise or substantiate the law and explain the concept of the particular rule or doctrine concerned.

It can safely be concluded that when a definition of good faith is attempted, words like morals, values, principles, honesty, justice, reasonableness, equity, fairness, decency, and community standards are inevitably used to comprehensively shape the concept of good faith.²²⁷ When one considers an instance of abuse of superior bargaining power, a concept such as good faith, encompassing all these notions, seemingly presents a solid path to justice. However, as established in our law the concept of good faith is an abstract value that cannot be independently and directly applied to a matter.²²⁸

This is unfortunate; if good faith were applied directly, instances of the abuse of superior bargaining power would not be tolerated as contract law would demand a standard of honesty and respect between contracting parties. As discussed above, it is impractical to expect the parties to contract on equal standing. There will always (or usually) be an imbalance of

²²⁵AM 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) *PER/PELJ* 16(5) 44, 51.

²²⁶ Brand (note 37 above) 73.

²²⁷ Louw (note 225 above) 51; Brand (note 37 above) 73; *Botha and Another v Rich N.O. and Others* 2014 (4) SA 124 (CC) 45; *Everfresh Market Virginia* (note 193 above) 36 C-D.

²²⁸ Brisley (note 35 above).

bargaining power. The concept of good faith becomes pertinent when there is an abuse of unequal bargaining power. The reasoning is that a version of contract law that demands honesty and respect for one another would not allow an abuse of superior power. Good faith speaks to the very essence of the contractual interaction which supports the submission that substantive equality must be realised in each and every contract. It is submitted that through the development of a concept of good faith, the abuses that may result from a situation of unequal bargaining power will be more effectively dealt with. Such a thought immediately raises the question of whether or not good faith should hold a more robust position in contract law. It is submitted that good faith is flexible enough to deal with modern day contracts, while the rigid, formalistic principles of contract law are falling short of justice as envisioned in the Constitution.²²⁹

This section will firstly explore the current role of good faith and subsequently its prospects of playing a more effective role in contract law. This study will then consider the question of whether instances of superior bargaining power will be dealt with in an entirely different manner than it is at present, if good faith were to be given a more prominent role by our courts.

4.2 The Current Role of Good Faith

The current role of the principle of good faith as well as the Constitutional and SCA's caution regarding the application of good faith cannot be explored without considering how the principle has been treated in the past.

The principle of good faith can be traced back to Roman law. In light of certain procedures and remedies available, Roman law differentiated between contracts *negotia stricti iuris* and *negotia bonae fide*. As succinctly summarised by Barnard-Naude, the enforceability of a *negotia bonae fide* depended directly on every aspect of the contract being in line with the *bonae fides*.²³⁰ On the other hand *negotia stricti iuris* required the parties (except if the contract expressed a requirement to adhere to the *bonae fides*) to strictly adhere to the terms agreed upon regardless of what would be considered appropriate by the *bona fides*. A defence of bad faith²³¹, the *exceptio doli generalis*, was introduced to eradicate any injustices

²²⁹ Hawthorn (note 23 above) 86.

²³⁰ Barnard-Naude (note 25 above), 176

²³¹ Brand (note 37 above) 74.

that may occur due to such a strict enforcement of contracts. However the need for an *exceptio doli generalis* defence fell away in Roman Dutch law as all contracts were required to be *negotia bonae fide*.²³² In other words, contracts were required to be in good faith.

Barnard-Naude, with reference to Aronstam, argues that because all contracts were required to be in line with the bona fide, and the bona fides would require contracts to be made in good faith, then the bad faith defence, or *exceptio doli generalis* would still be needed and therefore it had survived the transition from Roman law to Roman Dutch law.²³³

Unfortunately, the *exceptio doli generalis* was stopped in its tracks by the judgment of *Bank of Lisbon and South Africa v De Ornelas and Others*²³⁴, which held that the *exceptio doli generalis* did not make its way into Roman Dutch law let alone South African law; in addition it was held that this defence was unnecessary, obsolete and its use should be prohibited. Barnard-Naude surmises that this judgement had initially disallowed a contract to be struck down on the basis of good faith and, in agreement with Cockrell²³⁵, he argues that this rejection of good faith determining the enforceability of a contract stems from ‘an extreme form of individualism’.

Individualism proposes that the world comprises of individuals who always act in their own self-interest, but such that they can still co-exist with other individuals. During the 18th century contracts were measured against values of fairness and good faith, and this meant that contracts were not enforced fastidiously as the growing commercial class would like.²³⁶ The *Bank of Lisbon* case marked a watershed in our law concerning good faith as the judicial marginalisation of these values, in determining the enforceability of a contract, had begun by setting freedom of contract and the principle of good faith on opposite sides of the battlefield.

To further illustrate this point, the case of *Sasfin v Beukes*²³⁷, which was decided a few months after the *Bank of Lisbon* case, will be considered. The court in *Sasfin* was faced with a deed of cession of a bank customer’s earnings to the bank, such that the bank customer could end up ceding his entire salary. Beukes was at the mercy of the bank and the court found that due to the extreme unreasonableness of the cession, the whole contract was unenforceable as it ran contrary to public policy.

²³² Brand (note 37 above) 73; Barnard-Naude (note 25 above), 176.

²³³ Barnard-Naude (note 25 above) 178.

²³⁴ 1988 (3) SA 580 (A)

²³⁵ Barnard-Naude (note 25 above) 178.

²³⁶ Barnard-Naude (note 25 above) 164.

²³⁷ *Sasfin* (note 178 above).

Although it seems like progression towards toppling freedom of contract from its perch, in that the court reasoned that the strict adherence to the agreed terms of a contract may be overridden by other relevant factors, such as public policy, the court in fact issued a warning that has served to limit future development of the application of good faith in determining the enforceability of a contract. The court warned that the ability of a court to declare a contract contrary to public policy, and therefore unenforceable, must be used ‘sparingly and only in the clearest of cases’²³⁸. This means that the courts’ ability to use equity considerations alone in determining the enforceability of a contract is limited, and ultimately this allows commercial interests in strict adherence to agreed terms to prevail, almost unscathed. This can be described as perpetuating the formalistic nature of contract law, as this innovation was treated with scepticism.²³⁹

Brand highlights Parliament’s reluctance to allow equity considerations to possibly strike out a contract, by referring to the South African Law Reform Commission’s proposed draft bill on unfair contracts and contract terms, which recommended that courts should be allowed to strike out a contract that is found to be unreasonable, unconscionable or oppressive²⁴⁰. This rejection by Parliament further bolsters Barnard-Naude’s proposition on the hegemonic nature of the law of contract as evident in the role played by the principle of sanctity of contract. It can be said, the fact that the proposed bill is viewed with such opposition is illustrative of the dominant commercial class seeking to legitimise its interests by making it the interests of the working class. The dominant class does so by legitimising its interests by rationalising that the legal and commercial uncertainty that would result would be disastrous.²⁴¹

Olivier JA, who acted as project leader of the sub-committee of the Law Reform Commission, valiantly swum against the tide of such developments in favour of a more conservative role for substantive equity in his minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*.²⁴² In this case an elderly lady had signed as surety for her son. Sometime later she was declared unable to manage her own affairs. Her daughter applied for the suretyship to be set aside. The court did not decide the case using the principle

²³⁸ *Sasfin* (note 178 above) 9.

²³⁹ Hawthorne (note 22 above) 77.

²⁴⁰ Brand (note 37 above) 76.

²⁴¹ Brand (note 37 above) 77.

²⁴² *Saayman* (note 58 above).

of good faith but ultimately did find that the contract was unenforceable as the elderly lady lacked contractual capacity at the time she signed the deed.

Judge Olivier's minority judgement, described as notorious²⁴³, reasoned that in the *Saayman* case, considering the nature and circumstances that surrounded the contract, if the court did enforce the terms of the contract, this would run contrary to principles of good faith, bona fides and equity. In Olivier J's view this was sufficient to entitle the court to refuse the enforcement of the contract. The reason for his support for allowing a court to strike down a contract found to be contrary to good faith, was that although the *exceptio doli generalis* is no longer relevant in our law, this does not mean considerations of good faith are no longer a part of our law because it is still expected in terms of *iudicia bonae fide*, which was successfully assimilated into South African contract law from Roman Dutch law.²⁴⁴ Justice Olivier's minority judgement led to a bout of legal uncertainty²⁴⁵, until the case of *Brisley v Drotzky*²⁴⁶ which held that all the cases decided in reliance on Olivier J's minority in *Saayman* were decided incorrectly²⁴⁷

The court in *Brisley* disagreed with the lessee and explained that the minority judgement in *Saayman* was characterised by a value judgement of one judge, with whom the other four judges on the bench in that case disagreed that such principles, if contravened, are sufficient for a court to interfere in contractual relations of private parties. The court warned that when judges use their own moral compass to determine if a contractual provision should be enforced or not, there is a real danger of legal and commercial uncertainty. If the law was made by a value judgement in each case, the boundaries of what is right and wrong would change with every case and no one would know with accuracy, where those boundaries lie. It goes without saying that this would undesirably and inevitably lead to unnecessary litigation. The court also explained that principles of good faith, *boni mores* and fairness are not independent, substantive rules that can be directly applied by courts, rather they are abstract values that 'perform creative, informative and controlling functions through established rules of contract law'²⁴⁸. This judgement is clearly formalistic in nature as concepts of fairness, reasonableness and good faith are not considered to be important considerations and the idea

²⁴³ Barnard-Naude (note 25 above) 180.

²⁴⁴ Barnard-Naude (note 25 above) 176.

²⁴⁵ Brand (note 37 above) 78.

²⁴⁶ 2002 (4) SA 1 SCA.

²⁴⁷ Brand (note 37 above) 80-81.

²⁴⁸ Brand (note 37 above) 81.

of a call for judicial discretion is rejected outright.²⁴⁹ Such formalistic application of the principles of contract cannot possibly aid in transforming contract law to better realise the value of equality which underlies the Constitution.

This ideal was perpetuated in the case of *Barkhuizen v Napier*²⁵⁰ where the court held that the proper approach to determine constitutional challenges to contractual terms is to ascertain whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.²⁵¹

Regarding the concept of good faith the court made reference to the case of *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*²⁵² and the court did deduce that our law of contract law is impliedly subject to the *bona fides*²⁵³ or legal convictions of the community. However the court also acknowledged the warning made by the Appellate division that the community's idea of what makes up the *bona fides*, is subject to change.

In the more recent case of *Potgieter v Potgieter*²⁵⁴ the court disagreed with the court a quo's interpretation of Ngcobo J's judgment in *Barkhuizen*. The court a quo had incorrectly held that Ngcobo J's judgment now allowed courts to strike down clauses it found to be unreasonable, unfair and unjust, and were therefore contrary to public policy. However what Ngcobo J actually meant was that contracts or contract terms that were limiting a right of general application were to be subjected to a fairness and reasonableness enquiry. In this case however the clause in question did not attract such an enquiry.

The court in *Potgieter* ultimately held that until the CC holds otherwise, the courts cannot refuse to enforce a contract which it considered to be unfair or unreasonable.²⁵⁵ The court added that by allowing a court to decide a case based on what it considered to be fair and reasonable would lead to 'intolerable legal uncertainty' as the criterion for reasonableness

²⁴⁹ Hawthorne (note 22 above) 78.

²⁵⁰ *Barkhuizen* (note 53 above).

²⁵¹ *Barkhuizen* (note 53 above) 30.

²⁵² *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A).

²⁵³ The court referred to an extract from *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*: 'It would not then be inapt to say, elliptically, that the duty [of a promisor to not commit an anticipatory breach] flows from the requirement of *bona fides* to which our contracts are subject, and that such duty is implied in law and not in fact.'

²⁵⁴ *Potgieter v Potgieter* [2011] ZASCA 181 (30 September 2011)

²⁵⁵ *Potgieter* (note 254 above) 34.

and fairness will not be the law, it will be the preferences of the relevant judge.²⁵⁶ It is clear that the courts are adamant that good faith is an abstract, ethical value that can only play a controlling, informative and creative function and cannot be applied directly in contract law at present. The approach taken by the court in *Potgieter* has been described as ‘inaccurate, overly conservative and constitutionally unsound’.²⁵⁷

After reaching such a conclusion, as the court did in *Potgieter*, it seems counterproductive to attach the hope of the abuse of unequal bargaining power being adequately realised, to the concept of good faith. However it is submitted that the concept of good faith in contract law is yet to reach its zenith, and such a statement finds substance from the following analysis of recent cases and academic commentary.

4.3 The Prospects of Good Faith Playing a More Robust Role

Barnard-Naude proposes that the law at present supports a version of freedom of contract which champions commercial interests in its strict adherence to agreed contract terms. This is what he calls the hegemonic nature of the law. To break this hegemonic nature of the law Barnard-Naude proposes that the working class must realise that they have accepted the values of the commercial class to be legitimate.²⁵⁸ It is submitted that with a normative approach, that better realises the value of substantive equality, the realities of the middle, working class can be properly considered in terms of contract law.

In a critical examination of the SCA and CC judgements of the well-known *Barkhuizen* case Barnard-Naude chalks up the judgements as one that furthers commercial interests, by supporting a strict adherence to agreed contract terms. His argument is relevant in considering the future role of good faith as it traces the uncovering of legal reasoning, which protects commercial interests, so that the value of good faith can be properly considered.

In the SCA judgment of *Barkhuizen*, in which Cameron J emphasised, as he did in *Brisley*, that the Constitution does not allow a judge to render a contract unenforceable based on ‘imprecise notions of good faith’ and that notions that are enshrined in the founding values of the Constitution, such as public policy, non-sexism, non-racialism, human dignity, equality

²⁵⁶ *Potgieter* (note 254 above) 34.

²⁵⁷ Louw (note 225 above) 67.

²⁵⁸ Barnard-Naude (note 25 above) 159.

among others are the proper way for a judge to invalidate an agreement.²⁵⁹ Barnard-Naude criticises the SCA for rejecting good faith for being too imprecise a notion while accepting the arguably equally imprecise notions of public policy, human dignity, non-racialism, non-sexism and equality. He asserts that all these notions call for the courts to interpret and justify these notions such that they can be realised, and dismissing good faith in this manner is ‘arbitrary and incoherent’.²⁶⁰ Clearly Barnard-Naude proposes that the working class is persuaded to believe that good faith has no possibility of being directly applied by a judge because of its inherent imprecision. This is the belief that needs to be overturned in order to break the hegemonic nature of contract law.

In his most compelling illustration of the fact that the courts support a version of freedom of contract (which champions commercial interests in strict adherence to agreed contract terms) he draws a comparison between the judgments of Davis J in the case of *Mort NO v Henry Shield-Chiat*²⁶¹ and the CC’s majority judgement in *Barkhuizen*. This comparison raises the question of whether the consideration of good faith is a part of a consideration of public policy. The CC in *Barkhuizen* held that if a contract is proven to be contrary to public policy it will be unenforceable, and that public policy represents the values of the legal convictions of the community and imports notions of fairness, justice and reasonableness.²⁶² This means that the enforceability of a contract can be determined by the legal convictions of the community. Barnard-Naude then points out that Davis J describes the legal convictions of the community in terms of good faith, so both Davis J and the CC agree that the enforceability of a contract is determined by the legal convictions of the community. In the words of Barnard-Naude, ‘[t]he only disagreement between the CC and Davis J is the doctrinal name of these legal convictions’.²⁶³

The court in *Barkhuizen* did include good faith in the second leg of its test to determine if the terms of the contract are contrary to public policy. It is apparent that the court views good faith as a further filter to prevent enforcement of a contract term that is unfair or unjust.²⁶⁴ The court held that had reasons for non-compliance been provided only then the court would

²⁵⁹ *Napier* (note 9 above) 7.

²⁶⁰ Barnard-Naude (note 25 above) 195.

²⁶¹ 2001 (1) SA 404 (C)

²⁶² Barnard-Naude (note 25 above) 199.

²⁶³ Barnard-Naude (note 25 above) 199.

²⁶⁴ Barnard-Naude (note 25 above) 200.

have been able to apply the principle of good faith.²⁶⁵ It is submitted that through the lens of good faith, the true impact of the unequal bargaining power of parties will be realised. It is apparent that reasons for non-compliance, or the relative bargaining positions of the insured would have been measures against the yardstick of the principle of good faith.²⁶⁶

However, Ngcobo J states that ‘While there is a compelling argument for the proposition that both the maxim *lex non cogit ad impossibilia* and the requirement of good faith should be applicable to the enforcement of time-limitation clauses, the applicability of these common-law principles will depend on the reason advanced for non-compliance²⁶⁷ and as the reasons for non-compliance with the time limitation clause were rather sketchy in this case, the court could not determine if the clause was unfair and therefore contrary to public policy. Although the CC could not decide on the role of good faith on the facts before it, it must be noted that this comment by Ngcobo J is illustrative of the transformative steps forward a court is duty bound to take as the court provided that the principle of good faith is given effect by the common law rule that ‘contractual clauses that are impossible to comply with should not be enforced’.²⁶⁸ It can be concluded that but-for the reasons for non-compliance the court would have considered good faith in its determination of whether the contract is fair and ultimately in line with public policy.²⁶⁹ The CC has left us with the possibility that good faith may play a larger role as part of a public policy enquiry.

The CC addressed the issue of the role of good faith more directly in the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*²⁷⁰ and stressed the importance of defining the extent of the good faith requirement in contract law.²⁷¹ Yacoob J describes good faith as an ‘important moral denominator’ in terms of contract law²⁷² that is in line with the

²⁶⁵ *Barkhuizen* (note 53 above) 83; Barnard-Naude (note 25 above) 200.

²⁶⁶ Barnard-Naude (note 25 above), 200.

²⁶⁷ *Barkhuizen* (note 53 above) 83.

²⁶⁸ *Barkhuizen* (note 53 above) 82; Hawthorn (note 23 above) 88-89.

²⁶⁹ Barnard-Naude (note 25 above), 200.

²⁷⁰ 2012 (1) SA 256 (CC). Shoprite Checkers (Pty) Ltd had purchased Virginia Shopping Centre, and thereby became bound by the lease agreement between the previous owner and Everfresh Market Virginia (Pty) Ltd. Shoprite soon sought an order to evict Everfresh. Everfresh contended that clause 3 obliged Shoprite negotiate in good faith to agree on an amount of rental. Shoprite contended that this was not a valid right to renew, and the High Court agreed stating that an option to renew was unenforceable if the rental is still to be agreed upon. The High Court further stated that the requirement that Shoprite must negotiate in good faith was too vague a concept to enforce, and so it granted the eviction order. After its application for leave to the SCA was denied, Everfresh then applied to the Constitutional Court bearing the question of whether the operation of good faith in contract law must be revised.

²⁷¹ *Everfresh Market Virginia* (note 193 above)

²⁷² *Ibid* 36.

spirit purport and objects of the Constitution. It is clear and logical that good faith is at the basis of every contractual relationship because without the moral obligation to carry out every promise made the practice of entering into a contract will become hollow and meaningless. This case, whilst concerning the role of good faith in the more specific context of a so-called ‘agreement to agree’, may hold important implications for good faith in contracts, more generally.

Yacoob J, in his minority judgement, held that a strict application of agreed upon contract terms is too narrow.²⁷³

The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country. The values embraced by an appropriate appreciation of *Ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution.²⁷⁴

From this dictum we see that the importance of good faith must not be underestimated, as contracts are a vital part of everyday life and because contracts play such an integral part of everyday life, it follows that the part played by contracts must limit conflicts between contracting parties by importing requirements of good faith, freedom, dignity and equality on contracting parties. The CC is slowly attributing more appreciation of the potential role of good faith in contract law and that good faith is in fact embedded in the spirit, purport and objects of the Constitution, which irresistibly can be likened to principles of *Ubuntu* which further illustrate a need for recognition of a good faith requirement in contract law.

Yacoob J also held that Everfresh would have been successful in its mission to develop the common law such that it is infused with the spirit, purport and objects of the Constitution, including good faith, and that just because the High court did not consider s 39(2) when it should have, in his opinion Everfresh should not be denied the appeal.²⁷⁵

²⁷³ *Everfresh Market Virginia* (note 193 above) 23.

²⁷⁴ *Ibid* 22.

²⁷⁵ *Ibid* 37.

Moseneke J, in his majority judgement in this case, expressed his support for the common law being imbued with constitutional values, as well as values of *Ubuntu*.²⁷⁶ He concisely and eloquently expressed the following explanation of Ubuntu, which is not hard to reconcile with the spirit of good faith:

It [*Ubuntu*] emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'

Unfortunately the CC felt that the much needed call for the common law to be developed such that it can be infused with constitutional values such as good faith and Ubuntu could not be heard for the first and last time at the CC, and Everfresh's challenge was thus dismissed on such technical ground.

However, it can still be distilled from this judgement that the CC has moved away from labelling good faith as a danger to legal and commercial uncertainty and is willing to nurture it such that it can be assimilated into contract law more effectively. It is also important to note that by binding good faith to the comprehensive notion of Ubuntu the court in *Everfresh* has given new depth to the concept of good faith, which, in my opinion, sets good faith well on its way to carving a niche for itself in contract law. Ubuntu has the potential to guide the notion of good faith towards governing the relationship between parties and the manner in which an agreement is struck. These sentiments are also expressed by Louw:

Everfresh now stands as a clear indication that, firstly, the CC is prepared to tackle the proper role of good faith in contracts (especially under the value system of *ubuntu*) and, secondly, that the court appears to be of the opinion that the current role of good faith as expressed so consistently by the SCA in the cases referred to earlier probably needs to be revisited in favour of a more robust role for this principle than has hitherto been recognised.²⁷⁷

Barnard-Naude is also of the opinion that good faith, when considered with Ubuntu, should be apparent in the way we as a community interact with one another, and he declares as follows:

²⁷⁶ *Everfresh Market Virginia* (note 193 above) 71.

²⁷⁷ Louw (note 225 above) 66.

[T]he Constitution aspires to an ideal of civic friendship (a ‘politics’ of friendship if you will) which requires, mandates and demands negotiation (contracting) *otherwise* — that is, with respect for and consideration of the other contracting party. I believe that the Constitution aspires to the post-liberal ideal of civic friendship precisely because of its foundational injunction to respect the dignity of all others.²⁷⁸

After considering the judgement in *Everfresh*, in which the Constitution stressed the importance of reaching a conclusion on the role of good faith and that the concept of Ubuntu further bolsters a good faith argument and that these concepts are required to be considered appropriately to develop the common law in line with the spirit purport and object of the Constitution, it would seem that this is the type of ethos that once it is inculcated into society it will become a self-sustaining force for justice. This is further supported by Barnard-Naude and Louw who assert, quite convincingly, that good faith and Ubuntu projects a need for individuals in a community to infuse their relations with one another with respect, honesty and dignity. With such eloquent and well-reasoned academic opinion and such positive views on the possible future role of good faith being issued from the CC (more openly in *Everfresh* and less so in *Barkhuizen*) it is not hard to imagine that soon the good faith requirement will find a much more prominent place in our contract law.

The more recent case of *Botha and Another v Rich N.O. and Others*²⁷⁹ concerned an instalment sale agreement, in terms of which Botha agreed to purchase immovable property from a trust. The agreement included a cancellation clause which entitled the trust to cancel the agreement and retain all payments received if Botha breached the contract. After paying 75% of the purchase price, Botha defaulted on her payments. The trust then sued for cancellation and eviction, and was successful.²⁸⁰ Botha demanded transfer of the property into her name in terms of section 27(1)²⁸¹ of the Alienation of Land Act²⁸². The main issue before the CC was whether, in terms of section 27(1), Botha was entitled to have the property

²⁷⁸Barnard-Naude (note 25 above), 202.

²⁷⁹*Botha* (note 227 above).

²⁸⁰Ibid page 124.

²⁸¹ 27(1) provides that: ‘Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.’

²⁸² 68 of 1981.

registered in her name, against the registration of a mortgage bond in the trustees' favour; in the alternative, would the enforcement of the cancellation clause be unreasonable, unfair and unconstitutional and, if so, would the trustees be obliged to pay back the money paid by Botha.²⁸³

The court acknowledged its duty in terms of s 39(2) of the Constitution, namely that when the courts interpret a statute, such interpretation must be done 'through the prism of the Bill of Rights' such that its spirit, purport and objects are promoted in its interpretation.²⁸⁴ The court distilled the purpose of section 27 as being to protect the interests of the purchaser of land.²⁸⁵ Section 27(1) provides that a purchaser who has undertaken to pay the purchase price in instalments, and who has paid more than 50% of the purchase price, will be entitled to demand transfer of the land on condition that the land is registerable, and that a mortgage bond is simultaneously registered in favour of the seller in order to secure payment of the balance of the purchase price.

In response to Botha's claim, the trust contended that in order for the demand in terms of section 27 to be valid the purchaser must rectify her breach. As Botha had not attempted to make her payment as it was due, there was no demand that gave a right to specific performance.²⁸⁶ This is in accordance with the principle of reciprocity, which is based on the fact that a contract creates reciprocal obligations, therefore it follows that only if one party has performed or tendered to perform can that party claim for performance by the other party. This allows the other party to raise the defence of failure of counter-performance, also known as 'the exception of a non-performed contract (*exceptio non adimpleti contractus*)'. The court held that this was a defence that could be raised by the trust as Botha's right in terms of section 27 (1) was reciprocal to her obligations to pay instalments.²⁸⁷ The court found that, due to the principle of reciprocity, Botha's right in terms of section 27 only materialises once she has made good her arrears, by either paying it or registering a mortgage bond, as it would be unfair to secure her right to the property, even though she was in arrears.²⁸⁸

²⁸³ *Botha* (note 227 above) 21.

²⁸⁴ *Ibid* 28.

²⁸⁵ *Ibid* 31.

²⁸⁶ *Ibid* 42.

²⁸⁷ *Ibid* 43.

²⁸⁸ *Ibid* 44.

The court then turned to the rigid application of the principle of reciprocity. The court stated that a rigid application may lead to injustice and that the law of contract, based on the principle of good faith, is flexible enough to ensure fairness is realised. The court reasoned that ‘concepts of justice, reasonableness and fairness historically constituted good faith in contract’, and further stated that in terms of such concepts, the principle of reciprocity was born, so it must be in line with the principle of good faith.²⁸⁹ The court acknowledged that the Act aims to ensure that the relationship between sellers and purchasers is a fair one, and this is in line with constitutional values and the recognition of the ‘dignity, freedom and equal worth of others’.²⁹⁰ A contract created with the purpose of benefitting both parties cannot fulfil its purpose while both parties are pursuing their own self-interests, by excluding consideration for the other party’s interests. In this regard the court stated that:

Good faith is the lens through which we come to understand contracts in that way. In this case good faith is given expression through the principle of reciprocity and the *exceptio non adimpleti contractus*.²⁹¹

The court ultimately held that it would be unfair and disproportionate, given the 75% of the purchase price she had paid, to not allow Botha to exercise her right in terms of section 27, namely to have the property transferred to her name and, to register a mortgage bond in favour of the trust, in order to cure her breach. In this way the court’s decision to reject the defence of *exceptio non adimpleti contractus*, thereby allowing Botha to have the property transferred to her on the condition that she register a mortgage bond in favour of the trust and agree to pay all municipal balances, was ‘an equitable exercise of the discretion a court has to avoid undue hardship to the trustees.’.²⁹²

This judgement further illustrates the CC’s willingness to bolster the role of good faith and equality in contract law. The CC has clearly taken a substantive approach in recognising that it would be disproportionate and unfair to deprive Botha of her right in terms of s 27(1) considering the large amount of the purchase price she stood to lose should the cancellation clause, which she agreed to, had been enforced according to the black letter of the law.

²⁸⁹ *Botha* (note 227 above) 45.

²⁹⁰ *Ibid* 46.

²⁹¹ *Ibid* 46.

²⁹² *Ibid* 49.

When this CC judgement is considered it becomes apparent that if the trust had taken a good faith approach, that is by giving consideration to Botha's interests and a level of respect, fairness and reasonableness, the obvious course of action would be to allow Botha her right in terms of section 27(1), which also would protect the trust's interests as section 27(1) would have demanded a mortgage bond registered in the trust's favour. What immediately becomes apparent is that in this case, a good faith approach by the trustees would have led to less conflict and a commercially satisfying result.

It is all good and well that the CC is willing to revise the current role of good faith, but the threat of legal uncertainty is still looming in the background. Louw acknowledges that in addition to legal uncertainty, an unhealthy and careless approach to contracting may develop if people were allowed to use good faith to challenge the agreement they had struck²⁹³, and he suggests that an objective take on good faith is required²⁹⁴, which he defines as follows:

[A]n ethical standard of fair dealing between parties which encompasses notions of trust, a moral basis for the enforcement of promises, reciprocity, a duty to act fairly, having regard for the legitimate interests of the other party, and to refrain from conduct that is commercially unacceptable to reasonable and honest people

As Louw indicates, the need for a safer, more 'user friendly' form of good faith becomes quite apparent in the case of *Standard Bank v Dlamini*²⁹⁵, in which Dlamini had bought a car which broke down four days after he had bought it. Dlamini then immediately had the car towed back to the dealership²⁹⁶. Standard Bank asserted that they had a claim against Dlamini for vehicle he had voluntarily surrendered among other costs. However Pillay J identified that the issue here was whether Dlamini had comprehended the terms of the agreement he had signed.

Pillay J deduced that Dlamini was 'functionally illiterate', 'unsophisticated', and that he had completed school at standard one. The learned judge explained that Dlamini had become 'so excited about the purchase of a vehicle that he paid little attention to the repayment plan' and perhaps the most pertinent observation is that:

²⁹³ Louw (note 225 above) 85.

²⁹⁴ Louw (note 225 above) 84.

²⁹⁵ *Standard Bank v Dlamini* 2013 (1) SA 219 (KZD)

²⁹⁶ *Ibid* 1.

He relied on the Bank to deduct reasonable instalments. He did not expect the Bank to deduct a high amount that left him without the means to support himself, his wife and his two little children. He expected to discover what the amount of those instalments would be when the Bank deducted its first instalment from his account. He trusted his bank. On discovering that he bought a defective vehicle he returned it intuitively to the person who sold it to him.²⁹⁷

It becomes painfully obvious that the relationship of trust between Dlamini and Standard bank was one sided, much to the detriment of Dlamini. In a case like this the honest, respectful thing to do is to ensure that as the credit grantor, with its superior product knowledge, the customer is fully aware of the terms they are subjecting themselves to. Just as Dlamini had respected the bank enough to trust its decision on how much to take out of his account the same values of respect should have been extended to Dlamini.

Louw illustrates how an objective standard based on good faith relations between parties to a contract can be a more direct route to justice. He explains that if an objective standard based on good faith relations between parties is applied to the facts of Dlamini then it would be abundantly clear that Dlamini ‘was in every sense reduced to an object of economic gratification for the bank’ and that the bank had failed, dismally, to show Dlamini the required respect.²⁹⁸

4.4 Conclusion

Louw also states that:

It is [...] inconceivable that our community would not be deemed to aspire to a fairer system of contract law in which mutual respect and mutual responsibility towards the other would be paramount.²⁹⁹

It’s not hard to imagine that there are small towns dotted across South Africa in which people sleep with their doors unlocked, and leave their car keys in the car, a town where trust, justice and good faith is not just maintained but expected. South Africa at large, is a society that yearns for a culture of mutual respect and responsibility, and we are in desperate need of it.

²⁹⁷ *Dlamini* (not 295 above) 23.

²⁹⁸ Louw (note 225 above) 97.

²⁹⁹ Louw (note 225 above) 74.

Now that the courts are slowly coming around to giving good faith a defined, and as one should hope, an effective role in contract law, it is apparent that there is light at the end of the tunnel.

And with this chance of good faith becoming a defined and properly functioning concept in contract law it is undeniable that good faith and Ubuntu will not tolerate the abuse of unequal bargaining power in contract law, nor will it tolerate a shallow and restrictive interpretation of equality, dignity and freedom. This demonstrates a movement towards a more substantive approach to equality, in other words a consideration of the realities faced by contracting parties. In South Africa it is no secret that a reality faced by many people is a lack of financial literacy and an abundance of poverty which means there is a vulnerable group in society that may be subjected to economic duress. The next chapter will discuss the possibility of a doctrine of economic duress being assimilated into South African law as such a doctrine will better address the realities faced by South Africans.

5. THE ROLE OF ECONOMIC DURESS IN FULLY REALISING THE FACTOR OF UNEQUAL BARGAINING POWER

5.1 Introduction

In order for a binding contract to be created, certain requirements must be met. The parties to the contract must have the capacity to contract, the contract must be a legal one, performance according to the contract must be possible, and there must be certainty regarding the obligations of each party so the contract can be enforced.³⁰⁰ There is one more requirement which will be the focus of this chapter, namely that there must be consensus between parties for a contract to be binding. Consensus requires that there must be a meeting of the minds of the parties regarding the terms of the contract.³⁰¹ In other words the parties to the contract must agree to the material terms of the contract. This is in accordance with the will theory, which is a subjective approach to determining the validity of a contract.

However the situation does arise where it cannot be said that there was a meeting of the minds. This state of dissensus may be because of a misrepresentation, duress or undue influence. The next question to ask is whether one party had a reasonable belief, based on the words or conduct of the other party, that consensus had actually been reached.³⁰² As the law of contract seeks to protect the reasonable belief of the induced party, such a contract is considered to be binding based on 'quasi mutual assent'. The basis for a binding contract in such circumstances is the reliance theory, which is an objective approach to determining the validity of a contract.³⁰³ The protection offered to the induced, innocent party is that the contract is voidable should he wish to escape the contract provided that the requirements to void the contract are met.³⁰⁴ It is submitted that through the doctrines of economic duress and undue influence, the factor of unequal bargaining power may be more fully realised.³⁰⁵

³⁰⁰ D Hutchinson et al *The Law of Contract in South Africa* 1 ed (2009) 5.

³⁰¹ Hutchinson (note 300 above) 5.

³⁰² Hutchinson (note 300 above) 20.

³⁰³ Hutchinson (note 300 above) 20.

³⁰⁴ Hutchinson (note 300 above) 114.

³⁰⁵ Bhana & Pieterse (note 18 above) 887; L Hawthorne 'The Principle of Equality in the Law of Contract' (1995) 58 *THRHR* 157, 170.

5.2 Economic duress in South African Law

The doctrine of economic duress was recognised for the first time in South African law, in the case of *Medscheme Holdings (Pty) Limited & Another v Bhamjee*³⁰⁶. This case concerned two acknowledgements of debt signed by Bhamjee in favour of two medical aid schemes for money that he had claimed, and that the schemes had paid out to him. The relationship that existed between the parties was that Bhamjee was allowed to claim his fee straight from the medical aid schemes instead of from the patients.

Bhamjee had paid back the first acknowledgement of debt in instalments over two years. The payment of a portion of the second acknowledgement of debt was to be set off, in instalments, against money claimed for by Bhamjee but which had not been paid out yet.³⁰⁷

Not long after the second acknowledgment of debt was signed, Bhamjee was no longer permitted by the medical aid scheme to claim directly from them. Rather the patients would have to pay Bhamjee and would then be reimbursed by the medical aid schemes. This new arrangement did not sit well with Bhamjee's patients as they preferred to consult a practitioner whose fee could be recovered directly from the schemes. As a result Bhamjee's practice collapsed.³⁰⁸ Bhamjee then successfully sued Medscheme in the Pretoria High Court claiming that the acknowledgements of debt were signed under duress and were therefore void.³⁰⁹

The 'managed health care' service was a service offered by Medscheme to the schemes under its administration which monitors and controls the costs incurred by the scheme.³¹⁰ In managing the costs incurred, a comparison was made of a medical practitioner's cost-profile against the average cost-profile of comparable practices. If there were concerning results, an investigation may ensue, followed by efforts to reduce or eliminate the discrepancies. Subsequently the practitioner may be referred to his respective professional body and the matter will be discussed with the practitioner. The scheme did have the discretion to refuse to accept claims from the practitioner directly. The obvious result was that patients will be discouraged from consulting with such a practitioner and they would seek out other practitioners in the scheme. The court acknowledged that such a discretion to either accept or refuse claims directly from the practitioner affords the medical aid scheme a superior

³⁰⁶ *Medscheme Holdings (Pty) Limited & Another v Bhamjee* 2005 (5) SA 339 (SCA)

³⁰⁷ Ibid 3.

³⁰⁸ Ibid 4.

³⁰⁹ Ibid 5.

³¹⁰ Ibid 9.

bargaining position in relation to those practitioners who depend upon their claims being paid by the scheme, especially when the practitioner's economic survival depends on such an arrangement.³¹¹

Through the process of the 'managed health care' service it was discovered that Bhamjee's average cost-per-patient was substantially higher than the average cost-profile of comparable practices. In a meeting with a representative of the scheme, Bhamjee was informed that the scheme was considering no longer allowing him to make direct claims. Bhamjee then offered to pay a portion of the excess in an attempt to make the schemes reconsider. The representative promised to put this offer before the board of trustees. In making this offer Bhamjee signed the first acknowledgement of debt.³¹² The court accepted that Bhamjee had signed the first acknowledgment of debt, believing that if he did not then his lucrative practice would be at risk.³¹³

The SCA stated that an 'unlawful or unconscionable threat of some considerable harm' which induced an undertaking renders that undertaking voidable. Further the SCA recognised that the harm facing Bhamjee, as he alleged, was economic harm which resulted from the relationship between him and the scheme.³¹⁴ The question before the SCA was whether such a threat constituted duress in terms of the law.³¹⁵

On the signing of the second acknowledgement of debt, another representative of the scheme had a meeting with Bhamjee regarding information that had come forward that Bhamjee was cheating the scheme. Bhamjee claimed that the gist of what the representative told him was that if he refused to sign the second acknowledgement of debt the scheme would refuse to allow him to claim directly from them. The court held that the scheme had adequate reasons to believe that it had been cheated by Bhamjee, therefore the resulting acknowledgement of debt was 'no more than a settlement of the parties' respective contentions, prompted by legitimate commercial considerations that fell far short of duress.'³¹⁶ The SCA found that the acknowledgements of debt were not induced by an unconscionable threat that amounted to duress.³¹⁷

³¹¹ *Medscheme Holdings* (note 306 above) 7.

³¹² *Ibid* 11.

³¹³ *Ibid* 15.

³¹⁴ *Ibid* 6.

³¹⁵ *Ibid* 15.

³¹⁶ *Ibid* 29.

³¹⁷ *Ibid* 16.

The harm contemplated was specifically economic harm, and the court did acknowledge, with reference to *Van den Berg & Kie Rekenkundige Beampies v Boomprops*³¹⁸, that a doctrine of economic duress had not been accepted in South African law to date (in American and English law, a contract may be avoided on grounds of it being induced by economic pressure). The SCA went further to state that it saw no reason why the doctrine of economic duress should not be assimilated into South African law.³¹⁹

Although the SCA did not shed light on exactly how economic duress would operate in South African law, it did open the door to the possibility of such a doctrine finding a footing. The court did explain that cases of economic duress would be rare. The court's reasoning is as follows:³²⁰

For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in *Van den Berg & Kie Rekenkundige Beampies* at 795E-796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more – which is absent in this case – would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress.

This extract begs the question of when bargaining power (and its exercise) become legally relevant to a consideration of the validity of a contract. What can be concluded is that an agreement that is created by hard bargaining is acceptable in our law. A competitive economy thrives on such agreements. However the court has acknowledged that for economic bargaining to be considered illegitimate or unconscionable there is another factor that must be proven before the contract can be rendered void due to duress. In order to uncover this other factor, the concept of economic duress must be more closely examined.

5.3 *The Definition of Economic Duress*

Cassim likens economic duress to business compulsion, and defines it as 'imposition, oppression or taking undue advantage of the business or financial stress or extreme necessity

³¹⁸ 1028 BK 1999 (1) SA 780 (T)

³¹⁹ *Medscheme Holdings* (note 306 above) 18.

³²⁰ *Ibid* 18.

or weakness of another'.³²¹ Cassim goes further to explain that economic duress is 'constituted by illegitimate commercial pressure exerted on a party to a contract, which induces him to enter into the contract, and which amounts to a coercion of the will which vitiates his consent'.³²² Hawthorne describes the establishment of the doctrine of economic duress as a manner of ensuring the voluntariness of contract.³²³ However there is no authoritative, judicial definition of economic duress in South African law as it is not, as yet, recognised in South African law.

5.4 The Need for a Defined Concept of Economic Duress

Modern commerce is characterised by an ethos which holds the profitability of a transaction to be of greater importance than the manner in which the transaction was completed, and in such circumstances it is more likely that contracts may be completed in an improper manner, such as being induced by an economic threat.³²⁴

South Africa has experienced commercial growth which has resulted in more complex business relationships and some companies (and individuals) wield more wealth and power than others. However the law has not yet adapted to provide adequate relief for more complex commercial problems. It is now an undeniable reality in South Africa that an individual or a small business may be placed under an economic threat, which may be as illegitimate and unconscionable as a threat under recognised forms of duress. It is submitted that the doctrine of duress in its traditionally recognised form is no longer sufficient to provide relief to those who enter into a contract under duress, specifically economic duress.³²⁵

Section 39 of the Constitution requires the courts to develop the common law in terms of the spirit, purport and objects of the bill of rights. At this point, considering the competing needs of the marketplace, namely commercial certainty and the needs of vulnerable contracting parties who require legal recognition of the realities of their weak bargaining position, it is clear that the courts are charged with finding a just balance. It is submitted that through a defined doctrine of economic duress, the improper use of a stronger bargaining position that

³²¹ MF Cassim 'Medscheme Holdings (Pty) Limited v Bhamjee: The Concept of Economic Duress' (2005) 122 *SALJ* 528, 528.

³²² *Ibid* 528.

³²³ Hawthorne (note 305 above) 169.

³²⁴ G Glover 'Developing a Test for Economic Duress in the South African Law of Contract: A Comparative Perspective' (2006) *SALJ* 285, 286.

³²⁵ Cassim (note 321 above) 529.

many are subjected to may be better realised and dealt with, along with developing a more substantive understanding of consensus.³²⁶

As the court stated in *Medscheme*, a mere imbalance of power will not be sufficient to invalidate a contract, there is something more which is required for a contract to be rendered invalid.³²⁷ It becomes apparent that there is a need to determine when an imbalance of power leads to acceptable commercial pressure and when it leads to economic duress.³²⁸

5.5 The Proposed Test for Economic Duress

It is proposed that it is time for the South African law of contract to catch up with the rest of the world, by developing a doctrine of economic duress to deal with the often inevitable disputes arising in the context of modern commerce.³²⁹

Glover proposes a modern test for duress to be assimilated into South African law that has been developed in Anglo- American and European law. This test is significant because not only does it apply to all types of coercion but it was specifically developed in an attempt to better understand economic duress.³³⁰ The test comprises of two parts, namely the proposal enquiry and the choice enquiry. The proposal enquiry requires there to have been: (a) a threat (b) that was contra bonos mores, or illegitimate. Glover then states that the choice enquiry requires the threat to have: (a) in fact induced the contract, and (b) must have left the other party with no reasonable choice, or no acceptable alternative, but to succumb to the threat and enter into the contract.³³¹

5.6 Economic Duress Requires a Consideration of Bargaining Power

The second element of the choice inquiry is of particular importance in respect of this study. In considering the threat that has left the party with ‘no reasonable choice, or no acceptable alternative, but to succumb to the threat and enter into the contract’, it is submitted that this, is a clear reference to the bargaining power of the parties.

³²⁶ Bhana & Pieterse (note 18 above) 887.

³²⁷ *Medscheme Holdings* (note 306 above) 18.

³²⁸ Bhana & Pieterse (note 18 above) 887.

³²⁹ Glover (note 324 above) 286; Cassim (note 321 above) 529.

³³⁰ Glover (note 324 above) 287-288

³³¹ *Ibid* 287-288

Regarding the consequences of the threat, the doctrine of duress requires the party to consider all practical alternative options to submitting to the threat and signing the contract. The question that will be asked is would a reasonable person in the circumstances of the aggrieved party have behaved in such a manner. By considering the circumstances of the aggrieved party, it is obvious that the realities of the party's bargaining position will be a factor in determining if the party was under duress, that is, if this test is in fact assimilated into South African law.³³²

This becomes more apparent when one considers an illustration: a court may more easily find a case of duress if the aggrieved party was a consumer or a small business with few resources, than a multinational corporation with vast resources. A court is likely to find that it is acceptable for a consumer or small business, being threatened by a company in a more powerful position, to submit to the economic threat than resist it. While a larger company with ample resources is more likely able to put up some resistance.³³³ However the SCA's conclusion regarding the first acknowledgement of debt in *Medscheme* is out of step with the foreign approach proposed by Glover. In this regard the court held that the first acknowledgment of debt was a trade-off because '[Dr. Bhamjee] considered it to be economically worthwhile, even though he would no doubt have preferred not to have been required to make it' and therefore there was no duress.³³⁴

The court here implies that Bhamjee chose to sign the first acknowledgement of debt because it was an economically viable choice therefore it was not because he had no other practical alternative (as duress would require there to have been no practical alternative). The court does not consider that he chose to do so as it was the lesser of two evils and therefore he was still subjected to duress. In other words, the doctrine of duress may accept that a choice to sign a contract may be an economically worthwhile option however the aggrieved party may still be acting under duress. This is so because the pressure may not cause a person to act involuntarily or remove all their choices, rather the pressure may deflect their will thus pressuring the aggrieved party to choose between the lesser of two evils.³³⁵

³³²Glover (note 324 above) 308.

³³³Ibid 308.

³³⁴Medscheme Holdings (note 306 above) 19.

³³⁵Cassim (note 321 above) 533.

If the reasonable person test, as required by the choice enquiry, had to be applied here, and the options available to Bhamjee were considered, it is likely that a reasonable person in his position would have succumbed to the threat and signed the contract which was a lesser evil than having the scheme refuse to accept his direct claims, which would result in his business collapsing as it eventually did. This indicates that Bhamjee was in fact acting under duress. Bhamjee was backed into a corner, with no reasonable alternative, yet the court found that he had made a free choice or a choice without duress, because it was economically worthwhile. This line of reasoning does not consider the economic realities faced by Bhamjee and therefore does not fully realise the effect of the relative bargaining position of the aggrieved party.³³⁶ The doctrine economic duress must be developed, in line with European and Anglo-American law, to include a consideration of the economic realities faced by aggrieved parties.³³⁷

5.7 The Difference between Hard Bargaining and Economic Duress

It is of vital importance to note that by simply proving that there was an imbalance of bargaining power would not be sufficient to show that succumbing to the threat was reasonable. A consideration of the bargaining power would do little to give effect to substantive equality without also considering the realities of the party who makes the threat, namely that it is within their rights to drive a hard bargain. For this reason a clear distinction between hard bargaining and economic duress is imperative if the development of a doctrine of economic duress as well as an effective doctrine of Inequality of bargaining power are to be successfully integrated into South African law.³³⁸ It is submitted that the distinction between hard bargaining and economic duress becomes apparent when the conduct of the threatening party violates a constitutional value.

A situation of duress occurs when a stronger party takes advantage of a weaker party in an unconscionable manner.³³⁹ The right to equality is immediately implicated when terms are not negotiated on equal ground and are often burdensome and unwanted by the weaker party. The contract then becomes terms dictated by the strong party which is forced on the weaker party.

³³⁶ Cassim (note 321 above) 533.

³³⁷ Glover (note 324 above) 287- 288; Cassim (note 321 above) 529; Bhana & Pieterse (note 18 above) 887.

³³⁸ Cassim (note 321 above) 534; Bhana & Pieterse (note 18 above) 887.

³³⁹ Glover (note 40 above) 153.

It is illogical and impossible to require that each person be on absolute equal standing for a contract to be valid.³⁴⁰ Each person has a different skill set, a different background, and often unequal access to resources. Some differences must be accepted. A court will accept certain imbalances in bargaining power as being present, but should only see fit to intervene when one party has taken an unfair advantage of the other and acted contrary to good faith.³⁴¹

Therefore, to answer the question of when hard bargaining becomes illegitimate economic pressure one could argue this would be the case when the hard bargaining has the effect of inhibiting the constitutional value of equality. In determining when the value of equality has been restricted requires an in-depth analysis of the consequences of the conduct of the threatening party.³⁴² This in-depth analysis requires an examination of the specific context, or bargaining position, of each party because what is acceptable in one context may not be in another context.³⁴³ This highlights the vital importance of the role of the bargaining positions of each party to properly determine if hard bargaining has crossed the line and become economic duress. In other words it is only with a consideration of the bargaining positions of the parties, that it is possible to determine if the constitutional value of equality has been restricted.

Additionally, in the case of *Gerolomou Constructions (Pty) Ltd v Van Wyk*³⁴⁴, Tuchten J explained that it is not permissible for an economically powerful party to withhold what is owed to an economically weaker party in order to secure some commercial advantage.³⁴⁵ He went on to explain, with reference to *Barhkiuzen*, that the sanctity of contract is ‘intimately connected’ with the constitutional values of freedom and dignity. It was on this basis that the judge stated that the use of a threat to breach an existing contract is conduct that is contrary to the values of freedom and dignity.

It is important to note that the court found this case to be an instance of undue influence and not economic duress, however the facts of the case fall more appropriately within the doctrine

³⁴⁰Glover (note 40 above) 155-156.

³⁴¹Ibid 155; Ogilve (note 41 above) 311.

³⁴² Glover (note 40 above) 155 with reference to *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)

³⁴³ Ibid 155 with reference to *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)

³⁴⁴ *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP)

³⁴⁵ *Gerolomou* (note 344 above) 24.

of economic duress.³⁴⁶ This case shows that when the conduct of the threatening party, in the context of the particular bargaining positions of each party, restricts constitutional values it constitutes improper pressure and renders the contract voidable.³⁴⁷ In other words the values of freedom, dignity and equality may determine when hard bargaining crosses the line and becomes economic duress.

Further support for this submission is found in the proposal enquiry which requires that the threat be contrary to the *boni mores*, or legal convictions of the community. Public policy represents the legal convictions of the community, which are values that are viewed by society to be of paramount importance.³⁴⁸ Public policy is now informed by the values founded in the Constitution, namely the realization of human dignity, equality, freedom, the rule of law and human rights.³⁴⁹ This means that a contract which is contrary to the values of freedom, equality and dignity will be contrary to public policy and therefore unenforceable.³⁵⁰

When considering public policy, equity and dignity it is no longer possible to ignore the constitutional value of Ubuntu and its possible impact on contract law. The CC has explained that contract law can no longer be considered without consideration of the value of Ubuntu, which informs the spirit, purport and objects of the Constitution and which represents the values of the majority of the people.³⁵¹ The CC has expressed its desire to infuse the common law with constitutional values, including Ubuntu, which demands people to transact with a standard of reasonableness, mutual respect, fairness and good faith.³⁵² This is further evidenced by the fact that the CC no longer tolerates a rigid application of the principle of reciprocity.³⁵³ A person cannot be forced to adhere to a contract they have signed if such enforcement would lead to injustice.³⁵⁴ This is because contract law is based on good faith which demands a contract to be reasonable and fair.³⁵⁵ The principle of reciprocity inherently

³⁴⁶ CJ Pretorius, R Ismail 'Compromise, Undue Influence and Economic Duress; Gerolomou Constructions (Pty) Ltd v Van Wyk 2011 (4) SA 500 (GNP)' *Obiter* 2012 681, 691-692.

³⁴⁷ *Gerolomou* (note 344 above) 24.

³⁴⁸ *Barkhuizen* (note 53 above) 28.

³⁴⁹ *Ibid* 28.

³⁵⁰ *Ibid* 29.

³⁵¹ *Everfresh Market Virginia* (note 193 above) 23.

³⁵² *Ibid* 71-72.

³⁵³ *Botha* (note 227 above) 45.

³⁵⁴ *Ibid* 45

³⁵⁵ *Ibid* 45.

demands a contracting part to have respect for the other party's dignity and freedom first, before he attempts to enforce the contract.³⁵⁶

It follows that embedded in the proposed test for economic duress, developed in English and Anglo American law, is the requirement that the threat must be contrary to constitutional values in order for the conduct in question to constitute economic duress and not merely hard bargaining.

5.8 Conclusion

Although the parameters of the exercise of economic duress is not set out in the case of *Medscheme*, the SCA in this case has set the scene for the equity doctrine of economic duress to be assimilated into South African contract law. It is decided that a contract created due to mere hard bargaining is accepted to be valid, which means there must be something more that exists which renders the contract to be unconscionable and therefore voidable. For this reason, there is a need to determine when an imbalance of power leads to acceptable commercial pressure and when it leads to economic duress.³⁵⁷

Glover's proposed test for economic duress encompasses an enquiry to determine when economic duress exists, instead of acceptable commercial pressure (an enquiry which the law of contract cannot properly address as yet). The second element of the choice inquiry requires the bargaining power of the parties (in other words the economic realities faced by the parties) to be considered in order to determine whether the induced party had any reasonable alternatives but to succumb to signing the contract. The distinction between hard bargaining and economic duress becomes apparent when the conduct of the threatening party violates the constitutional values of dignity, equality and freedom as well as concepts of public policy, good faith and Ubuntu. It is clear that if this proposed test is assimilated into South African law, bargaining power and substantive equality, through the required consideration of the realities faced by the parties, will become more fully realised.

³⁵⁶ *Botha* (note 227 above) 46.

³⁵⁷ *Bhana & Pieterse* (note 18 above) 887.

6. CONCLUSION

Contracts form an integral part of our everyday life. Given the competitive, capitalistic environment in which we transact, it is usually inevitable that contracts entered into, do not epitomise equality as one party is usually in a superior bargaining position. This imbalance of bargaining power cannot be avoided, however judicial intervention is required when there is an abuse of a party in a weaker bargaining position. From the examination of *Brisley* and *Afrox* the SCA favoured a classical liberal understanding of freedom and dignity which seems to trump any proper consideration of substantive equality between parties. Even though the SCA in *Afrox* acknowledged that the bargaining power of the parties is relevant in determining whether a contract offended public policy, the nature of the lessor- lease or doctor- patient relationship between the parties is criticised to have not been fully considered as the constitutional requirement of substantive equality demands. These cases illustrate the underdeveloped enforcement of substantive equality in contract law. However, in line with its transformative duty, the courts went further in the case of *Barkhuizen* by creating a test for public policy which requires an examination of the realities faced by the contracting parties. Slowly but surely with the development of a substantive equality requirement in contract law, and the bargaining power, or realities faced by parties may become more fully realised.

However there is still some uncertainty regarding the manner of enforcing equity in contract law, as evidenced in the cases of *Jordan* and *Uniting Reform Church* which are significantly out of step with the cautious approach adopted by the SCA. These cases illustrate a need for the realisation of substantive equality in contract law as well as a well-defined method in which the courts deal with equity considerations like bargaining power in the future. In line with their constitutional duty to develop the common law with constitutional values, the courts must develop the law of contract to break free of restrictive classical liberal definitions of freedom and dignity and to realise substantive equality in contract law. This would demand a context sensitive approach to each matter.

The doctrine of good faith demands a standard of honesty and respect between contracting parties. It follows that an abuse of superior bargaining power would fall afoul of such a standard of honesty and mutual respect. Most recently in the cases of *Everfresh* and *Botha* the CC has expressed its desire to infuse the law with equity principles of good faith and Ubuntu as well as a step away from concentrating on a rigid approach of enforcement of agreed upon

contract terms. These cases illustrate the CC willingness to consider the realities faced by contracting parties, which is in line with a substantive equality approach to contract law.

It is further submitted that through a realisation of economic duress the bargaining power of parties can be more fully realised. An often over looked flaw in the reasoning that an agreed upon contract must be upheld, is that in some cases there is no actual meeting of the minds due to some duress experienced by the one party such that they feel forced to submit and sign the contract in question. The doctrine of Economic duress has not yet been assimilated into South African Law. However the SCA's optimism regarding a possible South African doctrine of economic duress, coupled with Glovers proposed test for economic duress illustrates that the law is ripe for such a development towards substantive equity. The test proposed by Glover, specifically the second leg of the test, requires an examination of the realities faced by the party due to the influence of the threat. This context sensitive approach seeks to give life to substantive equity in contract law.

The SCA and CC have slowly begun to pay more attention to constitutional values of dignity, freedom and equality, and considering the development of the role of good faith and the possible doctrine of economic duress it seems that contract law is well on its way to embodying substantive equality, with a healthy understanding of the effect of unequal bargaining power. The courts are charged with a transformative duty by the constitution to ensure such promising development continues:

What the Constitution demands of them [judicial officers] is that a legal order be established that gives substance to its founding values — democracy, dignity, equality and freedom; a legal order consistent with the constitutional goal of improving the quality of life of all citizens, and freeing the potential of each person. The challenge facing us as a nation is to create such a society; the challenge facing the judiciary is to build a legal framework consistent with this goal.³⁵⁸

³⁵⁸ Arthur Chaskalson *Farewell speech on his retirement as Chief Justice of the Republic of South Africa* Constitutional Court, 2 June 2005 [taken from Naude & Lubbe (note 79 above) 463]

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23 July 2014

Ms Micosha Palanee (210517367)
School of Law
Howard College Campus

Protocol reference number: HSS/0829/014M

Project title: The role of unequal bargaining power in challenging the validity of a contract in South African Contract Law

Dear Ms Palanee,

Full Approval – No Risk / Exempt Application

In response to your application dated 25 June 2014, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

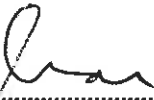
Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



.....
Dr Shenuka Singh (Chair)

/ms

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Cc Academic Leader Research: Dr Shannon Bosch
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