

‘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

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Q6: “ ... and I wondered how you think your concept of friendship, your non-canonical concept of friendship, can address economic exclusion in its most extreme form which is the exclusion by those who own capital of everyone else. You can’t ask those who own capital to be hospitable ...”.

JD: “I ask them nevertheless [laughter].”

Q6: “It’s naïve to ask them, it’s a naïve request.”

JD: “Perhaps, but I still do.”¹

‘One must speak for a struggle for a new culture, that is, for a new moral life that cannot but be intimately connected to a new intuition of life, until it becomes a new way of feeling and seeing reality.’²

1 Introduction

The pivot on which this contribution hinges is hegemony in the context³ of the South African law of contract. I must point out at the

* ‘... when first we practice to deceive.’ Sir Walter Scott *Marmion* (1825) Canto VI Stanza XVII, 349.

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¹ From ‘Politics and friendship: A discussion with Jacques Derrida’ available at <http://www.hydra.umn.edu/derrida/pol+fr.html> (accessed 29 May 2008).

² A Gramsci *Selections from cultural writings* (1985) 98.

³ And it will of course be unavoidable when considering the lexicography of hegemony, that the concept of conning (in both its senses) – and the conning of/ by the text; the context – will raise its head.

outset that the purpose or aim of this ‘hinging’ on hegemony and/in the South African law of contract, is not necessarily to take issue with, underscore or re-illustrate the claim that contract holds hegemony – in the sense that it ‘occupies a privileged position’ – in the South African legal system.⁴ Nevertheless, it might very well be the case that Alfred Cockrell’s admirable illustration of the hegemony of contract in the South African legal system can be explained also by the particular focus on hegemony in the South African law of contract on which I embark in this contribution. In other words, the hegemony of contract might well be attributable to the hegemony *within* contract. This is the case because the hegemony *within* might very well sustain the hegemony *of* and perhaps also *vice versa*. (A symbiosis comes to mind.) This hegemony within contract relates to a particular understanding of freedom of contract. Thus, the focus and point of departure in this contribution will be the hegemony – or hegemonic order(ing)⁵ – of/in a particular understanding of (freedom of) contract. This understanding of freedom of contract – and indeed of contract itself – is the individualist, rule-committed⁶ – *liberal*⁷ – understanding of freedom of contract.

The enactment of the Constitution,⁸ the transformative hopes it disseminates and the view that its normative framework is explicitly post-liberal⁹ occasions an opportunity for a re-evaluation of and a challenge to the individualist (hegemonic) understanding of freedom of contract, its concomitant commitments and, as we shall see, the tangled web it weaves in order to sustain the false consciousness on

⁴ A Cockrell ‘The hegemony of contract’ (1998) 115 *South African Law Journal* 286 286.

⁵ I want to insist on this marking according to which both senses of the word ‘order’ remain constantly in play, namely order as socio-political concept of hierarchy and order as sequential arrangement.

⁶ D Kennedy ‘Form and substance in private law adjudication’ (1976) 89 *Harvard Law Review* 1685 1685: ‘individualism seems to harmonise with an insistence on rigid rules rigidly applied.’

⁷ See the description of the liberal self – grounded in individualist morality – offered by F Michelman ‘The subject of liberalism’ (1994) 46 *Stanford Law Review* 1807 1812. Also see van K Marle & D Brand ‘Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha*’ (2001) 12(3) *Stellenbosch Law Review* 408 415.

⁸ Constitution of the Republic of South Africa, 1996.

⁹ See H Botha ‘Democracy and rights: Constitutional interpretation in a postrealist world’ 2000 (63) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 561 574. Botha notes three reasons why the Constitution requires more than a classical liberal interpretation. First, he points out that the Constitution contains a commitment to an open, value-orientated, participatory democracy. This is a commitment that cannot be reconciled with the reduced concept of democracy which pervades liberal theory. Secondly, Botha argues that the Constitution does not support a liberal conception of rights as boundaries between the individual and the collective; the rights in the Bill of Rights have a contingent and non-absolute meaning and to that extent they do not operate as a shield against government intervention or as trumps over collective interests. Thirdly, the Constitution is structured such that it requires a far more activist stance of the judiciary than what would be acceptable under a liberal interpretation (574-576).

which its legitimacy turns. However, in order to embark upon such a re-evaluation it will be necessary to begin by revisiting the concept of hegemony as encountered in the work of Antonio Gramsci as well as the expansions and reformulations of Gramsci's concept as it relates to law. Second, I will articulate more fully what is meant with and what are the commitments of the hegemonic liberal understanding of contract and freedom of contract. Third, I will track the rise of the hegemonic order(ing) in the South African law of contract. I will argue that the story of its rise can and must be considered as the story of the fall (that is, the marginalisation) of values and concepts in the law of contract that came to be understood as somehow threatening the hegemonic order(ing) (notably in this regard, good faith).¹⁰ An ongoing moment in this contribution interrogates the way in which the hegemony confronts the Constitution (both as an interruption,¹¹ as a value system and as law) in order continuously to pose the question whether the hegemonic order(ing) within the South African law of contract (and the adjudication that keeps this hegemony in place) should be resisted in the name of the spirit, purport and objects of the Constitution.

A primary contention in this article will be that the hegemony of a radically individualist understanding of freedom of contract is as firmly in place under the newly constituted legal order as it was under the apartheid legal order in South Africa. The law of contract is still seen as an institution of separation rather than relation, of apartness, rather than togetherness. That 'nothing changed again',¹² is evident in a series of cases decided after the reconstitution of the South African legal order.¹³ What will also become evident, however, is the series of contradictions and deconstructions that emerge in the course of

¹⁰ See in this regard G du Toit 'The significance of postmodern theories of interpretation for contractual interpretation: A critical analysis' unpublished LLD thesis, University of Stellenbosch, 2006 234-235.

¹¹ See, for instance, J Gilbert-Walsh 'Deconstruction as narrative interruption' (2007) 38(4) *Interchange* 317.

¹² For a variety of reasons I want to draw explicit attention here to Karin van Marle's discussion of the inscription 'and nothing changed again' on one of the etchings in Dianne Victor's celebrated series *Disasters of Peace*. Van Marle remarks as follows: "And nothing changed again", portrays the state of mind of many South Africans who do not experience easy living in post-apartheid South Africa. For them, nothing has changed again.' See K van Marle 'Art democracy and resistance: A response to Professor Heyns' (2005) *Pulp Fictions: Disasters of Peace: An Exchange* 15 26.

¹³ The most important of these cases are *De Beer v Keyser* 2002 1 SA 827 (SCA) (*De Beer*), *Brisley v Drotsky* 2002 4 SA 1 (SCA) (*Brisley*), *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) (*Afrox Healthcare*), *Johannesburg Country Club v Scott and Another* 2004 5 SA 511 (SCA) (*Johannesburg Country Club*), *Juglal NO v Shoprite Checkers t/a OK Franchise Division* 2004 5 SA 248 (SCA) (*Juglal NO*), *South African Forestry Co Ltd v York Timbers* 2005 3 SA 323 (SCA) (*South African Forestry Co*), *Napier v Barkhuizen* 2006 4 SA 1 (SCA) (*Napier*) and *Barkhuizen v Napier* 2007 5 SA 323 (CC) (*Barkhuizen*).

the marginalisation of good faith in the South African law of contract, which of course mirrors the rise of the hegemonic order(ing).

In the last part of the article I will argue why the hegemonic order(ing) of contract, mirrored by the marginalisation of good faith can and should be questioned in light of the transformative commitments inherent in the spirit of the Constitution. I will argue that good faith as the ethical element of contract directly involves the constitutional ideal of civic friendship in the South African law of contract. Civic friendship as an aspirational ideal of the new legal order then enjoins us to transform the hegemonic order(ing) in the law of contract by way of a direct involvement of good faith.¹⁴ I see the starting point of this transformation as a call for the politics of friendship in the politics of contract. In this context, I will argue that the provisions of the Draft Consumer Protection Bill stand in stark contrast to the commitments of the hegemonic understanding of freedom of contract and, although inadequate, these provisions point to a future law of contract that will have to be far more concerned with the ethical element of contract than it has been up to now. These provisions require a transformed understanding of freedom of contract in which good faith as the ethical element of contract comes to again play a constitutive role in the understanding of freedom of contract. This has obvious transformative implications for adjudication in the South African law of contract. In this context I will take issue with the Constitutional Court's 2007 judgement in *Barkhuizen* in which it followed a hesitant approach to the transformative role of good faith in the South African law of contract. Ultimately my contention will be that good faith interpreted in line with a transformative reading of the law of contract mandates a *relational* interpretation of freedom of contract that is far removed from its standard libertarian version.

2 Gramsci, hegemony and the law

In order to come to terms with the present focus on the hegemonic understanding of (freedom of) contract, it is necessary – as a point of departure – to review the development of hegemony as a conceptual tool of critique. For the benefit of the argument that will follow, it will also be necessary to enquire into contemporary views on the relationship between hegemony and law.

¹⁴ I realise and concede that the theoretical and methodological framework developed here is contested. Apart from the justifications offered in the text, the primary focus of this article (adjudication on the interaction between the common law of contract and the Constitution in 2007) does not allow me to fully defend this approach. In this regard, I intend to embark more fully on such an explanation in future work.

Hegemony as a critical concept was originally developed in the work of Antonio Gramsci¹⁵ who employed the word to explain how capitalism maintains control ‘not just through violence and political and economic coercion, but also ideologically, through a culture in which the values of the bourgeoisie became the “common sense” values of all.’¹⁶ In Gramsci ideology operates in such a way that the dominant class in fact instills a false sense in the dominated class that the good of the dominant class is also the good of the dominated class. This condition serves conformity and perpetuates a *status quo*.¹⁷ John and Jean Comaroff aptly describe the cultural effect of hegemony:

[W]e take hegemony to refer to that order of signs and practices, relations and distinctions, images and epistemologies – drawn from a historically situated cultural field – that have come to be taken-for-granted as the natural and received shape of the world and everything that inhabits it.¹⁸

Gramsci insisted that hegemony is only transformed once the dominated class realised the importance of creating its own culture which depends on the realisation that it had unwittingly adopted the values of the bourgeoisie and that its own values in fact opposed the values of the bourgeoisie.¹⁹ Breaking hegemony thus depends fundamentally on *the contestation of values and ideals* and perhaps more importantly on the contestation of the *relationships between and the content of* these values and ideals.²⁰

When it comes to the relationship between law and hegemony, Litowitz points out that law fulfils a dual function in relation to hegemony.²¹ On the one hand, the law represses (through the State’s monopoly on physical force) any disturbance that might challenge the hegemony. On the other hand, the law authorises and legitimates the status quo and so produces and perpetuates the hegemony without the need to revert to physical force.²² This contribution will focus primarily on this second dimension of hegemony, as I shall interrogate

¹⁵ A Gramsci *Selections from the prison notebooks* trans Q Hoare & GN Smith (1971).

¹⁶ JM Russel *Philosophical classics* (2007) 94.

¹⁷ As above. Also see TR Bates ‘Gramsci and the theory of hegemony’ (1975) 36(2) *Journal of the History of Ideas* 351 352: ‘The concept of hegemony is really a very simple one. It means political leadership based on the consent of the led, a consent which is secured by the diffusion and popularisation of the world view of the ruling class.’

¹⁸ J Comaroff & J Comaroff *Of revelation and revolution: Christianity, colonialism and consciousness in South Africa* (1991) 23.

¹⁹ Russell (n 16 above) 95.

²⁰ Bates (n 17 above) makes the point that the theory of hegemony recognises that man is ruled not just by force but also by ideas. The author also points to the Marxist mantra that ‘the ruling ideas of each age have ever been the ideas of its ruling class.’

²¹ D Litowitz ‘Gramsci, hegemony and the law’ (2000) *Brigham Young University Law Review* 515 531.

²² As above.

specifically how law – a particular version of contract law – endorses and thus normalises or legitimates the individualist or libertarian worldview. For Gramsci as for Litowitz this second dimension of hegemony is the more dangerous one as it carries within it the potential to paralyse all resistance and silence all questioning. Litowitz argues that the concept of hegemony requires the attention of students of law, precisely because it possesses this profound ‘ability to induce submission to a dominant worldview.’²³

Whereas Gramsci originally maintained that law is a hegemonic tool of the dominant *class*, Litowitz argues that when it comes to contemporary legal analysis a more nuanced notion of hegemony is required. Litowitz contends that under conditions of post-modernity we need an understanding of hegemony that avoids ‘Gramsci’s reliance on orthodox Marxist categories that are no longer tenable.’²⁴ Litowitz argues that postmodern theory brought about a profound but gradual shift in the understanding of hegemony away from essentialist Marxist discourse rooted in rigid class distinction.²⁵ Postmodern theorists understood that oppression does not exclusively exist as the imposition of a dominant class and recognised that oppression is often invisible and can exist merely in the silencing of alternative perspectives.²⁶ Postmodernism thus changed the operative terminology in discourse about hegemony from “‘class/exploitation” to “discourse/marginalisation.””²⁷

Litowitz explains that this development in hegemony discourse can help legal scholars to recognise that law is hegemonic at the meta-level (in that it always already represents and legitimises dominant interests) while contesting hegemony at the micro-level. For Litowitz law participates in the establishment of hegemony through the dissemination of a ‘dominant *code* or *map*’²⁸ that relies on ‘unchallenged background assumptions that undergird the law.’²⁹ Thus law always already *is* hegemonic in that it ‘induces people to comply with a dominant set of practices and institutions without the threat of physical force’³⁰ because people are lulled into a false consciousness about the legitimacy of law which causes them uncritically to accept legal practices and institutions that might in fact be harmful and exploitative. In other words the meta-level at which law is hegemony sustains and keeps in place law’s hegemonies at micro-level – and *vice versa*.

²³ Litowitz (n 21 above) 516.

²⁴ Litowitz (n 21 above) 518.

²⁵ Litowitz (note 21 above) 533.

²⁶ Litowitz (n 21 above) 534.

²⁷ As above.

²⁸ n 21 above, 517.

²⁹ As above.

³⁰ As above.

Under the force of hegemony the assertion that ‘law ... is also the site of everyday resistance and struggle’³¹ comes to be either dismissed and ignored or actively undermined and suppressed. However, contesting the hegemonies upon which the law *as* hegemony is founded can be the first step in raising consciousness upon which refusal and resistance of things as they are and supposedly always have been, can be built.³² This is the central motivation behind the present focus on the hegemonic order(ing) in the South African law of contract. I do not want to suggest that the Marxist roots of hegemony discourse can or should be simply or finally denied or that escape from these roots should be relentlessly pursued.³³ As we shall see, the South African law of contract vividly reflects the Gramscian insight that bourgeois best interests come to be uncritically accepted as the best interests of the working classes and the poor through the phenomenon of false consciousness which generates false consent. However, what postmodern theory contributes to hegemony discourse is the notion of discourse marginalisation. I will argue in what follows that the rise of the hegemonic order(ing) in the law of contract occurs through an explicit judicial marginalisation of discourses on equity, fairness and good faith.³⁴ In the context of the reconstitution of the South African legal order this raises important and difficult questions about the potential of the South African law of contract (in its current guise) to contribute to the project of transformative constitutionalism.³⁵

³¹ K Calavita ‘Book review: M Lazarus-Black *et al* *Contested states: Law, hegemony and resistance*’ (1996) 25(1) *Contemporary Sociology* 94 94-96.

³² Litowitz (note 21 above) 518. Also see D Kennedy ‘Antonio Gramsci and the legal system’ (1982) VI(1) *ALSA Forum* 32 37: ‘What the Gramscian analysis suggests is that one of the ways out of the reform/revolution problem in all these legal activities is to try to develop, at the level of conscious communication with other people, the extent to which they are letting their goals be perverted by the hegemonic false consciousness generated by law.’

³³ See in this regard E Laclau & C Mouffe *Hegemony and socialist strategy* (2ed, 2001) viii.

³⁴ A detailed discussion of the link between, on the one hand, the ideas that predominate in judicial decisions in the law of contract and, on the other, the beliefs about social organisation that are dominant in elites and the general populace, falls beyond the scope of this article. But see, for instance, E Mensch ‘Freedom of contract as ideology’ (1981) 33 *Stanford Law Review* 753 757 who points out that the rise of the classical view of contract in the courts can be attributed to the popularity of Victorian moralism amongst the elites of the time. There are, in addition, several places in this article where I do not use the term ‘hegemony’ in any purist Gramscian sense of the word but rather in its more general sense to denote predominance. Where the word is primarily used in this way there is nevertheless a secondary allusion to the Gramscian notion operating in the background.

³⁵ See K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146 146.

3 The rise of the hegemonic order(ing) in contract

3.1 The rise of the market economy, the subjectivity of value and the will theory

The present hegemonic order(ing) in contract begins, of course, in the late 18th century. At this point in history, freedom of contract still had an explicit and intricate connection with principles of morality such as fairness, conscience and justice.³⁶ The maxim *pacta servanda sunt*, in this understanding of freedom of contract, was still regarded as ‘*the imperative of good faith in contracts*’.³⁷ As Atiyah points out, this meant that: ‘the Courts were, at that time, still more interested in seeing that parties to a contract made a fair exchange, than they were in enforcing bare promises.’³⁸ On this approach, contracts were not enforced meticulously. Instead, they were meticulously subjected to enquiries into the fairness of the exchange.

The problem with this approach to freedom of contract was that by the nineteenth century it became regarded as anachronistic, because it did not serve the interests of the rising commercial classes of the emerging market economies.³⁹ In these emerging economies value became regarded as entirely subjective. Horwitz indicates that, for this very reason, the late 18th century businessman became interested in a freedom of contract that would guarantee the express value of the agreed performance, regardless of the substantive equality of the exchange.⁴⁰ This meant that, as the market economies and the commercial classes became dominant, the law of contract as it existed up to that point came to be considered unsuited for the purposes of the new economies. In short, the eighteenth century equitable understanding of freedom of contract was far too invested in the concept of objective value. The general view of the eighteenth

³⁶ MJ Horwitz ‘The historical foundations of modern contract law’ (1974) 87(5) *Harvard Law Review* 917–920. The eighteenth century approach is stated succinctly in *Evans v Llewellyn* [1787] 29 ER 1191 (*Evans*) 1191: ‘if the party is in a situation in which he is not a free agent and is not equal to protecting himself, this Court will protect him.’

³⁷ Van der Merwe *et al Contract general principles* (3 ed, 2007) 21 n 7 quoting H Eichler *Die rechtslere vom vertrauen* (1950) 8 (emphasis added). C Visser ‘The principle *pacta servanda sunt* in Roman and Roman-Dutch law’ (1984) 101 *South African Law Journal* 641–647 points out that originally *pacta servanda sunt* is integrally connected to good faith: ‘it would therefore appear that both canon law and the *lex mercatoria* from very early on accepted a general principle of sanctity of contract, based upon a moral conception of good faith ...’ (emphasis added.)

³⁸ PS Atiyah *The rise and fall of freedom of contract* (1979) 438.

³⁹ Horwitz (n 36 above) 945–946.

⁴⁰ MJ Horwitz ‘The triumph of contract’ in AC Hutchinson (ed) *Critical legal studies* (1989) 104–106.

century was that substantive justice existed to ensure that legal subjects do not abuse the legal system to exploit each other.⁴¹ In the nineteenth century the role and function of contract was no longer regarded as guaranteeing the justice of the exchange but to enforce so-called 'willed' transactions *inter partes*.⁴² So arises the so-called 'modern' or 'classical' law of contract in which the source of contractual obligation shifted from equitable exchange to consensus.⁴³

The pervasive political view of the nineteenth century – that of unlimited liberal freedom – informed and provided the justification for a conception of 'freedom' of contract as the shibboleth for the privileging of the parties' wills in conceptualising their relationships.⁴⁴ Once the concept of value became perceived as entirely subjective, the only basis for ascribing value could be concurrent, individual will. Principles of substantive justice came to be regarded as necessarily arbitrary and an uncertain standard of value.⁴⁵ At the point where intrinsic value could no longer be ascribed to anything, so the argument went, no substantive measure could exist by reference to which it could be determined whether one party was exploiting the other.⁴⁶ On this view, the appearance of consensus came to represent the 'evidence' that the contractual exchange itself was a fair one.

However, the loss incurred as a result of this shift in emphasis was particularly acute. Gordley indicates that nineteenth century jurists in fact entirely eliminated the concept of virtue from their discussion of contract and were left with the will alone.⁴⁷ The motto of modern contract thus became this: 'a man is obliged in conscience to perform a contract which he has entered into freely, although it be a hard one ...'.⁴⁸ As Hahlo so aptly described it: Darwinian survival of the fittest, the law of nature, also became the law of the marketplace.⁴⁹

⁴¹ Mensch (n 34 above) 753, 756.

⁴² As above.

⁴³ Horwitz (n 36 above) 946.

⁴⁴ Horwitz (n 36 above) 917. Also see J Gordley *The philosophical origins of modern contract doctrine* (1991) 161 where the point is made that consensus was applied almost exclusively to explain the basis of contractual obligations.

⁴⁵ Horwitz (n 36 above) 917.

⁴⁶ As above.

⁴⁷ Gordley (n 44 above) 162.

⁴⁸ IJ Powell 'Essay upon the law of contracts and agreements' (1790) as quoted in Horwitz (n 36 above) 917.

⁴⁹ HR Hahlo 'Unfair contract terms in civil-law systems' (1981) 98 *South African Law Journal* 70.

3.2 The role of individualism

The above formulation evinces the understanding of freedom of contract of advancing and advanced liberal capitalism underpinned by what is euphemistically called the ‘morality’ of individualism.⁵⁰ Individualism accepts as given a world of independent individuals who are encouraged to prefer the pursuit of self-interest rigorously. A consideration or sensitivity for the interests of others falls outside of the aims of this way of life, although one should be prepared to obey the rules that make it possible to co-exist with other self-interested individuals.⁵¹ Other than this, the individual is entirely self-reliant. His conduct conforms to the belief that other individuals in the community are themselves motivated only by pure self-interest.⁵² As regards individualism’s economic manifestation, Cockrell puts it succinctly: ‘[I]ndividualism assumes a world of traders who meet briefly on the market floor, where they engage in discrete and furtive transactions.’⁵³ This view is often described as market-individualism and reveals that the capitalist idea of the market and the ‘moral’ idea of individualism are heavily invested in each other.⁵⁴

Individualist beliefs regarding the role of law in society follow from the above convictions. Individualism holds that the law cannot impose upon legal subjects as a group the liability of shared profits or loss.⁵⁵ The law merely fixes the boundaries of individual freedom by defining and enforcing rights.⁵⁶ In the context of the law of contract, individualism believes that the parties create their own law through agreement (consensus) which is itself a manifestation of the individual’s autonomy. Mensch refers to this phenomenon as a ‘magic moment of formation, when individual wills created a right whose enforcement was necessary for the protection of free will itself.’⁵⁷ Contractual liability is thus only determined by the formal agreement (consensus) of the parties. The law of contract in an individualistic world, to borrow from Macaulay, provides the glue that binds

⁵⁰ Kennedy (n 6 above) 1774. Kennedy goes so far as to argue that ‘[t]he “freedom” of individualism is negative, alienated and arbitrary. It consists in the absence of restraint on the individual’s choice of ends, and has no moral content whatever.’

⁵¹ JM Feinman ‘Critical approaches to contract law’ (1983) 30 *UCLA Law Review* 829 839; Kennedy (n 6 above) 1713.

⁵² Kennedy points out that the individualist ethic should be distinguished from the egotistical ethic in the sense that the individualist ethic has a strong positive ‘moral’ content whereas the egotist believes that it is entirely impossible and undesirable to place any limits on the perusal of self-interest. See Kennedy (n 6 above) 1714-1715.

⁵³ A Cockrell ‘Substance and form in the South African law of contract’ (1992) 109 *South African Law Journal* 40 41.

⁵⁴ See CJ Pretorius ‘Individualism, collectivism and the limits of good faith’ (2003) 66 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 638 639.

⁵⁵ Kennedy (n 6 above) 1713.

⁵⁶ Cockrell (n 53 above) 42.

⁵⁷ Mensch (n 34 above) 760.

individuals to their agreements.⁵⁸ This emphasis on the creation of an own law through the agreement causes individualism to take the view that courts should enforce agreements rather than intervene in relation to their terms on grounds of fairness or equity.⁵⁹

With the rise of the market economy in the nineteenth century, the entire conceptual apparatus of the law of contract thus developed around this understanding of the relationship between the individual and society, the individual and the State and the individual and the law.⁶⁰ As Feinman indicates:

Classical legal thought imagined a world of independent individuals, each of whom acts within a broad sphere of legal autonomy to pursue her own self-interest. The market was the model of social organisation and the acquisitive capitalist the paragon of personal behavior.⁶¹

In the law of contract this thought established freedom of contract as the hegemony (predominance) of the will theory. Duncan Kennedy famously added that the hegemony of individualism on the level of substance, in turn established the hegemony of rules on the level of contract law's formal commitments.⁶²

But because of the fact that *domination* is implied in the concept of hegemony it would be inaccurate to contend that hegemony manages to liquidate its other entirely. This means that hegemony always implies a relation – a relation of domination and privileging, yes, but nevertheless, a relation. The trace of the Other thus always haunts any hegemony. The reason why this particular privileging or domination is hegemonic is because, as Cockrell indicates, 'this privileging invariably proceeds on the basis that the preference for individualism and the rule-form is an axiomatic truth rather than a controversial premise in an ongoing argument.'⁶³ The danger is that the hegemonic version of contract can lead us to think that this is the only order(ing) available in the law of contract – that freedom of contract grounded in individualism and the commitment to the rule-form, is the only version of contract that exists.⁶⁴

⁵⁸ S Macaulay 'An empirical view of contract' (1985) *Wisconsin Law Review* 465 466.
⁵⁹ Pretorius (n 54 above) 640.

⁶⁰ As Dalton points out, the will theory of contract flows from the political doctrine of contractualism, which holds that 'all restraint is evil and that the government that governs least is best.' See C Dalton 'An essay in the deconstruction of contract doctrine' (1985) 94 *The Yale Law Journal* 997 1013.

⁶¹ J Feinman 'The conservatives, the market and the common Law' (2005) 37 *Review of Radical Political Economics* 288 290.

⁶² Kennedy (n 6 above) 1685: '[t]he substantive and formal dimensions are related because the same moral, economic and political arguments appear in each.'

⁶³ Cockrell (n 53 above) 46.

⁶⁴ Pretorius (n 54 above) 644: 'There is no difficulty in recognising that individualism is the primary ideology underlying the law of contract. The problem lies in suggesting that it is the only one.'

The individualistic or liberal worldview in the understanding of contract did not and could not manage to altogether absent the law of contract from alternative worldviews. Applied to our current context this insight would imply that the traces of the pre-nineteenth century understanding of freedom of contract could not be erased by either the domination of the commercial classes of the nineteenth century or by the courts that represented their interests. The old underlying moral conceptions on which the law of contract was founded prior to the domination of individualism could thus not be abandoned outright.⁶⁵ For one, the courts still naively wanted to believe that parties to the contract were in fact reaching consensus on its terms as honest, just, fair and non-exploitative persons (that is, persons who are in good faith). To this extent the courts still acknowledged external standards of justice. But the critical legal issue had shifted from whether the contract was fair to whether there objectively appeared to have been a ‘meeting of the minds’ between the contracting parties.⁶⁶

Horwitz points out that although nineteenth century courts could not succeed in negating the ancient relation between natural law and contract law, they did succeed in setting up a system in which the courts could effectively ‘pick and choose’ which groups within the broad society they wanted to benefit in a given case.⁶⁷ The discourse of the nineteenth century managed to set-up an intellectual divide between the system of formal rules (associated with the ‘rule of law’ or law as rules)⁶⁸ and the ancient perceptions of morality and equity (which was seen as necessarily undermining the rule of law or perhaps, then, the law of rules). As already mentioned, the argument in Critical Legal Studies has been that this preference for rules was part of the classical *laissez-faire* individualist morality grounded in non-interventionism.⁶⁹ It is thus no coincidence that most of modern general contract law consists of rules by way of which one determines whether the will of the parties coincided and if not, rules that regulate the undoing of the exchange.⁷⁰ These rules are ordered around the doctrines of misrepresentation, duress, undue influence and so forth – theories that allegedly turn on the negation of the *will* – and do not visit explicitly – or explicitly do not visit – matters such

⁶⁵ Horwitz (n 36 above) 953.

⁶⁶ Horwitz (n 36 above) 955.

⁶⁷ As above.

⁶⁸ C Douzinas & A Geary *Critical jurisprudence* (2005) 7.

⁶⁹ Kennedy (n 6 above) 1741.

⁷⁰ See Van der Merwe *et al* (n 37 above) 19-32.

as the fairness of the bargain or the good faith of the parties.⁷¹ The theory of reasonable reliance on the appearance of consensus – as an alternative basis for the existence of a contract – is itself simply seen as a qualification of the will theory and not as a negation or in any way a complete alternative to it.⁷² Yet, as Cockrell indicates, the origin of the defect in the defences based on the negation of the will does not in fact reside in the will of one of the parties, but rather in the improper conduct. The same reasoning applies to the theory of reasonable reliance. These defences, as Cockrell argues, are all concerned with the legitimacy of conduct, and one way to link them would be to say that they all amount to instances of bad faith on the part of one of the parties.⁷³ On the hegemonic understanding, however, the open-ended norms or standards of the law of contract cannot do this work. It cannot be directly employed or appealed to in the adjudication of contractual disputes. In this regard, the point that has repeatedly been made by our own courts in the recent past is that good faith, reasonableness and fairness, although subjacent to, or underpinning the law of contract, can only be used in the resolution of contractual disputes to the extent that they have become embodied in so-called crystallised rules of the law of contract.⁷⁴ We will return to this problematic assertion below but for now it is important to state the general contention that these assertions serve only (in very real *political* ways) to keep the hegemony firmly in place.

4 The hegemonic order(ing) in the South African law of contract

4.1 Public policy as handmaiden and adversary of freedom of contract

Colonialism and imperialism of course carried the individualist understanding of freedom of contract grounded in the will to the numerous colonies. It is thus not surprising that the South African law of contract from its very inception reflects the hegemony of the will

⁷¹ CFC Van der Walt 'Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraktsbedinge' (1986) 103 *South African Law Journal* 646 658. Also see Dalton (n 60 above) 1001 who makes the point that dealing with unfairness via those constructs that affect the will of the parties (duress, misrepresentation, undue influence etc) effectively constitutes a privatisation of the public enquiry into contract when 'the undoing of a defective deal [is] presented as depending upon the absence of will or intent rather than on mere inequivalence of exchange.'

⁷² Van der Merwe *et al* (n 37 above) 22.

⁷³ Cockrell (n 53 above) 56.

⁷⁴ See *Brisley* (n 13 above) 16B-C; *Afrox Healthcare* (n 13 above) 40H-41A; *South African Forestry* (n 13 above) 338J-339B; and *Napier* (n 13 above) para 7.

theory of contract. One of the most frequently quoted passages – ‘the most privileged statement of all’⁷⁵ – justifying the privileging of (the ‘will theory version’ of) freedom of contract as the basis of contractual obligation in the South African law of contract, is to be found in a late nineteenth century case from the English law, *Printing and Numerical Registering Co v Sampson*:⁷⁶

If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.⁷⁷

In *Burger v Central South African Railways*⁷⁸ Innes CJ ‘developed’ this basic premise and held in no uncertain terms that the South African law of contract does not recognise the right of a court to release a party to a contract from his obligations on considerations of fairness.⁷⁹ And this is precisely the point, (as will hopefully become clearer below): when the focus is on the South African law of contract particularly, the *rise* of the hegemonic order(ing) of (freedom of) contract should be considered in the context of the *fall* of numerous values, principles and rights that came to be understood as freedom of contract’s adversaries and so became regarded as *opposed* to it.

A doctrinal aspect that has remained uncontroversial in the grand narrative of the South African law of contract has been the recognition that contracts concluded *contra bonos mores* and/or contrary to public policy fall foul of the validity requirement of legality and are therefore either void or unenforceable.⁸⁰ The extent of this power to declare void or unenforceable contracts or terms

⁷⁵ Cockrell (n 53 above) 46. See, for example, *Wells v South African Alumenite Company* 1927 AD 69 73 (*Wells*); *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 4 SA 494 (N) (*Roffey*) 504G-H; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) (*Sasfin*) 9F; *Edouard v Administrator, Natal* 1989 2 SA 368 (D) (*Edouard*) 379A; *Baart v Malan* 1990 2 SA 862 (E) (*Baart*) 868A; *De Klerk v Old Mutual Insurance Co Ltd* 1990 3 SA 34 (E) (*De Klerk*) 44; *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) (*Benlou Properties*) 187H; *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (C) (*Standard Bank*) 830D; and *Basson v Chilwan and Others* 1993 3 SA 742 (A) (*Basson*) 761G. See also V Terblanche (2002) ‘The Constitution and general equitable jurisdiction in South African contract law’ unpublished LLD thesis, University of Pretoria, 2002 153 who refers to the ‘privileged position of 19th century contract law theory in South Africa.’

⁷⁶ 1875 LR 19 (*Printing and Numerical Registering Co*) Eq 462 per Jessel MR.

⁷⁷ *Printing and Numerical Registering Co* (n 76 above) Eq 465. The mood is also expressed in more general terms by Kotze CJ in *Brown v Leyds* (1897) 4 OR 17 (*Brown*) 31 who held that ‘no Court of Justice is competent to inquire into the internal value, in the sense of the policy, of the law, but only in the sense of the meaning or matter of the law’.

⁷⁸ 1903 TS 571 (*Burger*).

⁷⁹ *Burger* case (n 78 above) 576.

⁸⁰ Van der Merwe *et al* (n 37 above) 192-193, 200-203.

contrary to public policy was expressed as follows in *Morrison v Angelo Deep Gold Mines Ltd*:⁸¹

[!]It is a general principle that a man contracting without duress, without fraud and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule, and certainly the law will not recognise any arrangement which is contrary to public policy.

The dialectic that emerges here is that, on the one hand, public policy generally favours the utmost freedom of contract but, on the other, contracts concluded in violation of public policy are unenforceable or void. Public policy is thus regarded (from the perspective of freedom of contract) as both a legitimating and controlling device in our law of contract.⁸² The resolution/synthesis of this dialectic is, however, not impossible when one understands that the exercise of alleged freedom of contract is precisely not *freedom* of contract – that is, it is not freedom that can legitimate a contractual arrangement – when it is exercised contrary to public policy. This understanding also points to a deeper problem with the notion of autonomy as freedom of contract, which is said to form the cornerstone or foundational principle of the law of contract. The public policy requirement communicates that some contracts that are freely entered into (that is, in which the wills of legally competent parties overlap) will not be enforced for want of legality (in the broad sense). This means that, as a matter of a contract's validity, there is a constitutive limit on freedom of contract that inevitably denies absolute party autonomy. And since legality is determined externally (not by the parties but with reference to 'the interests and convictions' of the society in which the contract is concluded)⁸³ it means that the cornerstone of the law of contract is both autonomous and heteronomous.

Our courts, however, do not approach the matter in this way. Freedom of contract is consistently *opposed to* other ideals, values and rights, instead of integrally connected to and thus determined by those other values and rights. When public policy is, for instance, considered in relation to restraint of trade clauses the position is taken that 'two values or freedoms come into conflict ... namely freedom of contract and freedom of trade.'⁸⁴ In our law the position (since the decision in *Magna Alloys*)⁸⁵ has been that restraints of trade are in principle enforceable in accordance with freedom of contract,

⁸¹ 1905 TS 775 (*Morrison*) 779.

⁸² See Van der Merwe *et al* (n 37 above) 17.

⁸³ Van der Merwe *et al* (n 37 above) 191.

⁸⁴ Van der Merwe *et al* (n 37 above) 213. Also see *Roffey* (n 75 above) 505F (per Didcott J): 'I am satisfied that South African law prefers the sanctity of contracts ... Freedom of trade does not vibrate nearly as strongly through our jurisprudence ... it is intrinsically the less commanding of the two ideas.'

⁸⁵ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) (*Magna Alloys*).

unless the restraint is contrary to public policy, the measure of public policy in relation to restraints of trade being reasonableness.⁸⁶ On this formulation, freedom of contract is said to be the 'preferred value'.⁸⁷

Recently the constitutionality of the *Magna Alloys* formulation was questioned in the case of *Reddy v Siemens Telecommunications (Pty) Ltd*⁸⁸ where it was argued that restraints of trade constitute limitations on the right to freely choose a trade, occupation or profession — a right expressly protected in section 22 of the Constitution.⁸⁹ This means, so the argument went, that a restraint of trade is enforceable only when it can be proved by the employer who wants to enforce it to be a reasonable and justifiable limitation (as required by section 36 of the Constitution) on the section 22 right.⁹⁰ The Supreme Court of Appeal (per Malan AJA) held that this argument effectively constituted an argument regarding onus and did not contest the earlier findings of the courts

that a restraint that is found to be reasonably required for the protection of the party who seeks to enforce it, in accordance with the test that has been laid down in the cases, is constitutionally permitted.⁹¹

The Court declined to adjudicate the issue of onus, holding that, 'whether the onus was reversed or not, the result in the present case would be the same.'⁹² It continued to hold that what is called for in

⁸⁶ In the context of the rules/standards discourse it should be pointed out that our courts do not seem to experience difficulty with the standard of 'reasonableness' both in the context of the public policy requirement and outside of it. In addition to its role in the area of restraints of trade provisions and public policy, reasonableness also plays a decisive role in the determination of contractual liability on the basis of reliance or the doctrine of quasi-mutual assent. In this regard see, for instance, *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A) (*Sonap Petroleum*) and *Constantia Insurance v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) (*Constantia Insurance*).

⁸⁷ Van der Merwe *et al* (n 37 above) 215.

⁸⁸ 2007 2 SA 486 (SCA) (*Reddy*).

⁸⁹ In *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2005 3 SA 205 (N) (*Canon*) 208-209 the court endorsed this reasoning.

⁹⁰ *Reddy* (n 88 above) 495C-E.

⁹¹ *Reddy* (n 88 above) 495D. See *Waltons Stationery Co (Edms) Bpk v Fourie en 'n Ander* 1994 4 SA 507 (O) (*Waltons Stationery*) 510I-511F (SA); *Kotze & Genis (Edms) Bpk en 'n Ander v Potgieter en Andere* 1995 3 SA 783 (C) (*Kotze & Genis*) 786E-I; *Knox D'Arcy Ltd and Another v Shaw and Another* 1996 2 SA 651 (W) (*Knox*) 657Hff and 661D-F, *CTP Ltd and Others v Independent Newspaper Holdings Ltd* 1999 1 SA 452 (W) (*CTP*) 468G-H; *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 2 SA 853 (SE) (*Fidelity Guards*) 861F-862G; and *Oasis Group Holdings (Pty) Ltd and Another v Bray* [2006] 4 All SA 183 (C) (*Oasis Group*) paras 23-25.

⁹² *Reddy* (n 88 above) 496A-B.

the case of restraints of trade is a value judgment

with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions.⁹³

It concluded that the common law approach to the determination of the reasonableness or not of the restraint 'gives effect to the precepts of section 36(1) of the Constitution'.⁹⁴ Thus the enquiry into the reasonableness of the restraint simultaneously answers the question whether the restraint is a reasonable and justifiable limitation of the right in question.

Clearly, the Court here views the right to choose a trade, occupation or profession freely as *coming into conflict* with freedom of contract as *pacta servanda sunt*. However, an alternative approach was followed in the later judgment of Davis J in *Advtech Resourcing t/a Communicate Personnel Group v Kuhn*.⁹⁵ In this judgment Davis J held that if contractual autonomy is part of the constitutional value of freedom and informs the ideal of dignity,⁹⁶ then under a transformative Constitution such as ours, contractual autonomy must be read as internally limited by the rights in the Bill of Rights and 'the spirit of the Constitution read as a whole'.⁹⁷ In the context of restraints of trade this means that section 22 of the Constitution places an internal limit on freedom of contract to the extent that agreements in restraint of trade that constitute unreasonable and unjustifiable limitations on the section 22 right, will not be enforced. And since a restraint of trade constitutes a *prima facie* violation of the section 22 right, an employer who wants to enforce the restraint must prove that it is a reasonable and justifiable limitation of the right.⁹⁸

When the Constitution states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law 'to the extent that they are consistent with the Bill' of Rights⁹⁹ it places the common law notion of freedom of contract on an *equal footing* with all the rights in the Bill of Rights. In so doing, it contests the *a priori* elevation of a liberal notion of freedom of contract in the common law in the sense that it calls for

⁹³ Reddy (n 88 above) 496D.

⁹⁴ Reddy (n 88 above) 497 F/G.

⁹⁵ 2008 2 SA 375 (C) (*Advtech*).

⁹⁶ *Advtech* (n 95 above) 387I.

⁹⁷ *Advtech* (n 95 above) 388A.

⁹⁸ *Advtech* (n 95 above) 387A.

⁹⁹ Section 39(3) of the Constitution.

a *synchronisation* of freedom of contract with the ideals, values and rights in the Bill of Rights. Drucilla Cornell distinguishes the concept of synchronisation from both Dworkinian coherence and liberal conceptions of balancing: ‘Synchronisation recognises that there are competing rights situations and real conflicts, which may not be able to yield a “coherent” whole.’¹⁰⁰ For Cornell synchronisation refuses closure and so calls for an ongoing, never-ended (re-)thinking of the whole even as it marks the failure of constructive coherence. For Cornell ‘the tension between the promise of synchronisation and the failure of its achievement’ opens the law to its transformative potential.¹⁰¹

In this context and on this approach, freedom of contract as *pacta servanda sunt*, becomes internally defined by the right in section 22 and, for that matter, any other right in the Bill of Rights as well as the founding values and ideals of the Constitution. But such an approach is only possible once one accepts that section 22 (and indeed all the rights in the Bill of Rights) is on an equal footing with freedom of contract (as the Constitution clearly says it is). Simply put, there cannot be talk of freedom of contract where the restraint of trade (or whatever contractual provision) is found to unreasonably and unjustifiably limit a right in the Bill of Rights or can be said to be contrary to the spirit, purport and objects of the Constitution. It goes without saying that where the limitation of a constitutional right is alleged in the context of restraints of trade, such an approach would – in this context – require the prioritisation of direct horizontal application of the Bill of Rights, even though indirect horizontal application might lead to the same result.¹⁰²

The oppositional/dualistic reading of freedom of contract – by way of which its hegemonic understanding is maintained – is, in addition, also clearly illustrated through the unwillingness to read a fairness jurisdiction into the public policy requirement.¹⁰³ As Glover argues, the defence that the enforcement of a contract is in specific circumstances unfair or unconscionable, has only been approved of in

¹⁰⁰ D Cornell *Transformations* (1993) 36.

¹⁰¹ n 100 above, 35.

¹⁰² See in this regard S Woolman ‘The amazing, vanishing bill of rights’ (2007) 3 *South African Law Journal* 762 777. To reach directly for the baton of indirect horizontal application by way of sec 39(2) when a constitutional right is alleged to have been infringed is to render sec 8 of the Constitution redundant. As Woolman indicates, such an approach is inconsistent with the Constitutional Court’s decision in *Khumalo v Holomisa* 2002 5 SA 401 (CC) (*Khumalo*) para 32 where O’Regan J made it clear ‘that we should not attribute a meaning to one section of the Constitution that renders another section, quite literally, senseless.’

¹⁰³ Van der Merwe *et al* (n 37 above) 199. P Aronstam *Consumer protection, freedom of contract and the law* (1979) 43.

the restraint of trade context where, as we have seen, the restraint of trade is subjected to a reasonableness enquiry.¹⁰⁴

However, in *Sasfin v Beukes*¹⁰⁵ the Appellate Division considered the extent to which ‘simple justice between man and man’¹⁰⁶ can trump the public interest in the strict enforcement of contracts *generally*. Primarily, the case centred around the validity of a deed of cession in which a customer of a bank (a doctor) ceded all his future debtors to the bank regardless of whether he owed the bank money or not.¹⁰⁷ The cession effectively rendered the doctor the slave of the bank. The majority of the court was of the opinion that these aspects of the cession could not be severed from the rest of the agreement and held that the entire transaction was unenforceable.¹⁰⁸

In this case the Appellate Division was willing to evaluate the substantive fairness of the disputed deed of cession to come to a conclusion that the cession was clearly unreasonable and irreconcilable with the public interest. Lewis describes the decision as ‘the one decision which yields a ray of light in the field of contractual policy, where the court was both bold and innovative in escaping the shackles of formalism’.¹⁰⁹ Be that as it may, one again sees the opposition between freedom of contract and other values in Smalberger JA’s judgment where it is held that unlawfulness comes into play where the public interest in the strict enforcement of contracts in accordance with the principle of freedom of contract, is trumped by other relevant factors.¹¹⁰ These relevant factors are expressed by the Court to ensure that ‘public policy ... properly take into account the doing of simple justice between man and man.’¹¹¹

The uneasiness with which the Appellate Division approaches the issue of unfair contracts is illustrated in the following famous *dictum*:

No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should however be exercised *sparingly* and only in the *clearest* of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is

¹⁰⁴ G Glover ‘Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?’ (2007) 124 *South African Law Journal* 449 451.

¹⁰⁵ 1989 1 SA 1 (A) (*Sasfin*).

¹⁰⁶ As above.

¹⁰⁷ *Sasfin* (n 105 above) 6A-D.

¹⁰⁸ *Sasfin* (n 105 above) 17-19.

¹⁰⁹ C Lewis ‘Towards an equitable theory of contract: The contribution of Mr Justice EL Jansen to the South African law of contract’ (1991) 108 *South African Law Journal* 249 264 n76.

¹¹⁰ *Sasfin* (n 105 above) 9D-G.

¹¹¹ *Sasfin* (n 105 above) 13J.

contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.¹¹²

Hawthorne has remarked that the *dicta* above merely emphasises the South African judiciary's narrow interpretation of the relevance of equity considerations in the public interest.¹¹³ By holding that it is only in the '*clearest of cases*' that a court may use its power to refuse to enforce an unfair term, and that the power to do this must be used '*sparingly*', the court suggests that unconscionability in and of itself cannot invalidate a contract.¹¹⁴ The promise that we can correct for clear or extreme cases only, simply suggests, to paraphrase Dalton, that the worst features of the system can be held in check, without tinkering with its regular operation.¹¹⁵ Van der Merwe *et al* confirm the matter:

Sasfin's decision must not be interpreted to mean that the unreasonably harsh or unconscionable effect of a term between the parties is by itself a sufficient ground for making an agreement illegal.¹¹⁶

In *Donnelly*¹¹⁷ Kriegler J stressed this point and placed a great deal of emphasis on the fact that the *Sasfin* judgment should not be regarded 'as a free pardon to recalcitrant and otherwise defenceless debtors'¹¹⁸ because it is 'decidedly not that'.¹¹⁹ Kriegler J also did not let the opportunity pass to emphasise that '*pacta servanda sunt* is still a cornerstone of our law of contract'¹²⁰ and that 'nothing said or implied'¹²¹ in the *Sasfin* principle can be said to derogate from this important fact.¹²² In *Botha (now Griessel) v Finanscredit (Pty) Ltd*¹²³ the Appellate Division confirmed that

a Court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest.¹²⁴

¹¹² *Sasfin* (n 105 above) 9A-B. (emphasis added)

¹¹³ L Hawthorne 'Public policy and micro lending – has the unruly horse died?' (2003) 66 *THRHR* 116 118.

¹¹⁴ These sentiments are also reflected in cases decided by the lower courts in the aftermath of *Sasfin*. See in this regard *Standard Bank* (n 75 above) 825C-827A and *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W) (*Pangbourne Properties*) 210G-214F.

¹¹⁵ Dalton (n 60 above) 1037.

¹¹⁶ Van der Merwe *et al* (n 37 above) 219.

¹¹⁷ *Donnelly v Barclays National Bank Ltd* 1990 1 SA 375 (W) (*Donnelly*).

¹¹⁸ n 117 above, 381F.

¹¹⁹ As above.

¹²⁰ *Donnelly* (n 117 above) 381H.

¹²¹ As above.

¹²² As above.

¹²³ 1989 3 SA 773 (A) (*Botha*).

¹²⁴ *Botha* (n 123 above) 782I-783C.

In this case the court refused to declare a deed of suretyship void on the grounds of public policy, holding that, although ‘somewhat rigorous’, the surety was not left ‘helpless in the clutches of the plaintiff’.¹²⁵ This prompts one to ask whether one party should necessarily be left helpless in the clutches of the other for the court to exercise its *Sasfin* power? If so, very little of the work of reform and transformation of the law of contract can be expected to be done through the utilisation of the *Sasfin* principle.

But the point that I would like to stress going forward is that the courts’ concern with maintaining the hegemony of the will theory of contract causes them to assume that there is an area in which freedom of contract can be exercised independent of public policy, fairness, reasonableness and good faith. From a political point of view, the paradox which inscribes itself in this opposition between freedom of contract and the so-called constraints of public policy, fairness, reasonableness and good faith exists in that the claim that the reliance on freedom of contract and its concomitant rules is somehow a-political and thus unproblematic, generates increasing and proliferating politics in the law of contract. The more the courts attempt to depoliticise the law of contract by way of limiting the open-ended norms in favour of liberal legalism grounded in a rule jurisprudence, the more it politicises it by way of these oppositions and dualisms.

Below I will argue that the unwillingness to deal with unfair contracts in terms of the public policy requirement is symptomatic of a deeper illness, namely the courts’ refusal to accept that the ethical element of contract (good faith or the *bona fides*) – as a foundational value of the law of contract – forms part and parcel of not only the public policy requirement¹²⁶ but also of the very maxim *pacta servanda sunt*.¹²⁷ In other words, the opposition between the foundational norms of freedom of contract and good faith serves – as we shall see – to maintain a certain instrumental politics in the law of contract weighted in favour of commercial interests. The opposition itself thus furthers the privileging or hegemony of a liberal version of freedom of contract, which closes off the law of contract from the question of the ethical embodied in the good faith requirement.

¹²⁵ *Botha* (n 123 above) 783J.

¹²⁶ *Van der Merwe et al* (n 37 above) 200: ‘in the context of legality there is a close relationship between what is fair and reasonable and what is in accordance with good faith’.

¹²⁷ See n 37 above.

4.2 Good faith and the *exceptio doli generalis* in the South African law of contract

The South African law of contract has long considered all contracts as acts of good faith.¹²⁸ This is the case because we inherited substantial parts of the Roman-Dutch law of contract in which contracts were considered *iudicia bonae fidei*.¹²⁹ In Roman law, however, a distinction existed between *negotia stricti iuris* and the *negotia bonae fidei*.¹³⁰ Contracts from the *ius stricti* bound the debtor to perform strictly in accordance with what he promised in the formula and not in accordance with what the *bona fides* could expect of him, unless the formula itself referred to the *bona fides*.¹³¹ In the case of the *negotia bonae fidei* the *bona fides* were conclusive and the absence thereof, whether during negotiations, conclusion or institution of the action, gave rise to a defence.¹³² The *bona fides* thus operated as an evaluative yardstick to determine the enforceability of the *negotia bonae fidei*.

To curb possible injustices or unconscionable conduct as a result of the enforcement of the *negotia stricti iuris*, the *praetor* introduced the *exceptio doli generalis*.¹³³ Here the defendant was allowed to submit facts that he would otherwise not have been able to submit because of the operation of the strict *ius civile*.¹³⁴ The *exceptio* therefore functioned to curb the abuse of rights in appropriate circumstances and became the instrument with which more equitable

¹²⁸ *Meskin v Anglo-American Corporation of SA Ltd* (1968) 4 SA 793 (W) (*Meskin*) 802; *Paddock Motors (Pty) Ltd v Ingesund* 1976 3 SA 16 (AD) (*Paddock Motors*) 28; *Magna Alloys* (n 85 above) 893C; *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) (*Tuckers Land*) 652; *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) (*Mutual & Federal*) 433; *Savage & Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W) (*Savage & Lovemore Mining*) 198A, *Sasfin* (n 75 above) 8C-D; *Botha* (n 123 above) 782J; *LTA Construction Bpk v Administrateur Transvaal* 1992 1 SA 473 (A) (*LTA Construction*) 480D; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) (*Eerste Nasionale Bank*) 321; *Janse van Rensburg v Grieve Trust* 2000 1 SA 315 (C) (*Janse van Rensburg*) 325-326; *Afrox Healthcare* (n 13 above) 40I-J; *Van der Westhuizen v Arnold* 2002 6 SA 453 (SCA) (*Van der Westhuizen*) 469E-F.

¹²⁹ *Van der Merwe et al* (n 37 above) 319. *Aronstam* (n 103 above) 173: 'the sole question facing a court in Roman-Dutch law was whether the conduct of a party to a contract, either in any negotiations that preceded the contract, or in any action that was based upon it, had complied with the requirements of good faith.'

¹³⁰ See CFC van der Walt (n 71 above) 648 and NJ Grové 'Kontraktuele gebondenheid, die vereistes van die goeie trou, redelikheid en billikheid' (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 687-688 who show that the distinction was closely related to the Roman procedural law and the specific defences it allowed for in different cases.

¹³¹ *Van der Walt* (n 71 above) 648.

¹³² As above.

¹³³ As above.

¹³⁴ As above.

principles were introduced in the law of contract by the praetorian law.¹³⁵

The question regarding the reception of the *exceptio doli generalis* into the South African law of contract has been contentious. The question is complicated by the fact that all contracts became *negotia bonae fidei* in Roman-Dutch Law, thus appearing to do away with the need for such a defence. However, Aronstam argues that the *exceptio doli generalis* became part of the Roman-Dutch law in that it was implied by good faith:¹³⁶

if all contracts were *bonae fidei* they had to be performed in accordance with the dictates of good faith, and any absence of *bona fides* could be taken into account by a judge in any action based on such contracts.¹³⁷

Aronstam's argument thus is that the *exceptio doli generalis* formed part of the requirement of good faith and as such was received into the South African law of contract.

Six months before the decision in *Sasfin* (discussed above), the Appellate Division had occasion to consider the question regarding the reception of the *exceptio doli generalis* into the South African law of contract in the case of *Bank of Lisbon and South Africa v De Ornelas & Others*.¹³⁸ In this case the court primarily concerned itself with the question whether the *exceptio* survived the reception of Roman Law into Roman-Dutch Law and of Roman-Dutch Law into the South African law. The court held that the *exceptio doli generalis* never formed part of the Roman-Dutch law,¹³⁹ could therefore not have been received into the South African law¹⁴⁰ and that its occasional appearances on the scene of the South African law¹⁴¹ should finally be prohibited by burying it 'as a superfluous, defunct anachronism.'¹⁴²

This decision is also generally regarded as the decision in which the Appellate Division did away with the perception that a contract could be adjudicated and declared unenforceable by a court on the

¹³⁵ G Lubbe 'Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg' (1990) 1 *Stellenbosch Law Review* 9. Also see C Lewis 'The demise of the *exceptio doli*: Another route to contractual equity?' (1990) 107 *South African Law Journal* 26 31-32.

¹³⁶ n 103 above, 173.

¹³⁷ n 103 above, 172.

¹³⁸ 1988 3 SA 580 (A) (*Bank of Lisbon*).

¹³⁹ *Bank of Lisbon* (n 138 above) 605H.

¹⁴⁰ *Bank of Lisbon* (n 138 above) 607A.

¹⁴¹ For a discussion of the various interpretations of the *exceptio doli generalis* see SWJ Van der Merwe *et al* 'The *exceptio doli generalis*: *Requiescat in pace – vivat aequitas*' (1989) 106 *South African Law Journal* 235. Also see *Weinerlein v Goch Buildings Ltd* 1925 AD 282 (*Weinerlein*); *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (AD) (*Zuurbekom*); *Paddock Motors* (n 128 above); and *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A) (*Arprint*).

¹⁴² *Bank of Lisbon* (n 138 above) 607B. Also see Lubbe (n 135 above) 9.

basis of good faith.¹⁴³ The conflation of these two issues (the abolition of the *exceptio doli generalis* on the one hand and the abolition of an explicit good faith jurisdiction, on the other) finds its origin in the following *dictum* of Joubert JA:

Nor can I find any evidence of the existence of a general substantive defence based on equity. This is not surprising inasmuch as the Dutch Courts, unlike the English Courts until the Judicature Act 1873 became operative in 1875, did not administer a system of equity as distinct from a system of law. Roman-Dutch law is itself an inherently equitable legal system. In administering the law the Dutch Courts paid due regard to considerations of equity but only where equity was not inconsistent with the principles of law. Equity could not override a clear rule of law. That is also the position of our Courts as regards their equitable jurisdiction ... Moreover, I cannot find any support in Roman-Dutch law for the proposition that in the law of contract an equitable exception or defence, similar in effect to the *exceptio doli generalis*, was utilised under the aegis of *bona fides*.¹⁴⁴

In his discussion of the majority decision, Cockrell shows that the decision that the *exceptio doli* constitutes 'a superfluous, defunct anachronism',¹⁴⁵ is founded upon an extreme form of individualism which denies that the law may 'legitimately superimpose an overriding duty to act in good faith',¹⁴⁶ upon the voluntary agreements of legal subjects with full capacity.¹⁴⁷ As Cockrell points out, the Court's problem with accepting the *exceptio* was that it enjoins a judge to employ a standard that cannot be cast in 'a clear rule of law'.¹⁴⁸ As the Court held, quoting *Van der Linden's* account of *Voet* 1.1.16: '... [j]udges and jurists ought to look to nothing more carefully than this, that they do not forsake the written law for some headstrong equity ...'.¹⁴⁹ Joubert JA's rejection of the *exceptio doli*

¹⁴³ See *Eerste Nasionale Bank* (n 128 above) 323B.

¹⁴⁴ *Bank of Lisbon* (n 138 above) 605I-606D.

¹⁴⁵ *Bank of Lisbon* (n 138 above) 607B.

¹⁴⁶ n 53 above, 44.

¹⁴⁷ As above.

¹⁴⁸ Also see the judgment in *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A) (*Tjollo Ateljees*). In this decision the Appellate Division recommended the abolition by the legislature of the doctrine of *laesio enormis*. According to *laesio enormis* a party who had either agreed to pay a price of more than double the value of the thing or agreed to sell for less than half of the value of the thing could either cancel the agreement or claim price adjustment (see *Van der Merwe et al* (n 37 above) 132). Cockrell (n 53 above) 45 illustrates clearly that the basis of the decision was, on the one hand, that *laesio enormis* constituted an altruist intrusion on the terrain of individualism and, on the other, that *laesio enormis* could not be cast in the rule form.

¹⁴⁹ *Bank of Lisbon* (n 138 above) 610D-E.

is thus clearly linked to his disapproval of the discretion which will be afforded to judges by its acceptance.¹⁵⁰

The attempt to rid our law of the *exceptio doli generalis* should then, given these observations, be understood as part and parcel of the attempt to keep the hegemony of freedom of contract as the will theory and the maxim *pacta servanda sunt*, firmly in place. With this decision, the Appellate Division attempted finally to seal the hegemony of the will theory as freedom of contract. This is particularly evident when *Bank of Lisbon* is considered in the light of the *Sasfin* decision six months later in which possible interference with liberal freedom of contract by way of public policy was further curtailed.¹⁵¹ The abolition of the *exceptio doli generalis* confirmed that the enquiry in the South African law of contract when it comes to enforceability is conducted with reference to so-called clear rules of law that are grounded in individualism. Consequently as we shall see, the *Bank of Lisbon* decision forms the focal point when it comes to the marginalisation of good faith as the ethical element of contract in South Africa.

This marginalisation, however, was not achieved without some strife. In the first place – regarding the *exceptio doli generalis* as a technical remedy – the Appellate Division contradicted itself when it held in the later case of *Van der Merwe v Meades*¹⁵² that the *replicatio doli* still formed part of our law. As Kerr argued at the time, the same court had previously held in *Bank of Lisbon* that the conclusions about the non-reception of the *exceptio doli generalis* ‘equally hold for the *replicatio doli generalis*’.¹⁵³ Kerr submits that the linking was correct.¹⁵⁴ If, as Kerr points out, the *replicatio doli*, on the later decision of the court, survived the reception, and the same court linked the *replicatio* with the *exceptio* and has not departed from that position, then the only conclusion that can follow is that the *exceptio doli generalis* must also have survived the reception.¹⁵⁵

¹⁵⁰ The majority decision clearly does not take account of, or acknowledge, the subjectivity/discretion which is at play in considering whether ‘a clear rule of law’ is in fact that and, even more problematic, the subjectivity that is at play in any decision as regards the question whether the ‘clear rule of law’ is applicable or not.

¹⁵¹ The mantra that public policy should properly take into account the doing of simple justice between man and man and the way in which that mantra was employed in *Sasfin* does not, without more, lead to a conclusion that *Sasfin* somehow provided an escape route from strict enforcement of contract. This is evident from the cases that followed *Sasfin*, as discussed earlier.

¹⁵² 1991 2 SA 1 (A) (*Van der Merwe*) 2F-3A.

¹⁵³ *Bank of Lisbon* (n 138 above) 608F-G.

¹⁵⁴ AJ Kerr ‘The *replicatio doli* reaffirmed. The *exceptio doli* available in our law’ (1991) 106 *South African Law Journal* 583 584.

¹⁵⁵ n 154 above, 585.

Regarding the question whether the *Bank of Lisbon* judgment – in doing away with the *exceptio doli* – in fact did away with the power to declare a contract or a provision thereof as void or unenforceable on the basis of good faith, Olivier JA argued strongly in his famous (perhaps notorious) minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*¹⁵⁶ that *Bank of Lisbon* did not and could not have done away with this power. Olivier JA argued that the reception of all contracts as *iudicia bonae fidei* into the South African law of contract made the *exceptio doli generalis* (as a technical remedy that had to be pleaded), superfluous in that it was implied in the idea of *iudicia bonae fidei* that a court would have discretion to examine and pronounce on the *bona fides*. Olivier JA continued that this would be the position from the perspective of those who accept the broad, dynamic working of the *bona fides* and the discretion of judges to apply the *bona fides*.¹⁵⁷ Olivier JA argued bravely that the *bona fides* principle forms part of the public policy requirement¹⁵⁸ and could be directly applied to the facts before him. This was a certain attempt to radicalise the public policy principle as enunciated in *Sasfin*. To quote Olivier JA:

[e]k hou dit as my oortuiging na dat die beginsels van die goeie trou, gegronde op openbare beleid, steeds in ons kontraktereg 'n belangrike rol speel en moet speel, soos in enige regstelsel wat gevoelig is vir die opvattinge van die gemeenskap, wat die uiteindelijke skepper en gebruiker van die reg is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoortlikheid.¹⁵⁹

(I believe that the principles of good faith, based on public policy, still play and should continue to play an important role in our law of contract as it does in any legal system which is sensitive to the convictions of the community – the ultimate creator and user of the law – with respect to the moral and ethical values of justice, fairness and propriety.)

In his discussion of unfair contracts in the fourth edition of *The law of contract in South Africa*, Richard Christie remarked that

[t]here is every reason to hope that when the opportunity arises the Supreme Court of Appeal will apply Olivier JA's reasoning, harnessed to the concept of public policy, in the context of the unfair enforcement of a contract.¹⁶⁰

In *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd*¹⁶¹

¹⁵⁶ n 128 above.

¹⁵⁷ *Eerste Nasionale Bank* (n 128 above) 323.

¹⁵⁸ *Eerste Nasionale Bank* (n 128 above) 323-324.

¹⁵⁹ *Eerste Nasionale Bank* (n 128 above) 326 F-H.

¹⁶⁰ RH Christie *The law of contract in South Africa* (4ed, 2001) 19.

¹⁶¹ 1999 4 SA 928 (SCA) (*Friedman*).

the Supreme Court of Appeal (SCA) held *obiter* that in the matter before it

[a]n analogous conclusion may well be reached if one applies the modern concept of the role of public policy, *bona fides* and contractual equity to the question in issue (see for example, *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* NO [reference omitted] per Olivier JA.¹⁶²

This appeared at the time to have constituted at least an implicit endorsement of what Olivier JA said in that case.

In *Miller*¹⁶³ Ntsebeza AJ interpreted the judgment of Olivier JA in *Saayman* to mean that a court can indeed refuse to uphold a so-called non-variation or *Shifren* clause¹⁶⁴ on the basis of considerations of good faith.¹⁶⁵ In turn, Van Zyl J argued – relying explicitly on Olivier JA’s judgment in *Saayman* – in *Janse van Rensburg v Grieve Trust*¹⁶⁶ that ‘the principles of justice, equity, reasonableness and good faith’ required the development of the common law in the case before him.¹⁶⁷ Davis J, in *obiter* remarks in *Mort NO v Henry Shields-Chiat*¹⁶⁸ also invoked Olivier JA’s judgment and added that

it is clear that if the doctrine [of *bona fides*] is to be taken seriously then the primary importance accorded to the private autonomy of contracting parties must be reconsidered *as must the hegemony of the will theory of contract* which survives even in the context of *dicta* which nod in the direction of social responsibility.¹⁶⁹

Davis J implicitly accepted Olivier JA’s reasoning in *Eerste Nasionale Bank* that good faith forms part of the public policy requirement when he stated that Olivier JA’s approach builds on the judgment of Smalberger JA in *Sasfin* and particularly on the dictum from that case as quoted earlier.¹⁷⁰ Similar to Olivier JA, Davis J attempted to radicalise *Sasfin* by the attempt to infuse it with the *bona fides*.

But what sets Davis J’s judgment in *Mort* apart is the express link made in the judgment between, on the one hand, the argument in favour of the *bona fides* and, on the other, the ethical implications

¹⁶² *Friedman* (n 161 above) 937F. Also see Pretorius (n 54 above) 643.

¹⁶³ *Miller and Another NNO v Dannecker* 2001 1 SA 928 (C) (*Miller*).

¹⁶⁴ This name for a non-variation clause (which generally stipulates that no amendments to a written agreement shall be valid unless reduced to writing) is derived from the decision in *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere* 1964 4 SA 760 (A) (*Shifren*).

¹⁶⁵ *Miller* (n 163 above) 938 para 19

¹⁶⁶ n 128 above.

¹⁶⁷ n 128 above, 325D-F.

¹⁶⁸ 2001 1 SA 464 (C) (*Mort*).

¹⁶⁹ n 168 above, 474I (Emphasis added).

¹⁷⁰ See note 112 above.

for adjudication in the law of contract of the reconstitution of the legal order occasioned by the enactment of the Constitution. To quote Davis J:

Like the concept of *boni mores* in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community – a far more difficult task. This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity. The principle of freedom does, to an extent, support the view that the contractual autonomy of the parties should be respected and that failure to recognise such autonomy could cause contractual litigation to mushroom and the expectations of contractual parties to be frustrated. [Reference omitted.] But the principles of equality and dignity direct attention in another direction. Parties to a contract must adhere to a minimum threshold of mutual respect in which ‘the unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts.’ [Reference omitted.] The task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution.¹⁷¹

However, in *Brisley v Drotzky*¹⁷² the majority of the SCA rejected – in no uncertain terms – both Olivier JA’s *Eerste Nasionale Bank* judgment as well as the judgments that built on it. In the first instance, the majority criticised Olivier JA’s judgment for attempting indirectly to resurrect the *exceptio doli generalis*.¹⁷³ With this statement the majority seems to have uncritically accepted that the *exceptio doli generalis* is not a part of our law. But as we have seen, on the Court’s own jurisprudence it is not at all clear whether the *exceptio doli generalis* has in fact been abolished. The terse statement in *Brisley* regarding the attempt to resurrect the *exceptio doli generalis* dismisses this controversy/contradiction by pretending that the *exceptio* is in fact dead and buried. This statement in *Brisley* can of course be seen as implicitly overriding the court’s *Van der Merwe* decision (in which *it*, ironically, *resurrected* the *exceptio doli generalis*), but the Court explicitly stated in a footnote that the question regarding the reconsideration of the *exceptio* did not arise in *Brisley*.¹⁷⁴ This left as uncertain as ever the position in our law regarding the status of the *exceptio*.

¹⁷¹ *Mort* (n 168 above) 474I-475D

¹⁷² n 13 above. The dispute in this case also concerned the question regarding the enforceability of contractual terms (including a *Shifren* clause) in circumstances where oral amendments to the agreement were made but not reduced to writing.

¹⁷³ *Brisley* (n 13 above) 14 para 17.

¹⁷⁴ *Brisley* (n 13 above) n 10.

As regards Davis J's view in *Mort* that the *bona fides* (like the *boni mores* in the law of delict) are shaped by the legal convictions of the constitutional community (as an ideal community), the majority held that if this means that the enforcement of contractual terms depends on the convictions of the community (*gemeenskapsgevoel*), then it cannot agree because there are material policy differences between the approach to the law of delict and the approach to the law of contract.¹⁷⁵ According to the majority the unqualified acceptance of Davis J's judgment will create a state of unacceptable chaos and disorder in the law of contract.¹⁷⁶ A court cannot seek shelter in the shadow of the Constitution, writes the *Brisley* court, in order to attack and overthrow principles.¹⁷⁷ In this regard it should be emphasised that Davis J did not appeal to an unqualified, actually existing community in his judgment. He explicitly referred to the *constitutional* community – which can only be an *ideal* community – and that is why Davis J explicitly invoked the *constitutional* ideals of dignity, equality and freedom. The point Davis J was making was that the very reconstitution of the legal order required that good faith should be given content with reference to the normative (and transformative) commitments of the Constitution. He was not hiding in the shadow of the Constitution in order to attack and overthrow principles from that vantage point.

Be that as it may, the majority in *Brisley* accordingly rejected the idea that good faith can be utilised as an independent, free-floating basis for the invalidation or unenforceability of contractual provisions¹⁷⁸ on the basis that good faith as 'the legal convictions of the community' would prove to be too nebulous a concept to determine the enforceability of contractual terms. The Court stated, however, that good faith is a fundamental principle which in general underlies the law of contract and becomes expressed in its particular rules and principles.¹⁷⁹

At this point in the judgment the *Brisley* court introduced what it called another underlying value of the law of contract: the principle

¹⁷⁵ *Brisley* (n 13 above) para 21.

¹⁷⁶ *Brisley* (n 13 above) 15 para 21. 'Om eensklaps aan regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou, is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van *pacta sunt servanda* grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat 'n bepaalde regter in die omstandighede as redelik en billik beskou.' This statement prompted L Hawthorne 'The end of *bona fides*' (2003) *South African Mercantile Law Journal* 271 276 to remark as follows: 'This *cri de coeur* has two deplorable aspects: the tacit belief that the majority of contractual terms are not reasonable or equitable, and the belief that judges are not to be trusted with what is reasonable and equitable.'

¹⁷⁷ *Brisley* (n 13 above) 16D para 24.

¹⁷⁸ *Brisley* (n 13 above) 16D para 22

¹⁷⁹ *Brisley* (as above).

that public policy requires that contracts that have been entered into freely and in all earnest by parties with full capacity should be enforced.¹⁸⁰ The Court continued to hold that these two underlying values (good faith and freedom of contract) sometimes come into conflict with each other and that it is the task of the Courts and the SCA principally to weigh these values against each other and to make gradual and slow changes on occasions when they appear to be necessary.¹⁸¹

Again, this judgment makes it clear that good faith and *pacta servanda sunt* are positioned as *opposing* values, that is to say an instrumental politics is set up between the two underlying values. But it is also the case that it is at this point that the *Brisley* judgment deconstructs itself.¹⁸² It does so in the following way: When the court discusses the idea of an underlying value in relation to good faith, it makes the point that it is in the very nature of an underlying value that courts do not use it directly to adjudicate contracts. Rather, they wait for the underlying value to become embodied in the particular rules of the law of contract. For this reason the Court concludes that good faith is not an independent or free-floating basis for the invalidation of contractual terms. But when it comes to the discussion of the other underlying value – the enforcement of contracts in the public interest – the Court does not realise the implications of its own opinion regarding underlying values. Certainly, the consequences of identifying freedom of contract as an underlying value should be the same – courts should wait for the underlying value to become embodied in the rules of the law of contract. Yet, the history of the South African law of contract is the history of the *direct reliance* on the so-called underlying principle of freedom of contract. If there were to be no direct reliance on so-called underlying values, then it would be hard to imagine how the rules of the law of contract were formulated in the first place. The fact that freedom of contract is an underlying value has never prevented a court from directly relying on it. Why then should the ‘underlying value’-character of good faith prevent direct reliance on it? Yet this is exactly what the *Brisley* majority wants us to believe: good faith cannot be directly relied upon because it is an underlying value. This was stated even more explicitly in *Afrox Healthcare Bpk v Strydom*.¹⁸³

¹⁸⁰ *Brisley* (n 13 above) 16D para 23 quoting *Magna Alloys* (n 85 above) 893I-894A.

¹⁸¹ *Brisley* (n 13 above) 16D para 24.

¹⁸² J Derrida & M Ferraris *A Taste for the Secret* (2001) 80: ‘I ought to have specified that what happens deconstructs itself in the process. It is not I who deconstruct; rather something I called “deconstruction” happens to the experience of a world, a culture, a philosophic tradition: “it” deconstructs, *ça ne va pas*, there is something that buds, that is in the process of being dislocated, disjointed, disjoined, and of which I begin to be aware. Something is “deconstructing” and it has to be answered for.’

¹⁸³ *Afrox Healthcare* (n 13 above).

Concerning the place and role of abstract ideas such as good faith, reasonableness, fairness and justice, the majority in the *Brisley* case held that, although these considerations are subjacent to our law of contract, they do not constitute an independent or 'free-floating' basis for the setting aside or the non-enforcement of contractual provisions; put differently, although these abstract considerations represent the foundation and very right of existence of rules of law and can also lead to the shaping and transformation of these rules, they are not self-contained rules of law. When it comes to the enforcement of a contractual provision, the Court has no discretion and does not act on the basis of abstract ideas, but precisely on the basis of crystallised and established rules of law.¹⁸⁴

One clearly sees in this dictum the consistent political privileging of the individualism/rules position by way of which the hegemonic understanding of freedom of contract is kept firmly in place (which in turn keeps the hegemonic order(ing) of the law of contract in place). The Court's unease with good faith (described by Cockrell as 'the epitome of a legal standard that embodies communitarian values of altruism, care and concern'¹⁸⁵ (the opposite thus of individualism)) is that it cannot be regarded as a rule of law. On the other hand, freedom of contract is simply, unproblematically understood as being both an underlying value and a rule which could be relied upon to hold the defendant in *Afrox* for instance, to an agreement that exempted a hospital from liability for everything but its intentional infliction of harm.¹⁸⁶

A number of deductions regarding good faith and freedom of contract in the South African law of contract can be made at this point. The first is that good faith is currently not considered in the South African law of contract to be a part of the public policy requirement (which, from a transformative point of view, presents its own set of problems, primarily in that public policy becomes closed off from the ethical question generally when good faith does not form part of it). Second, good faith is not considered to be an independent or free-floating basis for the invalidation or non-enforcement of contracts or contractual terms. Third, the latter is the case because good faith is an underlying value of the South African law of contract and is/becomes embodied in the particular rules of the law of

¹⁸⁴ *Afrox Healthcare* (n 13 above) 40H-41A (author's translation from the original Afrikaans). The point was restated in *South African Forestry* (note 13 above) 338J-339B as follows: 'although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly ... After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder.'

¹⁸⁵ Cockrell (n 53 above) 55.

¹⁸⁶ *Afrox Healthcare* (n 13 above).

contract. (How this happens is uncertain given that courts are not allowed to touch good faith.) Fourth, freedom of contract understood as the maxim *pacta servanda sunt*, although itself an underlying value of the law of contract, is and can be used in a direct way.¹⁸⁷ Fifth, there appears to be no reason other than an ideological or political one which would explain why one underlying value – freedom of contract – can be used to develop rules by way of which a party can be held to or released from her agreements, whereas another underlying value – good faith – cannot be used in this way.

In addition, a matter that is repeatedly ignored in the debate regarding the role of good faith in the South African law of contract is the implications for the law of contract of the newly constituted legal order. In the *Brisley* case, for instance, the Court faulted Davis J's and other judges' appeal to this order as putting in place an ideal community to which can be appealed in the law of contract by way of good faith (as part of the public policy requirement). The stance of the *Brisley* court represents a static, closed view of a legal system in which good faith has somehow been worked out in the past and incorporated into the rules of the law of contract. As such, this view questions the dynamic role of the *bona fides* in relation to the transformation of the South African law of contract and, as Olivier JA suggested in *Eerste Nasionale Bank*, it is out of step both with the spirit of our law and with the needs of the community.¹⁸⁸

In 2007 the Constitutional Court delivered two decisions that involved the tangled web weaved with freedom of contract, good faith, the *exceptio doli generalis* and public policy in the South African law of contract. Below I shall critically evaluate these decisions after which I shall argue for a re-emphasis on good faith as the ethical element of contract. I believe that this re-emphasis is mandated by an understanding of the new legal order as aspiring to the ideal of civic friendship. By deploying the word 're-emphasis' I want to signal my belief that the normative character of the Constitution requires us to consider good faith as part of the public policy requirement in two ways – both in that contracts concluded contrary to public policy are unenforceable but also in that public policy requires that parties who enter into agreements *freely*

¹⁸⁷ In this context, D Hutchison 'Non-variation clauses in contract: any escape from the *Shifren* straitjacket?' (2001) 118 *South African Law Journal* 720-745 has remarked that 'to reach directly for the baton of good faith would be to confess to a want of technical expertise or creativity. Palm-tree justice no doubt has its virtues, but as lawyers we should adhere to the ideal of justice according to law.' Hutchison does not explain why it is acceptable and in accordance with the 'ideal of justice according to law' to reach directly for the baton of freedom of contract. Surely, another form of 'palm-tree justice' is in play when one reaches directly for the baton of freedom of contract as itself an underlying value of the law of contract?

¹⁸⁸ *Eerste Nasionale Bank* (n 128 above) 319H-320B.

(ethically, in good faith) should be held to them. The meaning of freedom of contract in this way becomes constituted by a transformative understanding of good faith.

5 Good faith and the Constitution: Towards transforming¹⁸⁹ the hegemony

5.1 Introduction

In the Preface to the fifth edition of *The Law of Contract in South Africa*, Richard Christie wrote as follows:

In the preface to the fourth edition I was rash enough to express the hope that the judges would further develop the concepts of good faith and public policy. This they have done, but not in the way I expected. Since *Brisley v Drotzky*, *Afrox Healthcare Bpk v Strydom* and *South African Forestry Co Ltd v York Timbers* good faith as an abstract value cannot be used to intervene in contractual relationships, but public policy still can. To achieve a just result there are advantages in using the concept of public policy which our law has developed over the centuries and has linked to the Constitution, rather than the less familiar concept of good faith. But it will be a mistake to regard the door as forever closed ...¹⁹⁰

Prof Christie has also suggested that the courts are likely to find that the *Sasfin* principle (namely that a court will not enforce a contract if its enforcement would be contrary to public policy) is the most serviceable instrument for developing the common law of contract to give effect to a provision of the Bill of Rights.¹⁹¹ Below we shall see that this has indeed become the preferred route when it comes to the enforceability (and of course also constitutionality) of contractual terms. But we shall also see that the Constitutional Court did indeed leave the door wide open in its 2007 decision in *Barkhuizen*.¹⁹² The question thus currently looming large in the South African law of contract is whether the 'objective, normative value system'¹⁹³ of the Constitution requires the introduction of a good faith jurisdiction in the law of contract as part of the *Sasfin* principle. The judgments that

¹⁸⁹ The way in which I employ transformation in relation to hegemony closely relates to Drucilla Cornell's description of transformation. For her transformation means that 'a system can so alter itself that it not only no longer confirms its identity, but disconfirms it and, indeed, through its very iterability, generates new meanings which can be further pursued and enhanced by the sociosymbolic practice of the political contestant within its milieu.' Cornell (n 100 above) 2.

¹⁹⁰ RH Christie *The law of contract in South Africa* (5ed, 006) v.

¹⁹¹ n 190 above, 348.

¹⁹² *Barkhuizen* (n 13 above).

¹⁹³ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) (*Carmichele*) para 54.

supported Olivier JA's opinion in *Eerste Nasionale Bank* certainly argue that it does. It is implicit in the judgments of the SCA that it does not. A related question is whether the above question requires reconsideration of the *exceptio doli generalis* as a technical remedy. The latter question was also before the Constitutional Court in 2007.

5.2 *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd*¹⁹⁴

The facts in this case were substantially similar to the facts in *Brisley* save for the fact that the parties were both commercial entities. Crown Restaurant fell into arrears in terms of a written lease agreement with Gold Reef City Theme Park, which subsequently cancelled the lease and applied for an ejection order. Crown Restaurant, however, contended that Gold Reef City 'had verbally agreed to grant it an indulgence and allow it time within which to make proposals for settling the rental arrears.'¹⁹⁵ This verbal indulgence, it was argued on behalf of Crown Restaurant, meant that the company implicitly waived its right to cancel the lease. Gold Reef City, however, initially denied the verbal agreement, then conceded that it did 'allow' Crown Restaurant to make proposals for settlement within a stipulated time period¹⁹⁶ but ultimately contended that it was in any event entitled to rely on the non-variation clause in the written agreement. Gold Reef City further relied on a clause that stipulated that no indulgence granted precluded either party from enforcing any of its rights in terms of the agreement.¹⁹⁷

Gold Reef City was successful in the Court *a quo*. An application for leave to appeal to the SCA was unsuccessful. Crown Restaurant subsequently applied for leave to appeal to the Constitutional Court.¹⁹⁸ In the application for leave to appeal to the Constitutional Court, the Court was asked – for the first time in the proceedings - to consider the reintroduction of the *exceptio doli generalis* by way of a development of the common law under section 39(2) of the Constitution. The applicant contended that the remedy as an 'equitable remedy is in line with constitutional values'¹⁹⁹ and that on these particular facts it would – given the verbal agreement – be unconscionable for Gold Reef City to rely on the written agreement. There were thus two distinct issues before the court: first, whether the common law should be developed so as to reintroduce the *exceptio doli generalis* as an 'equitable remedy in line with

¹⁹⁴ 2008 4 SA 16 (CC) (*Crown Restaurant*).

¹⁹⁵ n 194 above, para 1

¹⁹⁶ See n 194 above, Applicant's Founding Affidavit para 23.2.(d).

¹⁹⁷ n 194 above, para 2.

¹⁹⁸ n 194 above, para 3.

¹⁹⁹ As above.

constitutional values' and second, if the answer to the first question is in the affirmative, whether on the facts the applicant could succeed with such a defence.

In its judgment the Constitutional Court pointed out that the trial court judge 'was called upon to deal *only* with the waiver defence and did so. He was not *invited* to develop the common law of contract to promote the spirit, purport and objects of the Bill of Rights, nor to address any of the other constitutional issues now raised by the applicant.'²⁰⁰ After this statement the Court elaborated on the undesirability for it to sit as a court of first and last instance. It stated that the High Court and the SCA have a vital role to play when it comes to the development of the common law of contract and concluded that there are no compelling reasons for the Court to deal (as a court of first and last instance) with the issues raised by the applicant. It again warned litigants that 'care should be taken to identify properly at the time of the institution of the proceedings which constitutional issue they wish to have addressed.'²⁰¹ Accordingly, the application for leave to appeal was dismissed.

In order to evaluate critically the apparently unproblematic nature of the Constitutional Court's dismissal of the application for leave to appeal, it is necessary that we recall here what was said in the decision of the Constitutional Court in *Carmichele*. In this case the applicant (plaintiff in the Court a quo) also did not invite either the trial court or the SCA to develop the common law in accordance with the spirit, purport or objects of the Bill of Rights.²⁰² She argued the issue relating to the development of the common law *for the first time* in the Constitutional Court and contended that had the High Court and the SCA applied the relevant provisions of the Constitution in determining whether a legal duty (in the context of the law of delict) was owed to her, it would have developed the common law and would have found that such a legal duty exists.²⁰³ To quote from the judgment of Ackermann and Goldstone JJ:

Despite the failure by the applicant to rely directly upon the provisions of either section 35(3) of the [Interim Constitution] or section 39(2) of the Constitution in the High Court and SCA, counsel for the respondent did not object to this issue being raised in this Court. If covered by the pleadings, and in the absence of unfairness, *parties are ordinarily not*

²⁰⁰ *Crown Restaurant* (n 194 above) para 4 (emphasis added).

²⁰¹ *Crown Restaurant* (n 194 above) para 6.

²⁰² *Carmichele* (n 193 above) para 41.

²⁰³ *Carmichele* (n 193 above) para 28.

precluded from raising new legal arguments on appeal. [Reference omitted.]²⁰⁴

Furthermore, in the course of the *Carmichele* judgment the Court stated the following:

In South Africa, the [Interim Constitution] brought into operation, in one fell swoop, a completely new and different set of legal norms. In these circumstances the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. We would add, too, that this duty upon judges arises in respect both of the civil and criminal law, *whether or not the parties in any particular case request the court to develop the common law under section 39(2).*²⁰⁵

The *Carmichele* judgment made it clear that there is a general obligation on courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. The judgment also makes it clear that the duty exists whether or not the parties in any particular case explicitly invite the court to develop the common law. Furthermore, it is clear that the *Carmichele* judgment envisages that there might be circumstances where a court is obliged to raise the matter on its own and require full argument. This would be required presumably when the legal issue ‘can hardly be described as an insignificant one, lying at an exotic periphery’²⁰⁶ of the law in question.

In the light of these findings in *Carmichele* regarding the general *obligation* to develop the common law, it is not clear why the Constitutional Court considered it material (and thus fatal to the applicant’s application for leave to appeal) in *Crown Restaurant* that the trial court was not *invited* to develop the common law. *Carmichele* tells us that judges have a general obligation to consider the development of the common law in light of the spirit, purport and objects of the Bill of Rights, even when they are not *invited* by parties before them to do so. This is particularly important when a significant legal issue calls for constitutional resolution. By the time that this case came before the trial court it was clear that much dispute existed over, *inter alia*, the status of the *exceptio doli generalis* in

²⁰⁴ *Carmichele* (n 193 above) para 31. Also see para 38: ‘It does not appear to have been suggested that there was any obligation on the High Court or the SCA to develop the common law of delict in terms of section 39(2) of the Constitution.’

²⁰⁵ *Carmichele* (n 193 above) para 36. Also see para 39: ‘we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). *At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.*’ (emphasis added.)

²⁰⁶ *Carmichele* (n 193 above) para 59.

our law, the role of good faith and the enforceability of a *Shifren* clause and/or a no indulgence clause in circumstances of subsequent verbal amendments/indulgences (that is, *in the context of the waiver question*).²⁰⁷ Moreover, it was (and still is) by no means clear how these matters are affected by the normative transformation of the legal order occasioned by the Constitution. Given the fact that the Constitution ‘brought into operation, in one fell swoop, a completely new and different set of legal norms’ it could certainly be asked whether the question of the development of the common law in this area should not have been raised by the trial court judge – as mandated by *Carmichele* – even though he was not explicitly invited to consider the development of the common law. It is thus not clear, under the circumstances, why further exploration by the trial court of the issues that were eventually raised in the Constitutional Court, was ‘understandably not undertaken’.²⁰⁸

In *Carmichele* the court held that the trial court and the SCA should indeed have considered the question regarding the effect of section 39(2) even though the parties did not raise the matter regarding development of the common law initially. The way in which the court dealt with this difficulty in *Carmichele* is very different from the way in which the *Crown Restaurant* matter was handled. *Crown Restaurant* was dealt with in terms of Constitutional Court rule 19(6)(b) which states that ‘[a]pplications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself.’ In *Carmichele* the court heard argument on the merits of the dispute in accordance with the principle enunciated in what is now Constitutional Court Rule 19(6)(c). *Inter alia*, this move allowed the court to deal with the question regarding the prospects of success in considering whether to grant the application for special leave to appeal. In *Crown Restaurant* the court did not utilise rule 19(6)(c) and did not explicitly deal in its judgment with the question of the prospects of success. The refusal to make an order in terms of rule 19(6)(c) leaves one to assume that in the view of the court the prospects of success were improbable on the papers. Yet this is not the reason the court gives for denying the application for leave to appeal. The reason it gives for the failure of the application is that the applicant did not invite the trial court to develop the common law, that is, it did not raise the constitutional argument timeously. In *Carmichele* the remedy decided on in circumstances where the constitutional argument was not considered by the trial court or the SCA was to refer the matter back to the trial

²⁰⁷ The trial judge in fact referred to *Brisley v Drotzky* (n 13 above). See *Gold Reef City Theme Park (Pty) Ltd v The Crown Restaurant CC* unreported, case no: 2006/595 WLD, 7 June 2006 para 23 – where the controversy regarding good faith and the *exceptio doli generalis* arose in the context of waiver.

²⁰⁸ *Crown Restaurant* (n 194 above) para 6.

court. Admittedly, a difference between the *Crown Restaurant* matter and the *Carmichele* matter is that in *Carmichele* absolution was granted whereas in *Crown Restaurant* a full trial took place. In *Carmichele*, the fact that absolution was granted by the trial court provided a reason for referring the matter back to the trial court *in addition to* the referral on the grounds that the trial court had to be given the opportunity to consider section 39(2) in relation to the matter before it.²⁰⁹ Even though a full trial had taken place in *Crown Restaurant*, there is in principle no reason why the matter could not be referred back to the trial court in that instance for a consideration of the relevance of section 39(2). Given the controversy and uncertainty in relation to the contract law issues raised in this matter and given that many of these contentious issues are raised in the context of waiver, a case could well be made that it would have been in the interests of justice for the Constitutional Court to have granted leave to appeal, upheld the appeal, set aside the order of the trial court and to have referred the matter back to the trial court for a proper consideration of the section 39(2) obligation in relation to the *exceptio doli generalis* and its philosophical underpinning – good faith.²¹⁰ This may be a costly exercise – as was the case in *Carmichele* – but it allows opportunity for the constitutional resolution of an issue that is crucially in need of it. However, this did not happen because the Constitutional Court was clearly of the view that on the papers there were not sufficient prospects of success even if the section 39(2) enquiry required development of the common law in such a way that the *exceptio doli generalis* be reintroduced.

From the point of view that even if there were prospects of success on appeal, a full trial had already occurred in the High Court and the cost to have the matter referred back to the trial court would have been prohibitive and unfair to the respondent, the Constitutional Court could itself have granted leave to appeal and could have decided the issue of the development of the common law on appeal. However, this was again not considered a viable option both presumably on the basis that there were not sufficient prospects of success on appeal and on the basis that it would have been extraordinary for the Constitutional Court to sit as court of first and last instance, because, as was indicated in *Carmichele* (referring to *Bequinot*)²¹¹ the Court would be put at a ‘grave disadvantage’ were it not to have ‘the benefit of a fully considered judgment from either the SCA or the High Court’²¹² on the point of the development of the common law. In the *Crown Restaurant* matter it is a pity that a point of law in such urgent need of constitutional resolution fell through the

²⁰⁹ *Carmichele* (n 193 above) para 81.

²¹⁰ See Glover (n 104 above) 451.

²¹¹ *S v Bequinot* 1997 2 SA 887 (CC) (*Bequinot*).

²¹² *Carmichele* (n 193 above) para 58.

cracks as it were and led to a judicial impasse which, seemingly, could only be normalised/justified by invoking the idea that the common law can only be developed when parties invite the courts to develop the common law. And it is this idea that sits uncomfortably with the 'general obligation' to develop the common law in line with constitutional values enunciated in *Carmichele*.²¹³

However, it is quite possible that there might be another reason for the Court's decision not to grant leave to appeal in the *Crown Restaurant* matter. This reason might relate particularly to the controversy regarding the status of the *exceptio doli generalis* and good faith in our law of contract. In other words, the Constitutional Court's refusal to hear argument on the merits and thus also its refusal to grant leave to appeal in *Crown Restaurant* might relate to the apprehensive way in which the substantive legal issue is *generally* treated in our law of contract. Simply put, my contention is that the Constitutional Court made a policy decision to deal with this case by not dealing with it. Implicit in the Court's reasoning is that it would be inappropriate for it to sit as Court of first and last instance (that is without the benefit of judgments from the lower courts) on a matter as contentious and as vexed as the status of the *exceptio doli generalis* and the good faith approach in our law of contract. In and of itself, this refusal might well have amounted to a silent endorsement of the hegemonic order(ing) in our law of contract.

But when considered in the light of the other contract law case before the Constitutional Court in 2007, the judgment of the Constitutional Court in *Crown Restaurant* might have been influenced by the fact that a more appropriate contract law case for the Constitutional Court (that is, a case where the constitutional issue had already passed through the trial court and the SCA) was before it at the time of *Crown Restaurant* that would, in any event, provide the Court with the opportunity to pronounce on good faith (as the philosophical underpinning of the *exceptio doli generalis*), albeit by not pronouncing on it. In other words, the silence we see in *Crown Restaurant* regarding the *exceptio* (and for that matter, good faith as its philosophical underpinning) foreshadows the silence about good faith that we shall see in *Barkhuizen*. The silence in *Barkhuizen*, however, is different in that it is a silence that opens Kafka's proverbial door of the law, whereas *Crown Restaurant* closed it.²¹⁴

²¹³ *Carmichele* (n 193 above) para 39.

²¹⁴ See, in general, F Kafka *The trial* trans B Mitchell (1998).

5.3 *Barkhuizen v Napier*

In this case the Constitutional Court had to consider the constitutionality of a time limitation clause in a short-term insurance policy.²¹⁵ The case came before the Constitutional Court on appeal from the SCA which held that there was no evidence before it that indicated that the contract/policy containing the time-bar clause was not entered into freely and voluntarily in the exercise of the constitutional rights to dignity, equality and freedom. This led the court to the conclusion that constitutional norms and values could not operate to invalidate the bargain concluded.²¹⁶

Before proceeding to the judgment of the Constitutional Court, a few important points should be made regarding the SCA's *Barkhuizen* judgment not the least of which is that this judgment constitutes the latest in the series of judgments that attempt to provide a constitutional fit and justification for the hegemonic order(ing) of the law of contract in South Africa.²¹⁷ This legitimation of the hegemonic order(ing) was most prominent in the *Brisley* majority judgment and separate concurring judgment of Cameron JA. Of his separate concurring judgment in *Brisley* Cameron JA says the following in his judgment in *Barkhuizen*:

Brisley rejected the notion that the Constitution and its value system confer on Judges a general jurisdiction ... or power to decide that contractual terms cannot be enforced on the basis of *imprecise notions* of good faith.²¹⁸

Cameron JA then added that the judgments in *Brisley* and *Afrox* 'affirmed that the common law of contract is subject to the Constitution'²¹⁹ and that public policy, as rooted in the founding values of the Constitution – human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism – is the proper instrument by way of which the courts can invalidate agreements that are offensive to the values of the new constitutional order.²²⁰

Cameron JA's judgment openly maintains an explicit opposition between public policy and good faith. However, Cameron JA offers no

²¹⁵ *Barkhuizen* (n 13 above) para 1.

²¹⁶ *Napier* (n 13 above) para 28. The court held that this lack of evidence was attributable to the way in which the matter came before it, namely by way of 'a terse statement of facts' (para 9).

²¹⁷ In a critique of the judgment of the SCA, Deeksha Bhana argues that the SCA reaffirmed the classical liberal position. See D Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 2 *South African Law Journal* 269.

²¹⁸ *Napier* (n 13 above) para 7 (emphasis added).

²¹⁹ *Napier* (n 13 above) para 6.

²²⁰ *Napier* (n 13 above) para 7.

justification as to why good faith should be regarded as more of an imprecise and vague notion than the notions in which public policy are supposedly rooted: dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism. Dignity particularly has in the past been repeatedly criticised for being, an *imprecise* notion.²²¹ Some have even gone so far as to describe equality as an empty concept.²²² Are the concepts of non-racialism and non-sexism not also open concepts? And what about ‘the advancement of human rights and freedoms’? Moreover, can it not be said that in a constitutional democracy founded on these values, good faith – as the *ethical* element of contract – encompasses, in fact embraces, all these founding values at once? Hector MacQueen and Alfred Cockrell have argued that the South African courts have long conceded that public policy is a dynamic concept in the South African law of contract. It nevertheless, argues MacQueen and Cockrell, falls to be distinguished from good faith.²²³ Whereas good faith applies community standards ‘much more directly’ to the relationship between the contracting parties, public policy enunciates moral and social standards that are not necessarily dependent on the relationship between the parties.²²⁴ The SCA appears to have, at least implicitly, accepted a dynamic conception of public policy.²²⁵ At the same time it appears to have adopted the view that public policy should be distinguished from good faith, but not along the lines suggested by MacQueen and Cockrell.²²⁶ The SCA rejects *any* direct reliance on good faith on the basis that it is *too imprecise* a notion. Yet, it accepts direct reliance on public policy – a concept as dynamic and as imprecise as public policy. Such a basis for the opposition between good faith and public policy is incoherent and arbitrary. The point is that *both* good faith and public policy are open-ended norms, imprecise notions, text that calls for interpretation and justification much like the entire Bill of Rights and the founding values and ideals of the Constitution. Both good faith and public policy amount to devices by way of which freedom of contract (as embodying the value of autonomy) is limited (and thus *constituted*) in the South African law of contract.²²⁷ To privilege public policy on the basis that good

²²¹ See for instance D Davis ‘Equality: The majesty of Legoland jurisprudence’ (1999) 116 *South African Law Journal* 398 413 and C McCrudden ‘Human dignity’ University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper 10/2006, April 2006.

²²² P Westen ‘The empty idea of equality’ (1982) 95 *Harvard Law Review* 537.

²²³ H MacQueen & A Cockrell ‘Illegal contracts’ in R Zimmerman *et al* (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2004) 143 173.

²²⁴ As above.

²²⁵ See *Magna Alloys* (n 85 above) 891 and *Sasfin* (n 75 above) 71-J.

²²⁶ See *South African Forestry* (n 13 above) para 32.

²²⁷ Perhaps the privileging of public policy can be explained by reference to the privileging of the mantra that public policy generally favours the strict enforcement of contracts, whereas good faith does not, without more, favour such a privileging of liberal ideology.

faith is too imprecise a notion (and thereby suggesting that public policy is somehow more precise) sits uncomfortably with the context of – and openness to – an entire legal order that is founded on more or less ‘imprecise’ notions namely dignity, equality and freedom, notions to which meaning is given in a long process over time at the same time as their meaning always depends – at least to a certain extent – on context.

A further aspect of the SCA’s *Barkhuizen* judgment to which I want to draw attention is the uncritical – and alarming – assumption in the judgment that the hegemonic order(ing) of the law of contract in South Africa is already constitutionally entrenched. I use the word ‘alarming’ here given the vast economic disempowerment in South Africa and the grossly unequal, undignified and in fact *unfree* bargaining relations and situations in South Africa that the law of contract normalises and on a continuing basis sustains. From this perspective, it is hard to believe the SCA when it argues that the law of contract – in its current permutation – approximates the ideals of a transformative legal order in the best possible way, even when it concedes that public policy is a dynamic concept the meaning of which is to be determined by reference to the values and rights in the Constitution. Of course, some argue that the achievement of socio-economic equality is not – and should not be – something which a general law of contract can do much – if anything substantial – about. Yet, this approach fails to take into account what Woolman calls ‘the structured silence of [contractual] disputes that never make it to court.’²²⁸ Moreover, when the Constitution requires in section 39(2) that when the common law is developed it *must* be developed taking into account the spirit, purport and object of the Bill of Rights, the Constitution explicitly involves all law in the project of transformative constitutionalism. It thus explicitly requires that one takes a view of the common law as something other than the neutral backdrop against which interactions between legal subjects occur. Judgments such as those delivered in *Brisley*, *Afrox* and the SCA’s *Barkhuizen* judgment are attempts to provide the authoritative statements that the Constitution did not significantly change/affect – that is, it attempts to *legitimise* – the hegemonic order(ing) in the South African law of contract. The positions taken in these judgments of course offer a particular ideological reading of the Constitution. The ideology that prevails reads the Constitution in a classical liberal way against which it is easy to legitimise the hegemonic order(ing) of a classical liberal law of contract as in accordance with it. Cameron JA’s judgment in *Brisley* is exemplary of such a classical liberal ideology when it comes to the relationship between the Constitution

²²⁸ See S Woolman ‘Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*’ (2008) 1 *South African Law Journal* 10 11.

and the law of contract. To recall, Cameron JA held that '[t]he constitutional values of dignity and equality and freedom require that courts approach their task of striking down contracts or declining to enforce them with perceptive restraint ... contractual autonomy is part of freedom'²²⁹ and 'shorn of its obscene excesses'²³⁰ it 'informs also the constitutional value of dignity.'²³¹ This judgment (like the judgment of the majority) is predicated upon an individualist ethic that is not only difficult to square with the altruistic ideals inherent in the spirit of a Constitution that aspires to a post-apartheid society; it also uncritically assumes that the strict enforcement of contracts (that is, a principled – and thus *political* – commitment to non-intervention by the courts in contractual matters) is in service of the constitutional values of dignity, equality and freedom.

The way in which Cameron JA's judgment in *Brisley* was later used in *Afrox* was criticised along the lines suggested above.²³² Lubbe for instance argued that when the foundational concepts of the Constitution are marshalled in the under-nuanced way in which they were in *Afrox*, the founding values of the Constitution serve to do only one thing and that is to dissipate pressure on the legitimacy of this hegemony.²³³ As Wagener argued, the linking of freedom of contract with dignity does not, without more, favour the strict enforcement of contracts.²³⁴ On the contrary, dignity might well be invoked to justify more active judicial control. Bhana and Pieterse also argued in this regard that 'the [constitutional] value of freedom does not equate with complete individual liberty and does not found an independent right to unlimited contractual liberty.'²³⁵

Turning now to the Constitutional Court's decision in *Barkhuizen*, it must be said that this decision of the Constitutional Court is, in a very real sense, not possible without the decisions and positions taken

²²⁹ *Brisley* (n 13 above) 35E.

²³⁰ *Brisley* (n 13 above) 35F. (I am also interested in understanding in which circumstances the court will regard freedom of contract as sufficiently 'shorn of its obscene excesses'.)

²³¹ *Brisley* (as above).

²³² D Bhana & M Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *South African Law Journal* 865 874; G Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *South African Law Journal* 395.

²³³ See Lubbe (n 232 above) 420.

²³⁴ S Wagener 'A proposal for the reform of the law of contract brought about by the judicial development of novel *naturalia*' (2005) *Responsa Meridiana* 19 39-40. Also see K Hopkins 'The influence of the Bill of Rights on the enforcement of contract' (2003) 425 *De Rebus* 25.

²³⁵ n 232 above, 879. Bhana and Pieterse also argue that the value of freedom 'is reined in significantly by its interaction with the constitutional values of equality and dignity'. Again, I do not believe that freedom is somehow reined in by its interaction with equality and dignity. Rather, freedom is *constituted* by its interaction with equality and dignity.

in *Brisley* and *Afrox* and of course also in the SCA decision in *Barkhuizen*. Here, in the first case before the Constitutional Court on the law of contract, it had the benefit of the judgments of the lower courts. Things were as they should be.

In *Barkhuizen* the appellant argued that the time limitation constituted an unjustifiable limitation on the constitutional right to approach a court for redress.²³⁶ In the High Court the appellant argued on the basis of the direct horizontal application of the constitutional right and succeeded in his claim.²³⁷ However, the Constitutional Court confirmed in this case the approach followed in the decision by the SCA. The proper approach when dealing with the constitutionality of contractual provisions is to subject the term to the public policy test 'as evidenced by the constitutional values, in particular, those found in the Bill of Rights.'²³⁸ This means, of course, that the route of indirect horizontal application is the preferred route when considering the constitutionality of a contractual arrangement.²³⁹ In determining whether a particular clause offends public policy *as animated by the Constitution*, the court held that the first question is whether the clause itself is reasonable.²⁴⁰ The second question, held the Court, is whether the clause should be enforced in light of the circumstances that prevented compliance with it.²⁴¹ In this leg of the enquiry unequal bargaining power is a factor, but not the only factor, that plays a role in the determination of public policy.²⁴² On the first question, the court held that the reasonableness of the provision is determined by weighing up the public interest in compliance with freely and voluntarily concluded terms (or, otherwise put, freedom of contract) against the public interest in the right of access to courts.²⁴³ The second question effectively involves an enquiry into the reasons why non-compliance is manifest. The onus to prove that it was impossible or unreasonable in the circumstances to comply with the clause rests on the party who alleges it.²⁴⁴ Thus, where the clause has been found not to be in violation of public policy (objectively speaking), it can still be escaped where the defendant proves good reason why there was failure to comply.

But there are two aspects regarding the Court's statements on public policy on which I want to dwell for the moment because they

²³⁶ *Barkhuizen* (n 13 above) para 1.

²³⁷ *Barkhuizen* (n 13 above) para 9.

²³⁸ *Barkhuizen* (n 13 above) para 30.

²³⁹ For criticism see Woolman (note 102 above) 774-781.

²⁴⁰ *Barkhuizen* (n 13 above) para 59.

²⁴¹ As above.

²⁴² As above.

²⁴³ *Barkhuizen* (n 13 above) para 57.

²⁴⁴ *Barkhuizen* (n 13 above) para 58.

have implications for good faith. First, I want to emphasise that the Court reconfirmed the trite notion that the validity or otherwise of contractual terms is determined by asking whether the clause is in accordance with public policy. Second, the Court emphatically stated that ‘public policy represents the legal convictions of the community; it represents those values held most dear by the society.’²⁴⁵ It also held that ‘[p]ublic policy imports the notions of fairness, justice and reasonableness.’²⁴⁶ According to the Constitutional Court then, the enforceability or not of contractual terms are determined by the legal convictions of the community as represented by ‘the values that underlie our constitutional democracy’.²⁴⁷ This statement flies in the face of the *Brisley* judgment in which the Court explicitly and in the strongest terms overruled Davis J’s judgment in *Mort* because it attempted to make the enforceability of contractual terms dependent on the legal convictions of the community.

Recall, however, that Davis J referred to the legal convictions of the community in relation not to public policy but to *good faith*. It thus appears that, to the extent that Davis J did indicate that the enforceability of contractual terms depends on the legal convictions of the constitutional community – as that term is understood as the aspirational ‘community of the “ought to be”’²⁴⁸ – the Constitutional Court is in agreement with him and disagrees with the SCA. The only disagreement between the Constitutional Court and Davis J is the doctrinal name of these legal convictions. The Constitutional Court calls it public policy, Davis J calls it good faith. Can it be that the Constitutional Court in this case in fact merged public policy with good faith? Can it be that good faith after all forms part of public policy as Olivier JA argued in his much-maligned judgment in *Eerste Nasionale Bank*? The answer to this question is by no means clear given Ngcobo J’s emphatic statement that the facts of the case did not require the Court to answer the question whether, under the Constitution, the limited role for good faith expounded since *Brisley*, is appropriate.²⁴⁹ Yet, the Court attributes exactly the same meaning to public policy as the meanings that have been attributed to good faith. A striking example is the similarity between the definition by the Constitutional Court of public policy as ‘importing the notions of fairness, justice and reasonableness’²⁵⁰ and Olivier JA’s definition of

²⁴⁵ *Barkhuizen* (n 13 above) para 28.

²⁴⁶ *Barkhuizen* (n 13 above) para 73.

²⁴⁷ *Barkhuizen* (n 13 above) para 29.

²⁴⁸ See D Cornell *Moral images of freedom* (2007) 22.

²⁴⁹ *Barkhuizen* (n 13 above) para 82. This point is emphasised in the judgment of O’Regan J (*Barkhuizen* (n 13 above) para 120): ‘there is in my view no need for this court to consider in what circumstances a court may, in terms of the principles of contract, decline to enforce a time-limitation clause against a particular applicant based on the defences of impossibility or good faith. That difficult question can stand over for decision in an appropriate matter.’

²⁵⁰ *Barkhuizen* (n 13 above) para 73.

good faith as realising the community's legal convictions regarding propriety, reasonableness and fairness.²⁵¹

On the other hand, the Court raised the good faith issue as it was dealing with the second leg of its test to determine the enforceability of the term on the ground of public policy: whether the terms are contrary to public policy in the light of the relative situation of the contracting parties. The court held that the applicability of the principle of good faith would depend on the reason advanced for non-compliance. However, the applicant did not disclose his reason for non-compliance. This made it impossible to say whether 'enforcement of the clause against the applicant would be unfair and thus contrary to public policy.'²⁵² In other words, the absence of a reason for non-compliance blocked, it seems, the consideration of the good faith requirement *within* the public policy test. In the absence of pleaded reasons for non-compliance, it would, according to the Court, be unfair to the respondent and contrary to *pacta servanda sunt* to excuse Barkhuizen from non-compliance with the time-bar clause.²⁵³ For these reasons, the majority accordingly dismissed the appeal.

On my reading it seems then at least probable that the court would have been willing to consider good faith (in the context of its formulated public policy test) had reasons been advanced for non-compliance with the term. In this way the court seems to both accept and reject the category distinction that MacQueen and Cockrell make between public policy and good faith. The Court clearly views good faith as the measure that would curb the enforcement of the term if enforcement 'would be unfair or unjust to the applicant.'²⁵⁴ Given the Court's statement regarding the role of unequal bargaining power in this leg of its public policy test, the suggestion seems to be that part of the good faith test will involve enquiring into the relative bargaining position of the parties and the way in which this impacted on the contractual arrangement. In this way it appears that the Court left the door wide open as regards good faith's potential role as part of the public policy test. Moreover, this means that the *exceptio doli generalis*, albeit in drag, has risen from the grave²⁵⁵ – a grave in which it was in any event never interred. Another implication of the judgment is that the Constitutional Court has confirmed that the alleged exercise of freedom of contract in violation of both the rights in and the spirit, purport and objects of the Constitution, will not be enforced on grounds of public policy.

²⁵¹ *Eerste Nasionale Bank* (n 128 above) 319B.

²⁵² *Barkhuizen* (n 13 above) para 84.

²⁵³ n 13 above, para 85.

²⁵⁴ As above.

²⁵⁵ Glover (n 104 above) 455.

To what extent this confirmation will constitute internal limitations on freedom of contract – and thus amount to a synchronisation of freedom of contract with the other constitutional rights and freedoms in furtherance of a transformative understanding – depends on whether there will be a departure from/transformation of the hegemonic order(ing) we have interrogated. Moreover, by leaving the door of public policy open to good faith, the court has created the possibility that good faith may in the future again become constitutive of freedom of contract, rather than marginalised and seen as opposed to it. Again, everything here depends on the content that will be afforded to good faith. It goes without saying that it is always possible (and indeed likely) that good faith can be afforded weak content that would just further legitimise the hegemonic understanding of freedom of contract. To put it perhaps more dramatically, it is of course always an imminent danger that good faith will simply become a private and privatising device.²⁵⁶ For this reason it becomes necessary to defend a progressive and transformative version of good faith.

6 Negotiating otherwise – good faith, civic friendship and freedom of contract

When considering the justifiable potential content of good faith – as the ethical ideal that undergirds the law of contract – I believe it is necessary to take as one's point of departure within the nature and the aspirations of the reconstituted legal order within which the law of contract operates as an institution of the common law subordinated to the Constitution. If it is the case that the 'proper' approach (post-*Barkhuizen*) to the influence of the Constitution on the common law of contract is the public policy enquiry, then good faith – as the ethical element of contract, as 'the law of the responsible transaction'²⁵⁷ – can and must come to play a role in the determination of the public policy requirement in order for the spirit of the Constitution as a whole to have a better chance of a transformative effect in the law of contract. In other words if there is to be talk of and hope for what Johan van der Walt has called *progressive* indirect horizontal application²⁵⁸ then we cannot afford to lose sight of good faith and the transformative potential it holds for the South African law of contract. Good faith holds this

²⁵⁶ See JWG van der Walt 'Die toekoms van die onderskeid tussen die publiekreg en die privaatreë in die lig van die horisontale werking van die grondwet (deel 2)' 2000 *Tydskrif vir die Suid-Afrikaanse Reg* 605 612.

²⁵⁷ J Derrida 'On forgiveness' in J Derrida *On cosmopolitanism and forgiveness* (2001) 56.

²⁵⁸ See in general JWG van der Walt 'Progressive indirect horizontal application: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) *South African Journal on Human Rights* 341.

transformative potential because, more than any other normative contractual device, it is good faith that invokes, as an ethical notion, respect for the dignity of contracting parties, precisely because, as MacQueen and Cockrell suggest, good faith focuses the enquiry explicitly on the *relationship* between the *particular* contractual parties. This respect for dignity when it comes to legal relations is a core aspect of the newly constituted legal order and its aspirations to civic friendship.

I would like to suggest, in conclusion then, that the 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.²⁵⁹ This, I would argue, requires that we afford content to good faith in the law of contract that would maintain it as a post-liberal concept. I want to emphasise here that I do not consider the dignity of which the Constitution speaks (and on which the instant conception of civic friendship and good faith turns) to be inevitably fated as a radically individualistic concept that, moreover, forms the basis of exclusively negative freedom. This argument is possible because of the links drawn in our early dignity jurisprudence between dignity and *ubuntu*.²⁶⁰ Drucilla Cornell draws the further link between *ubuntu*, (Kantian) dignity and friendship as follows:

In Kant, I am a friend to myself because of the dignity of my humanity. Under *ubuntu*, I am a friend to myself because others in my community have already been friends to me, making me someone who could survive at all, and therefore be in the community. It is only because I have always been together with others and they with me that I am gathered together as a person and sustained in that self-gathering.²⁶¹

It was Hannah Arendt who, in modern political theory, resuscitated and defended a ‘politics of friendship’ relying heavily on the work of Aristotle.²⁶² Arendt’s theory of civic friendship offers an account of politics that is both post-individualist and post-liberal. In fact, Arendt’s theory of civic friendship invokes an understanding of citizenship as a radically ‘*horizontal* allegiance to friends.’²⁶³ She sees in this understanding of political life the possibility of ‘words that

²⁵⁹ Constitution sec 10.

²⁶⁰ See, for instance, *S v Makwanyane* 1995 3 SA 391 (CC) paras 224, 308 & 311.

²⁶¹ D Cornell ‘A call for a nuanced constitutional jurisprudence: *Ubuntu*, dignity and reconciliation’ (2004) 19 *SA Public Law* 666 669.

²⁶² H Arendt *The human condition* ed M Canovan (1998) 243.

²⁶³ ME Stortz ‘Beyond justice: friendship in the city’ (1994) XIV(4) *Word & World* 409 414 (emphasis added).

are not empty and deeds that are not brutal.’²⁶⁴ As Martha Stortz comments on Arendt’s concept of civic friendship:

Civic friendship of all sorts emphasises the interdependence of citizens in public life. It articulates a horizontal understanding of citizenship, which prizes the relationship to another citizen and places that relationship at the centre of civic life.²⁶⁵

Most importantly, though, this form of friendship is not at all about the association of the self and the same. At its heart, Arendt’s understanding of civic friendship turns on plurality – that is, difference – because it is plurality in Arendt that is constitutive of the political.²⁶⁶ And plurality conditions us in the sense that our very individuality only takes shape through our recognition that we share the world with others.

This immediately implicates the idea of respect, for without respect there can be no durability for plurality. And as Arendt puts it in *The human condition*: ‘what love is in its own, narrowly circumscribed sphere, respect is in the larger domain of human affairs.’ ‘... [R]espect’, so she continues,

is a kind of ‘friendship’ ... it is a regard for the person from the distance which the space of the world puts between us, and this regard is independent of qualities which we may admire or of achievements which we may highly esteem.²⁶⁷

For Arendt then there can be no talk of civic friendship without this respect, which, to emphasise, does not depend on conditions of the self and the same. However, Arendt conceded that the modern age is characterised by the loss of respect and this ‘constitutes a clear symptom of the increasing depersonalisation of public and social life.’²⁶⁸ It is also because of Arendt’s acute awareness of the implications of this depersonalisation due to the loss of respect that she insists famously at the end of the preface to *The origins of totalitarianism* that, in the aftermath of the disasters of modernity ‘human dignity needs a new guarantee which can be found only in a new law on earth.’²⁶⁹

²⁶⁴ As above.

²⁶⁵ As above.

²⁶⁶ Arendt (n 262 above) 7.

²⁶⁷ n 262 above, 243.

²⁶⁸ As above.

²⁶⁹ H Arendt *The origins of totalitarianism* (1973) ix.

If we recall Derrida's assertion in *Politics of Friendship* that there is no friendship without respect of the other, that 'the co-implication of responsibility and respect can be felt at the heart of friendship'²⁷⁰ we will begin to see the trembling overlap between the ethical, the political and the juridical in the South African Constitution in which respect for the dignity of all others comes to play a constitutive role. Justice O'Regan has referred explicitly to respect and responsibility as 'the building blocks of the Constitution.'²⁷¹ And this respect is owed to the equal human dignity of everyone.²⁷² On my reading, this unconditional horizontality of the South African Constitution appeals to a prioritisation of Arendt's, but also Derrida's, vision of friendship in which the Greek form of love as *philia* is instituted as a socio-political concept but here in holding out the promise of a beyond to any condition of fraternity or 'confraternisation'.²⁷³ Shin Chiba argues that it is this form of love that permeates Arendt's search for a new and durable vinculum or social bond, which, let us recall, is the original name for law.²⁷⁴ The implication of this institutionalisation is that it is in fact respect, as *phronesis* and *praxis* for the Other²⁷⁵ – respect that resides in *love* of the Other – that becomes constitutive of the legal order.

Judge Dennis Davis has been foremost amongst those who have argued that the notion of *respect* for equal dignity (civic friendship) is translated into the law of contract by way of good faith.²⁷⁶ He has also opposed this concept to South Africa's political past. As Davis J puts it:

this concept of good faith is congruent with the underlying vision of our Constitution ... to the extent that our Constitution seeks to transform our society from its past, it is self-evident that apartheid represented the very opposite of good faith ... Our Constitution seeks to develop a community where each will have *respect* for the other ... Whatever the uncertainty, the principle of good faith must require that the parties act honestly in their commercial dealings. Where one party promotes its own interests at the expense of another in so unreasonable a manner as to destroy the very basis of consensus between the two parties, the

²⁷⁰ J Derrida *Politics of friendship* trans G Collins (1997) 252. Of course, Derrida is problematising Kant's formulations with regard to friendship here, notably Kant's separation of love from friendship. Time and space does not permit a discussion of this deconstruction.

²⁷¹ C O'Regan 'The three r's of the Constitution: Responsibility, respect and rights' (2004) *Acta Juridica* 86.

²⁷² As above.

²⁷³ See S Chiba 'Hannah Arendt on love and the political: Love, friendship, and citizenship' (1995) 57 *The Review of Politics* 505 512-513. Also see Derrida (n 267 above) viii.

²⁷⁴ n 273 above, 509.

²⁷⁵ Douzinas & Geary (n 68 above) 40.

²⁷⁶ But also see Grové (n 130 above) 689.

principle of good faith can be employed to trump the public interest inherent in the principle of the enforcement of a contract.²⁷⁷

In his judgment in *Mort Davis J* quoted the words of Reinhard Zimmermann²⁷⁸ in relation to this aspect:

the principles of equality and dignity require that the parties to a contract do none other but 'adhere to a minimum threshold of *mutual respect* in which the unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts'.²⁷⁹

This is the formulation for which *Barkhuizen* leaves the door open. Ultimately in our context, respect for the Other resides, as Davis J has also indicated, in the acknowledgement that:

[a] transformative constitution needs to engage with concepts of power and community ... the concept of contractual autonomy within the concept of a community of contracting persons must mean something distinct from a libertarian connotation, particularly if the concept of *ubuntu* is to play any role in our law.²⁸⁰

These statements about the law of contract as law subordinated under the new Constitution are explicit interpretations of the constitutional mandate as requiring a re-emphasis on the ethical element of contract in the furtherance of a post-liberal or positive freedom of contract. A freedom of contract that comes to understand that conduct cannot be characterised as free when it disrespects/violates dignity,²⁸¹ when it pretends that contract is a relation between things and not between persons, when it does not proceed according to respect for whoever is on the other side of the negotiation. To quote Colombo: 'Good faith implies a developed sense

²⁷⁷ *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2002 6 SA 202 (C) (*Shoprite*) 215G-216A.

²⁷⁸ R Zimmermann 'Good faith and equity' in R Zimmerman and D Visser (eds) *Southern cross: civil and common law in South Africa* (1996) 259-260.

²⁷⁹ n 168 above, 475B-C.

²⁸⁰ *Advtech* (n 95 above) 388A.

²⁸¹ The mantra in Ackermann J's celebrated minority judgment in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) (*Ferreira*) para 49 'to deny people their freedom is to deny them their dignity' should perhaps then be reconsidered in this light because, on this understanding in the law of contract, to deny people their dignity is to deny one's own freedom (of contract).

of community and a high level of awareness of personal responsibilities towards society.²⁸²

When Lubbe argues that our understanding of dignity in contract should be informed by Kant's precept that people should not

act contrary to the equally necessary self-esteem of others, as human beings, that is, [they are] under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being²⁸³

he already acknowledges the relational aspect of contract that would amount to a Hegelian version of contract as 'reciprocal recognition.'²⁸⁴ Rosenfeld explains that

under this paradigm contract is not only compatible with the reconciliation of individual autonomy and communal values, but it is also suited to foster the mutual determination of the individual and – or, perhaps more precisely, against – the communal.²⁸⁵

In turn this understanding of contract in terms of relationality and mutual recognition bears marked resemblances with Nancy's analysis of existence as 'being singular plural.'²⁸⁶ Once we understand that both good faith and freedom of contract are essentially relational concepts it becomes possible to think a law of contract beyond continuing and continuous exploitation, subservience and injustice – beyond 'our proud and deadly dualisms.'²⁸⁷

The legislature has made substantial inroads in this regard and, at the time of writing the Consumer Protection Bill had been approved by Parliament and is awaiting the President's signature. Amongst various other consumer protection mechanisms the Bill explicitly prohibits 'unfair, unreasonable or unjust' contracting.²⁸⁸ In addition, courts will be required in terms of clause 52(3) to decide whether a contract is unconscionable, unjust, unreasonable or unfair. Although guidelines for the determination of the unreasonableness, injustice or unfairness are set out in clause 48(2) they are explicitly intended not

²⁸² S Colombo 'Fascism, community and the paradox of good faith' (1994) 113 *South African Law Journal* 482 482.

²⁸³ Lubbe (n 232 above) 422, quoting I Kant *The Metaphysics of Morals* M Gregor ed (1996) 209.

²⁸⁴ M Rosenfeld 'Hegel and the dialectics of contract' (1989) 10 *Cardozo Law Review* 1199 1200.

²⁸⁵ As above.

²⁸⁶ JL Nancy *Being singular plural* (2000). In this work Nancy denounces the liberal idea of an individual atomistic self as the subject of ontology. As Nancy puts it: 'That which exists, ... coexists because it exists. The co-implication of existing [*l'exister*] is the sharing of the world.'

²⁸⁷ G Rose *Mourning becomes the law* (1996) 76.

²⁸⁸ Consumer Protection Bill 2008 clause 48(1) available at <http://www.thedti.gov.za/ccrdlawreview/DraftConsumerProtectionBill.htm> (accessed 20 June 2008).

to limit the generality of the section prohibiting unreasonable, unfair or unjust contracting.²⁸⁹ This Bill thus already points to a future law of contract that will be required to be far more concerned than it has been up to now, with good faith as the ethical element of contract and thus with the spirit of the ideal of civic friendship in South Africa.

7 Conclusion

At the heart of contract lies the idea that I have an interest in something of yours and that you have an interest in something of mine. The hegemonic capitalist over-emphasis on the *things* and the utter neglect of the *persons* who have these things, has provided an extremely distorted version of what the word ‘interest’ in the above formulation originally entails. Levinas takes his cue in his re-emphasis on the original meaning of the word ‘interest’ from Hegel, for whom contract exists as reciprocal recognition and freedom of contract exists in the free willing of one’s duty on the road to self-actualisation.²⁹⁰ In his essay ‘Sociality and money’,²⁹¹ Levinas reminds us that the word interest is a composite of ‘inter’ that is, of ‘between’ and of ‘esse’, that is ‘being’. For Levinas, essence is always interestedness or differently put being is always inter-estedness. Thus, to have a contractual interest always already implies

²⁸⁹ For incisive criticism and important suggestions see TJ Naudé ‘Unfair contract terms legislation: The implications of why we need it for its formulation and application’ (2006) 17 *Stellenbosch Law Review* 361-374. Also see TJ Naudé ‘The use of black and grey lists in unfair contract terms legislation in comparative perspective’ (2007) 124 *South African Law Journal* 128. In the latter article (135-136) Prof Naudé criticises this author for – in her opinion, exclusively – supporting an open-ended version (based on good faith) of the Unfair Contractual Terms Bill proposed by the Working Committee of the South African Law Commission (as it then was) in SA Law Commission Discussion Paper 65 *Unreasonable Stipulations in Contracts and the Rectification of Contracts* (July 1996). See AJ Barnard ‘A critical legal argument for contractual justice in the South African law of contract’ unpublished LLD dissertation, University of Pretoria, 2005 241. Apart from the fact that there is no disagreement between myself and Prof Naudé that, to quote Prof Naudé, ‘the use of non-exhaustive guidelines and a grey list by a court cannot be equated with the “mechanical application of precedent” and does not preclude a decision guided by “the relational, the collective and the transformative” at all’, I wish to make it clear that my doctoral study focused on the rhetorical history and lexicon of *adjudication* in the South African law of contract (which was and still is primarily based on the application of precedent). This mode, I argued, was, and still is in danger of *perpetuating* an individualistic interpretation of both future guidelines or lists of suspect terms and an individualistic reification of open-ended norms. This is an issue Prof Naudé herself raises – but then dismisses – as a potential problem with so-called ‘grey lists’. Where Prof Naudé and I part company as I see it, is that whereas I support Kennedy’s belief that individualism prefers the rule form and the commitment to formal realisability (which in turn fuels the false belief in neutrality), Prof Naudé believes that the rule form does not *necessarily* follow individualist political morality.

²⁹⁰ See GWF Hegel *Elements of the philosophy of right* ed A Wood (1991) 104.

²⁹¹ E Levinas ‘Sociality and money’ (2007) 16 *Business Ethics: A European Review* 203-206-207.

togetherness, being between and with. Levinas admits that ‘in the concrete of everyday life, human interestedness always already conceals itself’²⁹² but at the same time this concealment points to a beyond to it. This is the astonishing possibility of the human being between, or amongst, beings: the possibility of unconcealment, of giving his place, of sacrificing himself for the other, of the goodness of giving, ‘the positivity of an attachment to being as being for the Other.’²⁹³

What is needed in the South African law of contract is the best possible negotiation between these two dimensions of the human condition – inter-est and dis-inter-estedness. The hegemonic order(ing) of the South African law of contract at present does not allow for the best possible negotiation between human interestedness and human dis-interest. This is the case because ‘individualism is the structure of the *status quo*.’²⁹⁴ In this sense it does not allow for real transformation. This is the case because the obsession with individualism and the rule form does not allow for that which is inherent in transformation: the turn *towards* the Other. Yet, as Cornell reminds us: ‘[t]ransformation is demanded of us precisely because there is no self-enclosed subject who can truly cut herself off from the Other. We are constantly being challenged by otherness’.²⁹⁵ It is only once the (im)possibility of the ethical relation is explicitly *inscribed* and *described* in the South African law of contract by way of *at least* the *explicit* incorporation and exploration of good faith in the public policy/legality requirement that the best negotiation/the negotiation *otherwise*, becomes possible. The Constitutional Court’s decision in *Barkhuizen* and the Consumer Protection Bill allow for this possibility. To that extent the possibility of the impossible ethical relation can be part of the law’s work.

In the second of the films in the famous *Matrix* trilogy, the lead character, Neo, consults a present day (or perhaps futuristic) version of the ancient Greek oracle, which in the film is represented as a wise older woman. Let me end with the counsel the Oracle gives to Neo. Emphatically she states: ‘I am interested in one thing Neo – the future. And believe me, the only way to get there is together.’²⁹⁶

²⁹² n 290 above, 204.

²⁹³ Levinas (n 290 above) 205.

²⁹⁴ Kennedy (n 6 above) 1775.

²⁹⁵ Cornell (n 100 above) 41.

²⁹⁶ A & L Wachowski (dirs) *The Matrix reloaded* (2003).