THE IMPORTANCE OF LEGAL CERTAINTY IN THE SOUTH AFRICAN COMMON LAW OF CONTRACT IN PROMOTING THE CONSTITUTIONAL VISION

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DECLARATION

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I declare that **THE IMPORTANCE OF LEGAL CERTAINTY IN THE SOUTH AFRICAN COMMON LAW OF CONTRACT IN PROMOTING THE CONSTITUTIONAL VISION** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the dissertation to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.'

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SUMMARY

The importance of legal certainty in the South African common law of contract in promoting the constitutional vision is investigated and tested within a substantive contextual understanding. It emerges the common law of contract was dominated by the ideological underpinning and privileging of the common law principle *pacta sunt servanda*, which emphasised freedom and sanctity of contract over constitutional and common law values. Traditionally, this resulted in much uncertainty in the common law of contract. The study found that legal certainty relates to the degree of predictability and stability of judicial decisions. The importance of both freedom of contract as embodied in the *pacta sunt servanda* principle and constitutional and common law values for creating fair, just and equitable outcomes, and for promoting legal certainty and the realisation of the longer-term constitutional vision, was discussed against the backdrop of the important Constitutional Court judgment in the recent *Beadica* case.

KEY TERMS

economic role of law; development economics and law; socioeconomic development; economic certainty, proper role of fairness, reasonableness and good faith; legal certainty, constitutional vision, constitutional norms, constitutional transformation; *bona fides*; common law of contract; contractual fairness; good faith; public policy; role of economic and commercial certainty in law, business and law; *ubuntu*.

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To hold the balance true between the material and the human values of life is the oldest and the newest economic problem.[1]

Today many countries suffer from high and rising inequality with many citizens unable to fully benefit from economic progress.[2]

It is society that gives us the right to be active, our licence to operate. A business leader has to think about how to solve the societal challenges of today, because if we don't solve them, we will not have a business.[3]

Reducing inequality and accelerating real, meaningful and widespread inclusive growth are the most urgent challenges of our age. Along with governments and civil society leaders, business has an important role to play in addressing these challenges.[4]

Equality may demand the restraint of the liberty of those who wish to dominate; liberty - without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word - may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised.[5]

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1 Walton Hale Hamilton as quoted in Novak 2010 *Emory Law Journal* 377.

2 Blanke J as quoted in World Economic Forum "Why social innovation matters to business" https://health.oliverwyman.com/2016/03/social_innovationa.html (Date of use: 08 May 2020).

3 Letmathe PB as quoted in World Economic Forum "Why social innovation matters to business" https://reports.weforum.org/social-innovation/why-social-innovation-matters-to-business/ (Date of use: 08 May 2020).

4 Oliver Wyman Group as quoted in "Social innovation: A guide to achieving corporate and societal value" https://www.oliverwyman.com/our-expertise/insights/2016/feb/corporate-social-investment.html (Date of use 28 May 2020).

5 Isaiah Berlin as quoted in Chaskalson 2000 *SAJHR* 201.

CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1. Introduction

The Constitution is the supreme law of the land and as such it prescribes that all laws including the common law, is subordinate to it.[6] This means that any rule of contract law that conflicts with the Constitution is invalid.[7] Since its inception, our Constitution has strongly emphasised the need to "refashion" our common law legal system to transform and bring about a just and fair system of law, so that it is reflective of the shifting "social, moral and economic nature" of our society.[8] This transformative "new" legal "order",[9] systematically and consciously strives to promote and align the deep underlying constitutional values and principles, such as human dignity, freedom, equality,[10] rule of law[11] and *Ubuntu*[12]*;* the underlying common law of contract value of good faith,[13] as well as abstract notions of fairness, justice, reasonableness and equity.[14] Therefore, the Constitution requires that contractual terms are subjected to constitutional scrutiny and that their enforcement must be carried out in a way that promotes these constitutional principles and values.[15]

At the same time our Constitution also provides for substantive justice and equity in the form of our commitment to "social justice and fundamental human rights"; improving "the quality of life of all citizens" and freeing "the potential of each

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6 Section 2 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution").

7 Brand 2009 *SALJ* 72; see also *Brisley v Drotsky* 2002 12 BCLR 1229 (SCA) (hereinafter referred to as *Brisley*) [88].

8 *Thebus and Another v S* 2003 10 BCLR 1100 (CC) (hereinafter referred to as *Thebus*) [31].

9 Postamble of the Constitution of the Republic of South Africa 200 of 1993 (hereinafter referred to as the "interim Constitution"); see also *S v Makwanyane and Another* 1995 6 BCLR 665 (CC) (hereinafter referred to as *Makwanyane*) [262]; *Du Plessis and Others v De Klerk and Another* 1996 5 BCLR 658 (CC) (hereinafter referred to as *Du Plessis and others v De Klerk and another*) [157]; [161]; Chaskalson 2003 *SALJ* 658-659; Langa 2006 *Stell LR* 351-352; Langa 2000 *LDD* 115; Hoexter 2008 *SAJHR* 283-284, where this author refers to judges as "social engineers" tasked with the important task of what she defines as "transformative adjudication" to fulfil the "aims of transformative constitutionalism".

10 Section 1(a) of the Constitution.

11 Section 1(c) of the Constitution.

12 Du Plessis *Harmonisation* 97; see also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 3 BCLR 219 (CC) (hereinafter referred to as *Everfresh*) [71]; O'Regan 2011 *Advocate* 32; Liebenberg 2008 *Acta Juridica* 149; Davis 2011 *Stell LR* 845.

13 See Brand 2009 *SALJ* 73 where this author explains that in South African law, good faith has come to mean more than "mere honesty" or an "absence of bad faith". Good faith according to this author, has a "wider" meaning which encompasses an objective content that envelopes "abstract values such as justice, reasonableness, fairness and equity."

14 *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) (hereinafter referred to as *Barkhuizen*) [51]; [73].

15 *Barkhuizen* [6].

person".[16] In *Makwanyane*[17] Chaskalson CJ citing the Postamble of the interim Constitution articulated what the Constitution is:

> a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of **human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex** (my emphasis).

In this sense, the bridge metaphorically describes a pathway from our deeply divided past to a more robust and brighter egalitarian future.[18] Justice Langa correctly pointed out that the achievement of this transition requires giving serious attention to the socioeconomic conditions under which the majority of South Africans live.[19] This notion is supported by Albertyn and Fredman who argue that:

> the constitutional commitment to substantive equality requires attention to actual social and economic inequalities in society, to remedial and redistributive action and to achieving a society in which every person participates fully and is able to develop to his or her full human potential.[20]

For late Justice Langa, the economic development of "all our people" is the area "where the battlefront is" and he pronounced that this is "in fact what the Constitution urges us to aspire to achieve."[21] Langa puts the cusp in its nettle when he states:

> I have walked among the shacks and I have seen little children without food. I have asked myself what the real meaning of the Constitution is in the context of the founding constitutional values of human dignity, equality and freedom. Legal guarantees of political rights are indivisible from constitutional protection for social and economic rights. Without **economic security and independence**, individuals **will be unable to realise individual freedom** and express themselves freely in the social and political sphere. They will be unable to educate themselves, a prerequisite for robust political participation. Without **economic security and independence, culture and civil society cannot flourish** (my emphasis).[22]

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16 Preamble of the Constitution of the Republic of South Africa, 1996; see also Hawthorne 2016 *SUBB Jurisprudentia* 2016 48-49; Hawthorne 2008 *SAPR* 77-80; *Du Plessis and others v De Klerk and Another* [157]; [158].

17 *Makwanyane* [7]; see also *Du Plessis and others v De Klerk and Another* [157].

18 Langa 2006 Stell LR 352; *Du Plessis and others v De Klerk and Another* [157]; [158].

19 Langa 2011 *Stell LR* 2011 446-447; Langa 2003 *SALJ* 675-676.

20 Albertyn & Fredman 2015 *Acta Juridica* 433; see also Klare 1998 *SAJHR* 150; Albertyn 2018 *SAJHR* 459-467.

21 Langa 2011 *Stell LR* 2011 447.

22 Langa 2011 *Stell LR* 447; see also Albertyn 2018 *SAJHR* 467.

Langa quoting Keba M'Baye correctly states:

> [w]hat does freedom in effect mean for him that will die of hunger? The rights of man and of the citizen have no meaning for the men who stagnate in famine, sickness, and ignorance.[23]

Acknowledging the importance of the role of the economy and its role in socioeconomic transformation,[24] Justice Langa argued that this pervasive poverty is tied to the deficiency of education and lacklustre economic growth.[25] In *Beadica*[26] Theron J states:

> The fulfilment of many of the rights promises made by our Constitution **depends on sound and continued economic development of our country**. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the **sanctity of contracts is thus essential to the achievement of the constitutional vision of our society**. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda (my emphasis).[27]

The above statement is quoted here in full (and will be referred to again from time to time), because it is the motivation for my research topic for this dissertation. This statement goes to the heart of the research problem. This study, using an interdisciplinary approach, will rely on the large body of legal and economic literature available to resolve the research problem. It aims firstly to critically examine and explain the meaning of legal certainty as an expression of the rule of law. Then to critically analyse the significance of certainty in the common law of contract and particularly the important role that certainty in contract law plays, in the economy and commerce and the fulfilment of the constitutional vision and objectives.

Furthermore, this study aims to critically determine what economic and commercial ramifications will follow, if certainty in contractual relations is ignored or eroded, and how this will impede the long-term constitutional transformation of our society. In

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23 Langa 2011 *Stell* LR 447; see also Ahmed & Bulmer *Social and Economic Rights* 11, who make the same point that the "enjoyment of first-generation rights" is dependent "on the realization of second-generation rights" and that this "needs certain resources in order to effectively exercise freedom in the civil and political sense".

24 Langa 2006 *Stell LR* 352.

25 Langa 2011 *Stell LR* 447; see also Langa 2006 *Stell LR* 352; Langa 2003 *SALJ* 674-676.

26 *Beadica 231 CC and others v Trustees for the Time Being of the Oregon Trust and others* 2020 9 BCLR 1098 (CC) (hereinafter referred to as *Beadica*).

27 *Beadica* [85].

addition, the Constitutional Court (hereinafter referred to as CC) statements[28] on the importance of legal certainty, the economy and economic development and good faith in promoting a substantive idea of human dignity, equality and freedom (achievement of equality) will be critically evaluated and tested by examining the extensive body of economic and legal literature available on this important topic.

1.2 Constitutional pluralism

A deep-seated objective as expressed in the Preamble of the Constitution, was the creation of a society that not only entrenched the individual rights of citizens to "live free from all forms of discrimination and abuses of power" but also to set the cornerstones for a future society where the quality of life of every citizen is improved and the potential of every person is freed.[29] Hawthorne[30] (citing Botha)[31] observes the plural nature of the Constitution which tries to promote the rule of law on one side,[32] while on the other, supporting "a substantive normative vision" that is painted with "a transformative political agenda" that strives to give "recognition to transformation and social justice".[33] This dualistic constitutional approach to create an egalitarian South African society has left our courts grappling to decide the correct approach to adopt in the law of contract. Historically, striking the right balance between the competing constitutional values and principles such as human dignity, equality, freedom, rule of law, and *Ubuntu*; the underlying common law of contract values of good faith as well as the abstract notions of fairness, justice, reasonableness and equity and legal certainty (as an expression of the constitutional value of the rule of law) in the law of contract has always been contentious.[34] Hutchison[35] describes legal certainty as:

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28 See *Beadica* [80]-[90] where this is specifically discussed.

29 Sooka *Foreword* 16; see also Bhana 2013 *SAJHR* 352; Goldstone 2006 *HRB* 4;

30 Hawthorne 2008 *SAPL* 79.

31 Botha 2001 *THRHR* 523.

32 Hawthorne 2008 *SAPL* 79; see also Hawthorne 2014 *THRHR* 409.

33 Hawthorne 2008 *SAPL* 79; see also Albertyn 2018 *SAJHR* 464; Bhana 2013 *SAJHR* 351; Albertyn & Goldblatt 1998 *SAJHR* 248; *Du Plessis and others v De Klerk and Another* [165].

34 Hutchison 2019 *Acta Juridica* 99; Hawthorne 2014 *THRHR* 408; see also Hutchison & Pretorius (eds) *Law of Contract* 23.

35 Hutchison 2019 *Acta Juridica* 100.

> a rule of law concern in commercial dealings: since contracts are planned transactions, the application of the law must produce predictable outcomes.

He goes on to point out that if these "outcomes" are not amicably regarded by "fair and reasonable people in the particular context, contract law will lose its legitimacy."[36] Until the CC judgment in *Beadica*, past cases involving contract law disputes of fairness, exposed a reluctance by our courts for instilling constitutional transformation by putting legal certainty ahead of the other common law and constitutional values.[37] In fact, as Hofmeyr and Howard[38] argue, our courts have struggled to come to grips with the competing constitutional values (human dignity, freedom, equality, rule of law, *Ubuntu*) and the underlying common law of contract value of good faith (that include abstract notions of fairness, justice, reasonableness and equity) and legal certainty (as an expression of the rule of law), as embodied in the axiom *pacta sunt servanda*. This principle expresses the goals of contract law namely that:

> the function of contract law is thus not merely to ensure that people keep their promises…rather it is to provide a legal framework within which people can transact business and exchange resources secure in the knowledge that … the law will uphold their agreements.[39]

Wallis argues there is a strong need for "reasonable commercial certainty and this is key to the "operation of the economic system of both South Africa and the world."[40] He goes on to say "without it the outcome of commercial transactions becomes speculative and this is a disincentive to trade".[41] In a similar vein Brand JA remarked in *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* that "[a] legal system in which the outcome of litigation cannot be predicted with some measure

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36 Hutchison 2019 *Acta Juridica* 100.

37 In this regard see *Bank of Lisbon and South Africa Ltd v De Ornelas* [1988] (3) SA 580 (A) (hereinafter referred to as *Bank of Lisbon*); *Brisley*; *Mort NO v Chiat* 2000 2 All SA 515 (C) (hereinafter referred to as *Mort*); *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA) (hereinafter referred to as *Afrox*); *South African Forestry Company Ltd v York Timbers Ltd* 2004 4 All SA 168 (SCA) (hereinafter referred to as *York Timbers*).

38 Hofmeyr A and Howard G "Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity" https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-24-june-Can-unfair-or-unreasonable-contracts-be-set-aside-The-Constitutional-Court-provides-clarity.html (Date of use: 27 July 2020).

39 Hutchison & Pretorius (eds) *Law of Contract* 22.

40 Wallis 2016 *SALJ* 545.

41 Wallis 2016 *SALJ* 545.

of certainty would fail in its purpose".[42] One of the study aims is to test this hypothesis to determine if this is true. A review of the available legal and economic literature on this important subject, revealed that no study has been done in South Africa to determine the important role that legal certainty in the law of contract plays for promoting the constitutional vision.

1.3 Legal position of fairness and the importance of legal certainty pre-Beadica

Pre-constitutionally and as far back as 1925, Kotze JA in *Weinerlein*[43] strongly pronounced that "equity cannot and does not override a clear provision of our law"[44] and went on to say the common law contains many equitable principles but "equity, as distinct from and opposed to the law, does not prevail with us".[45] In stark contrast to Kotze JA, Wessels JA accentuated the view that our courts are empowered to refuse enforcement of unconscionable claims.[46] Again in *Wells v South African Alumenite Company*[47] the Appellate Division (hereafter referred to as AD) found that where "men of full age and competent understanding" have contracted "freely and voluntarily" such contract "shall be held sacred and enforced by the courts of justice."[48] In *Bank of Lisbon* the *exceptio doli generalis* as a defence where a party had acted *mala fide*, was dealt the deathblow, when it was removed from our common law of contract. Joubert JA ruled that the *exception* had never become part of our law.[49]

In *Sasfin*[50] the court recognising public policy compliance as a yardstick for judicial enforcement, struck down a deed of cession because it found that multiple clauses contained in the agreement were grossly inequitable; "incompatible"; "unconscionable" and "exploitive", so much so, that it "must inevitably offend against the *mores* of the public" and therefore could not be endured.[51] Hence, making it clear

42 *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 1 All SA 525 (SCA) (hereinafter referred to as *Fourways Haulage*) [16].

43 *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 295 (hereinafter referred to as *Weinerlein*).

44 *Weinerlein* at 295.

45 *Weinerlein* at 295.

46 *Weinerlein* at 292-293.

47 *Wells v South African Alumenite Company* 1927 AD 69.

48 *Wells v South African Alumenite Company* 1927 AD 69 at 73.

49 *Bank of Lisbon* 413.

50 *Sasfin (Pty) Ltd v Beukes* 1989 1 All SA 347 (A) (hereinafter referred to as *Sasfin*) 349-351.

51 *Sasfin* 357-359.

that contracts contrary to public policy are not recognised in our law.[52] Here, although recognising that public policy favours "utmost freedom of contract",[53] the court also pointed out that public policy required taking into account the "doing of simple justice between man and man".[54] Smalberger JA giving recognition to the importance of public policy considerations[55] as a controlling mechanism for contractual agreements warned, the power to strike down contracts that are contrary to public policy should be exercised "sparingly" and only in the "clearest of cases" so as to avoid uncertainty as to the validity of contracts.[56]

In *Mort* the court upheld an agreement concluded between an attorney and an injured minor. Here, the attorney had callously debited the minor's award from the Road Accident Fund with excessive fees, thereby depriving the minor of the ability to manoeuvre his economic future. The court held that the concept of good faith was insufficient to eclipse sanctity of contract.[57] In *Brisley* the Supreme Court of Appeal (hereinafter referred to as SCA) was of the view that good faith could not independently sway a court to refuse the imposition of a contractual provision,[58] because any notion of entertaining good faith as a standalone independent ground to strike down a contract, would create obnoxious uncertainty in our law of contract.[59] Similar views were also expressed in *Afrox* where the court had to decide on whether an exemption clause that indemnifies a hospital's nursing staff against liability for negligence, is valid and enforceable. Following an unfettered black letter approach, the SCA put sanctity of contract ahead of good faith and ruled that legal decisions in contract law are not arbitrarily decided on notions of good faith, reasonableness and fairness, but rather on prevailing legal rules.[60] Again, in *York Timbers* Brand JA reaffirmed that abstract values, such as fairness and good faith, could not independently be imposed into contractual terms[61] but did introduce the

52 *Sasfin* 357.
53 *Sasfin* 351.
54 *Sasfin* 352.
55 *Sasfin* 350.
56 *Sasfin* 351.
57 *Mort* 525-526.
58 *Brisley* [22].
59 *Brisley* [22].
60 *Afrox* [32].
61 *York Timbers* [27].

notion of public policy for judicial enforcement, as good grounds for our courts to refuse the enforcement of unconscionable contractual terms. Until this point, our courts have volleyed between the two positions of certainty and equity.

Post-constitution, *Barkhuizen* significantly set the tone for future constitutional jurisprudence, by solidifying public policy as the lens through which contractual fairness must be determined. Here, the constitutionality of a time bar clause in a short-term insurance contract was at issue. The facts in *casu* were the applicant had submitted a claim to the insurer which claim was repudiated by the insurer. The applicant failed to institute legal proceedings within a ninety-day period, which was a requirement in terms of the contract. The respondent invoked the time-bar clause 5.2.5 in the contract, to prevent the applicant from seeking judicial redress. The applicant argued that the clause was unconstitutional because it was inconsistent with the provisions of section 34 of the Constitution and that the contractual term barring redress, was contrary to public policy because its operation was unduly harsh, unreasonable and unfair to the applicant.[62]

In deciding on this matter, Ngcobo J acting for the majority, drew attention to the appropriate approach our courts must use when faced with constitutional challenges to contractual terms.[63] Relying on public policy as a judicial yardstick for scaling whether the contractual term being challenged on constitutional grounds is in tune with public policy, Ngcobo J confirmed that the underlying values as expressed in the Bill of Rights must be considered when determining the fairness of a contractual clause.[64] "Fairness, justice and equity, and reasonableness" he proclaimed, are inseparable "from public policy" and public policy embodies "the legal convictions of the community; it represents those values that are held most dear by the society"; taking into account "the necessity to do simple justice between individuals" while at the same time being "informed by the concept of *ubuntu"*.[65] "Public policy" Ngcobo J stated would prevent the judicial enforcement of a term in a contract where "its

62 *Napier v Barkhuizen* 2006 9 BCLR 1011 (SCA) (hereinafter referred to as *Napier*) [2].

63 *Barkhuizen* [28]; [29]; [30].

64 *Barkhuizen* [29], [30].

65 *Barkhuizen* [28]; [51]; [73].

enforcement would be unjust or unfair."[66] Ngcobo J also stated that the ability of regulating "one's own affairs" even if this was to "one's own detriment" is the very essence of freedom and a vital part of human dignity.[67] The honourable justice also expressed the view that the "extent to which the contract was freely and voluntarily concluded", is a key factor to be considered in determining what "weight …should be afforded to the values of freedom and dignity".[68]

To determine if a term in a contract can survive constitutional scrutiny, Ngcobo J formulated a two stage test: (1) if the "objective terms" of a contract "are not inconsistent with public policy on their face" then (2) the second stage of the test is triggered, which is to determine if the contractual "terms are contrary to public policy" in relation to the "relative situation of the contracting parties."[69] In applying the test to this case, the majority found that the 90-day time limitation clause was not "unreasonable", nor was unfairness obvious and therefore enforcement of the clause would be against public policy.[70] No evidence was adduced to show that there were unequal bargaining positions between the party's, or that the applicant was not made aware of the contractual term.[71] In addition, the applicant failed to "disclose any reason for non-compliance" that would have rendered the enforcement of clause 5.2.5 of the contract "unjust and unfair"[72], and therefore the court concluded "the enforcement of clause 5.2.5 would not be unjust to the applicant" and was therefore "unavoidable".[73]

In *Bredenkamp*[74] Standard Bank unilaterally cancelled Mr Bredenkamp's two companies and trust bank accounts. Mr Bredenkamp opposed this action on the grounds that the Bank was only entitled to do so, if it could show good cause. Relying on *Barkhuizen*, Bredenkamp's defence argued Standard Bank's action was unreasonable and that that the Constitution imposes a reasonableness requirement

66 *Barkhuizen* [73].
67 *Barkhuizen* [57].
68 *Barkhuizen* [57].
69 *Barkhuizen* [56].
70 *Barkhuizen* [67].
71 *Barkhuizen* [66].
72 *Barkhuizen* [84].
73 *Barkhuizen* [56].
74 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 113 (SCA) (hereinafter referred to as *Bredenkamp*).

on all contractual provisions and their enforcement.[75] In defence of its right to cancel the contracts, the bank relied on a contractual clause which entitled it to close the accounts. On appeal, the appellants did not make any suggestion that the common law was to be developed.[76] They agreed that the express terms of the contract were "fair and reasonable" and accorded with the values expressed in the Constitution.[77] In dismissing the appellants case, The SCA found firstly that the appellants had not contended that the common law of contract be developed, thereby ending any arguments requiring development of the common law.[78] Secondly, the appellants failed to direct the courts attention to the exercising of any right to terminate the contract that concerned any constitutional principle.[79] Thirdly, the appellant did not allege any shortfall of *bona fides* and the appellant failed to show that the Bank did not act in good faith, in closing the accounts.[80] The SCA also pointed out the bilateral relationship of fairness in contract by stating "[f]airness has two sides."[81] In *Everfresh* the court emphasised the important point that our common law of contract controls the business environment wherein "trade and commerce take place" and described the maxim *pacta sunt servanda* as "the age-old contractual doctrine that agreements solemnly made should be honoured and enforced".[82] The court went on to state that the development of the common law had to have regard for "values" such as "good faith" and "Ubuntu".[83]

The importance of public policy as a measure for deciding judicial enforcement was again emphasised in *Botha and another v Rich* which pertained to the constitutional validity of a cancellation clause in a contract. In this case the CC had to decide whether the cancellation of a contract (where the first respondent had paid more than half the purchase price) for a material breach, was fair and constitutionally compliant.[84] The CC unanimously found that although the cancellation clause in the

75 *Bredenkamp* [9]; [10]; [26].

76 *Bredenkamp* [29].

77 *Bredenkamp* [27].

78 *Bredenkamp* [27]; [29].

79 *Bredenkamp* [30].

80 *Bredenkamp* [31].

81 *Bredenkamp* [65]; on the point of fairness see also Wallis 2016 *SALJ* 555.

82 *Everfresh* [70].

83 *Everfresh* [22]; [23].

84 *Botha and another v Rich NO and others* 2014 7 BCLR 741 (CC) (hereinafter referred to as *Botha*) [2].

agreement was *prima facie* valid, its constitutionality still had to be tested against the public policy requirement which is protected in the Constitution. If it was then found to be unfair, it would be viewed as contrary to public policy and therefore invalid.[85] The CC introducing the principle of proportionality for judicial enforcement, refused to allow the cancellation on the grounds that it would be a disproportionate penalty for the breach.[86] "The fairness of awarding cancellation", stated the court, "is self-evidently linked to the consequences of doing so".[87] In *Mohamed's Leisure Holdings*[88] the cancellation of a lease agreement for non-payment of rental, after serving the lessee with the necessary notices, were at issue. The respondent argued that the cancellation should fail because it was against public policy to cancel the agreement. In upholding the cancellation, the SCA found that contracts freely and voluntarily entered, must be upheld.[89]

In *Pridwin*[90] a private school had cancelled contracts it concluded with parents for the schooling of their children, in accordance with a contractual provision entitling them to cancel. On appeal Cachalia JA upheld the cancellation, and found no basis for a contracting party to have a constitutional duty to "act fairly or reasonably" in regard to a contractual "termination clause".[91] The CC on the other hand, upholding the appeal held otherwise. Nicholls AJ held that all contractual agreements between private parties are "governed by the principle of *pacta sunt servanda*" except to the extent that they are offensive to "public policy".[92] The learned Justice also stated that where constitutional values or rights are concerned, the determination of public policy had to be established with reference to constitutional values which include "notions of fairness, justice and reasonableness."[93] In this way he added, not only is

85 *Botha* [23].

86 *Botha* [51].

87 *Botha* [49]; [50].

88 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) (hereinafter referred to as *Mohamed's Leisure Holdings*).

89 *Mohamed's Leisure Holdings* [30].

90 *AB and another v Pridwin Preparatory School and others* 2020 9 BCLR 1029 (CC) (hereinafter referred to as *Pridwin* (CC), to differentiate it from the SCA case and to enable the reader to easily follow which case is being referred to).

91 *AB and another v Pridwin Preparatory School and others (Equal Education as amicus curiae)* 2019 8 BCLR 1006 (SCA) (hereinafter referred to as *AB and another v Pridwin* (SCA) [69] for the purposes of differentiating the SCA case from the CC case to make it easier for the reader to follow).

92 *Pridwin* (CC) [61].

93 *Pridwin* CC) [61].

"space for enforcing agreed bargains (*pacta sunt servanda*)" created, but it also empowers our courts to refuse the enforcement of contractual terms that go against public policy (on a constitutional value basis), despite the parties having agreed to the contractual terms.[94]

1.4 Summary of legal position pre-Beadica

From the plethora of cases discussed above, it is evident that judicial decision-making involving certainty in contractual relations and good faith has in the past oscillated between these two views. The legal position however, as it stood after *Pridwin* now became clear. It was accepted that good faith and public policy are now deeply embedded in our law of contract and that future contractual disputes would have to take these values into consideration when determining fairness in contract terms. Public policy as informed by fairness, justice and reasonableness had now become the lens through which judicial enforcement of contracts must take place.

1.5 Summary of legal position as it now stands in Beadica

The latest CC judgement regarding the legal position concerning certainty and equity in the law of contract was handed down in *Beadica* on 17 June 2020. This case now represents the legal position as it stands at the time of writing. In this case the CC had to decide on the correct constitutional method to be used for "judicial enforcement" of contractual terms.[95] In particular, looking at how public policy can be used by a court, as grounds to refuse the enforcement of otherwise valid contractual terms. Such public policy grounds, include those grounds that the court would consider to be "unfair, unreasonable or unduly harsh".[96]

This case involved the termination of a lease agreement where the applicants had failed to exercise their options to renew the lease agreement.[97] The applicants did not provide written notice of their intention to renew the leases within the prescribed time period. This was a requirement in terms of the renewal clause in the lease.[98]

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94 *Pridwin* (CC) [61].

95 *Beadica* [1].

96 *Beadica* [1].

97 *Beadica* [7].

98 *Beadica* [7].

The applicants' approached the Western Cape High Court (hereinafter referred to as WCHC) for a declaratory order declaring that the option to renew the leases had been "validly exercised" and to prevent the Trust (lessor) from evicting the applicants.[99] The High Court (hereinafter referred to as HC) relying on the principle of "proportionality" as the HC understood this principle from *Botha,* ruled in the applicants' favour. The HC dismissed the Trust's counter-application which required the lessees to be evicted. The HC also declared that the lease agreements between the party's, had been "validly renewed."[100] The SCA was critical of the HC's decision for failing to pay attention to the principle of *stare decisis,*[101] which requires lower courts to abide by and follow the decisions of higher courts. The SCA's previous rulings had enforced the principle of *pacta sunt servanda* and the need for certainty in the law of contract which the HC had failed to do.[102]

The SCA although recognizing that our courts are empowered to refuse the enforcement of contractual terms that oppose public policy, also warned that such power had to be exercised "sparingly, and only in the clearest of cases".[103] The SCA rejected the notion that a sanction for breach of contract can be disproportionate, and that a failure to comply with the terms of a contract, is unenforceable. The SCA found that this idea was "entirely alien" to our law and that giving recognition to such a notion "would undermine the principle of legality."[104] The SCA also found that there were no public policy considerations which would render the renewal clauses unenforceable and overturned the HC's order by dismissing the application.[105]

Upholding the SCA's ruling, the CC ruled that the pre-constitutional privileging of *pacta sunt servanda* is now inappropriate under the Constitution.[106] The CC went on to say that many of the rights and promises contained in the Constitution depends

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99 *Beadica* [10].

100 *Beadica* [10]; [11].

101 For an explanation of this concept see *Gcaba v Minister for Safety and Security and Others* 2010 1 BCLR 35 (CC) (hereinafter referred to as *Gcaba v Minister for Safety and Security*) [58]; see also Legal Information Institute "*Stare decisis*" https://www.law.cornell.edu/wex/stare_decisis (Date of use: 16 September 2020).

102 *Beadica* [12].

103 *Beadica* [12].

104 *Beadica* [12].

105 *Beadica* [12].

106 *Beadica* [86].

on the sustainable economic development of South Africa,[107] and that legal certainty in contract law will foster a productive environment that will advance our constitutional rights.[108] Therefore, the CC pointed out, protecting "the sanctity of contracts" is indispensable for the realisation of "the constitutional vision of our society."[109] The CC made it clear that our constitutional project will be endangered if our courts strip away the important "*pacta sunt servanda"* principle.[110] Hence, the CC stated that the legal position as it was outlined in *Pridwin*[111] is as follows:

> (i) Public policy demands that contracts freely and consciously entered into must be honoured; (ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy; (iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it; (iv) The party who attacks the contract or its enforcement bears the onus to establish the facts; (v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds; (vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

However, the CC further explained that although *pacta sunt servanda* remains an important principle,[112] it is no longer fitting "under a constitutional approach" and that under the Constitution *pacta sunt servanda* is no longer the most important principle informing the judicial control of contracts.[113] The CC went on to say that public policy articulates our constitutional values and as such, it is the legal tool that must be used to control the enforcement of contracts.[114] The CC further stated that public policy is "informed by a wide range of constitutional values" and found that there was no

107 *Beadica* [85].

108 *Beadica* [85].

109 *Beadica* [85].

110 *Beadica* [85].

111 See *AB and another v Pridwin* (SCA) [27]; see also *Beadica* [82].

112 *Beadica* [83]

113 *Beadica* [86].

114 *Beadica* [83].

reason to privilege *pacta sunt servanda* ahead of our other constitutional rights and values.[115]

The CC explained that in cases where constitutional rights and values are concerned, these rights and values require that courts employ a watchful "balancing exercise" to reach the conclusion that enforcement of the contractual terms would be against public policy under the particular conditions of each case.[116] Regarding the "perceptive restraint" principle, the CC stated that our courts should not shy away from the constitutional duty they have been given, to infuse public policy with constitutional values.[117] Significantly, the CC pointed out that courts should not be obstinate when applying these "public policy considerations" to the extent that they fail to attach appropriate weight to the all-embracing mandate of the Constitution.[118] The court made it clear that the degree to which "judicial restraint" must be exercised should be cautiously balanced against constitutional rights and values.[119]

1.6 Public policy, economy and commerce

It now trite law that public policy is deeply entrenched in the Constitution and its underling values.[120] Any challenge to a contract term on a constitutional base, will require careful questioning about whether or not the disputed provision opposes public policy.[121] Public policy in a legal sense, signifies the deep inner beliefs of the society and represents those values that the society value most.[122] These values play a significant role in public policy analysis to the extent that they "perform creative, informative and controlling" functions, by enlightening our substantive law of contract.[123] Therefore, it is important that our courts always keep transformation as mandated by the Constitution in mind.[124] In this regard, it is important to note that "transformative adjudication" makes it necessary for our courts to pursue

115 *Beadica* [87].
116 *Beadica* [87].
117 *Beadica* [90].
118 *Beadica* [90].
119 *Beadica* [90].
120 *Barkhuizen* [28].
121 *Barkhuizen* [28].
122 *Barkhuizen* [28].
123 *Beadica* [73].
124 *Beadica* [74].

"substantive justice" which lies at the heart of the "foundational values of the Constitution" and that this is in fact what the Constitution commands – transformation.[125] Due to its now relative significance in the law of contract, public policy will also be discussed against the backdrop of the economy, commerce and constitutional objectives to determine what values our society hold most dear with regard to the economy, commerce and the achievement of the Constitutional vision.

1.7 Research aims

The principle aim of this research study is to draw attention to and critically evaluate the importance of legal certainty in the law of contract. Finding the right balance between freedom and sanctity of contract (which ensure certainty of contract),[126] and considerations of fairness, remains one of the most tenacious problems facing modern contract law.[127]

This dissertation will highlight the cogent reasons why our courts seek to preserve legal certainty by enforcing contracts that are freely and properly entered by the parties, even if at times they might appear to be unfair. My thesis is that the key reasons for this are to be found in mainly, the preservation of the society's economic and commercial stability, development and wellbeing and aligns well with the constitutional requirement of compliance with public policy and the long-term goal of achieving substantive equality. While the common law principles of freedom and sanctity of contract, does ensure legal certainty,[128] efficiency and predictability,[129] many academics, legal practitioners, legal advisors and others alike are of the view that these principles on their own, have failed to achieve the desired results that the South African Constitution as the highest law of the land demands.[130] This study aims to highlight both the need for and importance of legal certainty (as an expression of the rule of law), to achieve economic and commercial certainty. I will argue that this in turn leads to continuous progressive socioeconomic development

125 *Beadica* [74].

126 Thomas 2005 *Orbiter* 687; see also Hutchison & Pretorius (eds) *Law of Contract* 23-24.

127 Louw 2013 *PELJ* 45.

128 Thomas 2005 *Orbiter* 687.

129 Thomas 2005 *Orbiter* 687.

130 See Louw 2013 *PELJ* 60, where this author discusses the normative values in light of the Constitution and the conservatism of the SCA towards constitutionalizing contract law.

which is strongly in tune with public policy. I further intend to draw attention to how legal certainty supports the constitutional vision and substantive equality, while also being reflective of greater public policy.

Legal certainty, it will be argued, is an important legal principle in the law of contract that, albeit long term, gives effect to the normative values of human dignity, equality and freedom in a way that promotes substantive equality. Relying on the large body of economic evidence as set out in academic literature, I will argue that not giving enough regard to the importance of legal certainty could result in the breakdown and destruction of the economic and commercial systems that have developed over time and which is necessary for the realisation of the broader constitutional vision. In this sense, it is my intention to provide additional support to the CC's view in *Beadica* that legal certainty promotes, rather than subverts, substantive equality. [131]

1.8 The problem statement

As discussed above, there has been growing legal discourse and debate between the important role that legal certainty must or should play, against the constitutionally directed normative values of fairness and equity in the South African law of contract.[132] Although this debate appears to have now been resolved in the latest CC's ruling in *Beadica,* I believe there is still room for adding to this important debate by providing sound reasons for the advancement of legal certainty in accord with constitutional imperatives, within the context of the current South African law of contract.

Therefore, the objectives of this study are firstly to determine what exactly is meant by legal certainty (as an expression of the constitutional value of the rule of law) in the law of contract. Thereafter, I will critically examine the important role that the economy[133] and commerce play in socioeconomic development and therefore the achievement of substantive equality and the constitutional vision. Here, I will critically analyse, assess and determine how socioeconomic development benefits

131 *Beadica* [85].

132 Hutchison 2019 *Acta Juridica* 99; Hutchison & Pretorius (eds) *Law of Contract* 23.

133 See Rodrik 2014 *Challenge* 5, where this author discusses the importance of economic growth on developing countries and its impact on improving the living standards of people and reducing poverty.

society as a whole in accord with constitutional and public policy imperatives for the achievement of the much acclaimed "greater good".[134] The "greater good" refers to "the overall benefits that society as a whole receive" against the limited "private benefit received by individuals and smaller pockets of society".[135] The term "common good" has been coined in different ways and discharges of any unitary definition. Common good can refer to any number of concepts. However, in its everyday meaning, the common good signifies a state in which specific "good" is mutually shared and is beneficial for all the members of a community.[136]

In her FW De Klerk annual conference speech made on 31 January 2020, Gwen Ngwenya[137] stated that our constitutional legitimacy will in future be dependent on achieving two goals (1) nonracialism and (2) improving the quality of life of citizens. She went on to say that, the further we move away from these ideals "the weaker the support for the Constitution becomes." Thus, another aim of this research project is to identify and discuss some of the main perils associated with uncertainty in the law of contract, and its associated impact on socioeconomic development, and how this will impact on the constitutional project.

Important questions that this research seeks to address are the following: Why is economic and commercial development so important for South Africa's socioeconomic development? What is the public policy view on economic and commercial development? How does legal certainty in contract law promote the broader constitutional values and vision? What role does business enterprise play in stimulating socioeconomic growth and why is legal certainty in contract law so important for business, the economy and for the future of our constitutional project? Why is legal stability and reasonable predictability so important for socioeconomic development? What are the long-term benefits of contractual certainty and how does this relate to and give effect to the normative values of human dignity, equality and freedom in a substantive sense? What are some of the repercussions of legal

134 Encyclopaedia Britannica https://www.britannica.com/topic/common-good (Date of use: 04 August 2020).

135 Encyclopaedia Britannica https://www.britannica.com/topic/common-good (Date of use: 04 August 2020).

136 Encyclopaedia Britannica https://www.britannica.com/topic/common-good (Date of use: 04 August 2020).

137 Ngwenya G "FW De Klerk Annual Conference 'Hope for the Future: Achieving the Vision in the Constitution' speech made on 31/01/2020" https://www.fwdeklerk.org/index.php/en/document-library/speeches (Date of use: 15 September 2020).

uncertainty on economic growth on a developing nation state like South Africa and for the longer-term constitutional project? Why does it seem that the SCA and now the CC appear to be reluctant to place the other normative constitutional values ahead of legal certainty or are they simply reinforcing the broader public policy requirement to fulfil the constitutional objectives and vision?

In *Beadica* Theron J stated, numerous "rights" and "promises" which has been made by our Constitution is dependant "on sound and continued economic development of our country".[138] "Certainty in contractual relations", she pronounced, "fosters a fertile environment for the advancement of constitutional rights."[139] Justice Theron also acknowledged that "protection of the sanctity of contracts is thus essential" for our "achievement of the constitutional vision of our society" and went on to warn the "constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda.*"[140] Although Justice Theron made these strong pronouncements, her statements were not backed with strong empirical evidence to support them. Furthermore, no research study has been undertaken in South Africa or anywhere else for that matter to determine if these assumptions are correct. Therefore, after having completed the aforesaid objectives, my next objective will be to rely on the extensive body of economic literature available to conduct a critical investigation into and interrogate paragraphs 81-90 of the recent CC ruling in *Beadica* to test the efficacy of Justice Theron's statements.

1.9 Point of departure

Contract law is extraordinary in all its dimensions. The law of contract is such an important part of our law that it is difficult to contemplate another area of law that plays such a pivotal role in our everyday lives.[141] It underscores almost every facet of our society and;[142] without contract law the way we live would be seriously

138 *Beadica* [85].

139 *Beadica* [85].

140 *Beadica* [85].

141 See Business Law "How the rule of law is important to business" https://online.scu.edu.au/blog/how-rule-of-law-is-important-to-business/ (Date of use: 12 June 2020).

142 Elliott & Quinn *Contract law* 2; *Biotechnology Australia Pty Ltd v Pace* 1988 15 NSWLR 130 at 132.

constrained.[143] Society is dependent on the daily exchange of goods and services in the marketplace.[144] Market interactions rely heavily on voluntary agreements between individuals or other "legal persons".[145] Evidently, agreements become binding through the force of law brought about by a legal contract. Everyday millions of situations create contracts. A ride on a taxi to work, the buying of a ticket to a festival, buying a new apartment, the purchase of a hamburger or a movie ticket at the cinema, the signing of an employment, residential or commercial lease agreement are all elementary examples of contracts that surpass us without us giving any thought to the legal principles that direct these daily activities. Many of us are oblivious of these underlying contractual principles largely because in most cases the relationship and obligations are seamless, and no need arises to challenge the contractual agreement. In fact, by far most contracts are performed without any difficulty at all with parties generally fulfilling their contractual obligations without more.[146]

One thing is clear, it would be impossible to contemplate any form of economic and commercial development where we have an inability to enter into contracts freely and voluntarily.[147] Beyond any doubt, contract law, because of its immense importance in commerce, is often crafted in such a way that it is open to a set of precision driven rules that appears to leave no space for unclear abstract values that strive to promote substantive equity and fairness in the law of contract.[148]

The South African common law of contract is deeply grounded in principles such as freedom of contract and *pacta sunt servanda*[149], concepts that took form and shape

143 Elliott & Quinn *Contract law* 2; see also Hutchison & Pretorius (eds) *Law of contract* 4-44, for a comprehensive discussion of the many facets of contracts and the law of contract.

144 Elliott & Quinn *Contract law* 2.

145 Lawyers Attorneys "Contract Law– Its Importance in the World Today" https://legalcatch.wordpress.com/2007/10/12/contract-law-%E2%80%93-its-importance-in-the-world-today/ (Date of use: 02 June 2020); see also Stone & Devenney *Modern Law of Contract* 6-7.

146 Charman *Contract Law* 2.

147 Markham W "An overview of contract law" https://www.markhamlawfirm.com/law-articles/contract-lawyer-san-diego/ (Date of use: 06 June 2020).

148 Van Aswegen 1995 *SAJHR* 65.

149 This legal principle articulates the important principle that contracts freely and seriously entered must be honoured.

many centuries ago and can be traced back to the time of the Romans.[150] In *Barkhuizen v Napier*[151] Ngcobo J stated as follows:

> *Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a **universally recognised legal principle**. But, the **general rule that agreements must be honoured cannot apply to immoral agreements** which violate public policy (my emphasis).[152]

Its roots are firmly entrenched in '*laissez faire*' or free market trade, allowing free and voluntary participation in commercial transactions between individuals, companies, institutions and nation states alike.[153] Free market trade, involves an interdependent bargaining process where each party is generally assumed to be on the same level without state or other outside interference, with the resultant outcome being the achievement of the "greatest public good".[154]

Unfortunately, many proponents and practitioners in support of free market enterprise have abused the spirit, purport and nobleness of free market enterprise outcomes[155] by falling short and failing to understand the poor socioeconomic realities which South Africa faces. In this context one only needs to for example think of the consumer who due to historical circumstances has been deprived of the ability to read and write and who is asked to sign a prejudicial contract where the balance of power is disproportional and against him. Such examples in South Africa are numerous.[156] Although legislation such as the Consumer Protection Act[157] and Rental Housing Act[158] have been enacted to limit such abuse, Naude argues that such legislation is simply not enough to stem this abusive power.[159]

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150 Van der Merwe 1998 *TSAR* 2-3; see also Du Plessis 2016 *Loyola Law Review* 624.

151 *Barkhuizen v Napier* 2007 5 SA 323 (CC) (hereinafter referred to as *Barkhuizen*).

152 *Barkhuizen* [87].

153 See Elliott & Quinn *Contract law* 4; Hutchison & Pretorius (eds) *Law of Contract* 21-24; Stone & Devenney *Modern Law of Contract* 6.

154 Van Aswegen 1995 1 *SAJHR* 66.

155 Which, I define as producing outcomes that benefit society such as full employment, increased standards of living, higher educational levels, developed skills and improved quality of life and livelihoods for all; see also Thakor & Quinn 2013 *ECGI* 2.

156 For a more detailed exposition of this subject see Naude 2006 *Stell LR* 361, where this author explains the need for legislation to eradicate unfair terms in standardised contracts; see also Sharrock 2014 *Obiter* 136.

157 Consumer Protection Act 68 of 2008.

158 Rental Housing Act 50 of 1999.

159 Naude 2006 *Stell LR* 362.

This gross abuse of free market principles has resulted in disproportionate bargaining positions and sometimes unfair terms between contracting parties and in many instances has failed to address the much-needed development of socioeconomic justice at the behest of profit. In fact, it has broadened the social divide between the socioeconomic classes and left many with the false belief that free market economics is an evil devil that needs to be destroyed at all cost. This is even more pertinent today where individuals and companies alike, are motivated by self-interest and profiteering, thereby compromising fairness, equity and justice.

As a direct result hereof, the South African law of contract is undergoing a transformative process to adapt to what Davis and Klare and others,[160] describe as transformative constitutionalism.[161] In this regard the Constitution calls for an infusion of normative constitutional values such as human dignity, freedom, equality, *Ubuntu* and the underlying common law value of good faith and notions of fairness, and equity, alongside the important legal certainty principle. Hawthorne, vividly describes it more aptly as:

> the blurring of the boundaries between public and private law, which process has been accelerated by the increasing recognition of Human Rights and the horizontal effect thereof, coupled with the increasing realization that the law of contract plays a pivotal role in distributive justice. The above **places contract law in the combat zone between the rule of law and transformative constitutionalism**. In the context of the introduction of recent consumer legislation characterized by welfarism **it is opportune to question whether the constitutional consolidation of the rule of law and the constitutional substantive normative vision coupled with a transformative political agenda are compatible** (my emphasis).[162]

It is from this requirement that the important question of what Wallis refers to as compatibility arises.[163] Phrased differently, is it possible to have legal certainty, while at the same time achieving human dignity, freedom and equality as deep underlying constitutional values, infused in the South African law of contract? Are these

160 Davis & Klare 2010 *SAJHR* 404; Klare 1998 *SAJHR* 146; Liebenberg 2008 *Acta Juridica* 150; Rapatsa 2014 *Mediterranean Journal of Social Sciences* 887; Koraan & Geduld 2015 *PELJ* 1933; Van Marle 2009 *Stell LR* 300-301; Hoexter 2008 *SAJHR* 283; Langa 2006 *Stell LR* 351-352.

161 See also Davis & Klare 2010 *SAJHR* 404; Kibet & Fombad 2017 *AHRLJ* 340.

162 Hawthorne 2008 *SAPR* 78.

163 Wallis 2016 *SALJ* 545; see also Lane 2015 *Without Prejudice* 52.

concepts compatible? Proponents favouring legal certainty over these constitutional values argue that abandoning legal certainty in contract will subvert the constitutional value of the rule of law and result in gross uncertainty, chaos and even the collapse of the economic and commercial systems,[164] that form the very cornerstones of a progressive and developed society and result in a failure of realizing the constitutional vision (which is to improve the quality of life and living standards of all citizens and liberalising the potential of each citizen).[165] On the other hand, many others believe that putting legal certainty ahead of the other constitutional normative values leads to gross abuse of human rights and creates serious injustices in contract law.[166] This discourse is what Van der Walt refers to as the "tension between the push for constitutional reform and the pull of traditional stability".[167] A pragmatic substantiated and understandable resolution of this ongoing debate in the South African law of contract, is urgently needed and should be a valuable contribution to the existing body of knowledge of South African contract law.

1.10 Description of the research methods to be used

Legal research and analysis is a fundamental skill in the legal profession because legal problems are resolved through debate, research, analysis and understanding of past legal experiences and finding new solutions.[168] Domingo (citing Brinks and Botero[169]; Perry-Kessaris[170] and others) underscores the fact that inter-disciplinary research across the social and legal sciences is poor, and therefore argues that there is what this author calls "insufficient cross-fertilisation in the knowledge base" for us to find meaning in the character of law and its purpose for giving shape to

164 Wallis 2016 *SALJ* 545-546; *Basson v Chilwan and others* 1993 2 All SA 373 (A) 386; *Sasfin* 351; Brand 2016 *Stell LR* 89-90; see also the same article for a comprehensive discussion on the roles of good faith, equity and fairness in the law of contract and where this author concludes that "imprecise and nebulous statements about the role of good faith, fairness and equity, which would permit idiosyncratic decision-making on the basis of what a particular judge regards as fair and equitable, are dangerous." He goes on to say that these statements cause uncertainty and an increase in moot litigation. He states further that "Palm-tree justice cannot serve as a substitute for the application of established principles of contract law."

165 Sooka *Foreword* 16.

166 Davis & Klare 2010 *SAJH* 403; Davis 2011 *Stell LR* 845; Davis 2010 *SAJHR* 85.

167 Van der Walt 2008 *CCR* 89.

168 Leckie et al 1996 *Library Quarterly* 173; see also Rowe 2009 *Stetson Law Review* 1-3.

169 See Brinks & Botero *Inequality and the Rule of Law: Ineffective Rights in Latin American Democracies* 214-239.

170 See Perry-Kessaris 2014 *Current Legal Problems* 169-198; Perry-Kessaris 2011 *Northern Ireland Legal Quarterly* 401-413.

"political, economic and social conduct".[171] Kroeze argues that multidisciplinary research is not only possible in law, but is something that legal researchers have done in the past and will continue to do in the future.[172] Kroeze submits that in law, like in other fields, there is a "call for the advancement of interdisciplinary research".[173] This author attributes this "call" to the "general perception that academic disciplines tend to exist in 'silos' and that this is in some way a bad thing".[174] Therefore she explains, the perception is that "interdisciplinary research" that transcends "disciplinary boundaries" such as law and economics, "will result in a more integrated scientific enterprise and this is regarded as a good thing."[175] She significantly points out that law is a social construct and that considerations of "legal issues and problems" require paying particular attention to "socio-political and economic problems".[176]

Du Plessis draws attention to the constitutional dispensation in South Africa and the role of research and argues that legal researchers have now been given new opportunities to conduct research into constitutional issues, development and the relationship between constitutional law and other fields (such as for example law and economics).[177] In order to solve this important research problem, I will rely on legal, commercial and economic literature which can be found in two key types of information sources available. These sources can be broadly grouped into primary and secondary sources of information. Primary sources of information relate to, case law, statutes, government gazettes, etc., while secondary sources on the other hand derive from primary sources of law, commerce and economics and offers valuable analysis and commentary on those sources. Examples of these can be found in hard copy in the law library as well as in electronic databases such as, reference sources (legal dictionaries, encyclopedias & noter-ups); law, commerce and economic books

171 Domingo *Rule of law, politics and development* 8.

172 Kroeze 2017 *The Journal for Transdisciplinary Research in Southern Africa* 1.

173 Kroeze 2017 *The Journal for Transdisciplinary Research in Southern Africa* 1; Kroeze 2013 *PELJ* 36.

174 Kroeze 2013 *PELJ* 36.

175 Kroeze 2013 *PELJ* 36.

176 Kroeze 2017 *The Journal for Transdisciplinary Research in Southern Africa* 1.

177 Du Plessis 2007 *PELJ* 23.

(textbooks); loose-leaf publications (regularly updated); law, commerce and economic journals; and yearbooks.[178]

1.11 Assumptions and limitations of the study

In order to ensure that this dissertation remains focused on the research aims, a delimitation of the exact boundaries of this dissertation are outlined below.

1.12 Economic and commercial development and importance

Most research carried out on this important topic is clothed in legal tradition and by far most commentators appear to have a myopic view, by failing to see the impact that legal certainty has on economic and commercial developments, and its wider effects on much needed socioeconomic progress (constitutional objectives and vision) in South Africa. A fresh view is therefore needed from an economic and commercial viewpoint to understand the relationship between economy, commerce, substantive equality, socioeconomic development, legal certainty and the Constitution in a South African sense. Todaro and Smith point out the scope of development economics is "even greater than economics".[179] These authors opine besides "being concerned with the efficient allocation of existing scarce (or idle) productive resources" development economics is also concerned with "the economic, social, political, and institutional mechanisms" that are so "essential to bring about rapid advances in the standards "of living for the peoples of…. Africa".[180]

Therefore, economics and particularly development economics and commercial development are wide topics which requires a complete study on its own and any attempt to cover these topics in this study is admittedly fraught with hazard. Due to its direct bearing on the research problem, this study will only address the need for and importance of economic and commercial development and the notion of stability, for socioeconomic development of a society such as ours. The principal aim of this selective approach is to cast light on the very important role that welfare

178 University of Johannesburg https://uj.ac.za.libguides.com/c.php?g=581170&p=7711587 (Date of use: 05 June 2020).

179 Todaro & Smith *Economic Development* 10.

180 Todaro & Smith *Economic Development* 10.

and development economics and commercial developments have on developing societies such as ours. Hence, only the importance of welfare and development economics and commercial development and its influence on creating a future prosperous, egalitarian society will be discussed. For obvious reasons, all other economic and commercial topics fall outside the scope of this study and will not be discussed here.

1.13 South African common law of contract and the Constitution

This dissertation will be limited to critically discussing the importance of contractual certainty against the backdrop of its importance for economic and commercial development. The role of economic and commercial developments for achieving substantive equality and the constitutional vision will be discussed at length. Only the common law principle *pacta sunt servanda*, as it is directly influenced by the meaning attached to it in the common law of contract will be considered. The consequences of contractual uncertainty and the need for contractual certainty will also be discussed. All other constitutional principles not related to the law of contract, will not be discussed as these falls outside the scope of this study.

1.14 The CC's pronouncements about the importance of legal certainty in the law of contract

Specifically, this study will critically address the CC's pronouncements in *Beadica* relating to the importance of freedom of contract (*pacta sunt servanda*) as balanced against the constitutional and common law abstract values for creating legal certainty in the law of contract.[181] The manner in which the CC synthesised the key contractual principles (incorporating a balance of freedom of contract and constitutional and common law principles) for adjudicating legal disputes and how this brings about legal certainty in the law of contract, will also be discussed. These pronouncements will be viewed through the prism of legal certainty, economy, commerce, public policy and the constitutional vision.

181 The CC's pronouncements as made in *Beadica* [80]-[90].

1.15 The framework of the dissertation

This dissertation is grounded on the following important questions:

i. What is the meaning of legal certainty in the law of contract and is legal certainty important in the law of contract?
ii. What role do the economy, commerce and socioeconomic developments play in creating an egalitarian society?
iii. What is the view of public policy on economic and commercial development and the realisation of the constitutional vision?
iv. Are the statements made by the CC in *Beadica*[182] regarding the importance of contractual certainty, economic growth, and the fulfilment of constitutional rights dependent on sound and continued economic development of South Africa?
v. Will certainty in contractual relations promote the advancement of constitutional rights?
vi. Is protection of the sanctity of contracts necessary to achieve the constitutional vision of our society?
vii. Will our constitutional project be endangered if our courts ignore the principle *pacta sunt servanda*?

To find answers to these and other applicable research questions, this dissertation will unfold as follows:

Chapter one introduced the study. In chapter one the research problem was identified, the area of study demarcated and defined, justification for the study was provided, research methods used were delineated and a suitable theoretical framework for the study was identified.

Chapter two will discuss the important concepts applicable to this study. The concepts that will be addressed in this chapter are: legal certainty (as an expression of the constitutional value of the rule of law), to be discussed in detail to determine what exactly is meant by legal certainty in contract law and to determine why legal

182 *Beadica* [85].

certainty is important in the law of contract; human dignity, equality and freedom (the concise meaning of these concepts will be discussed in light of their application in terms of achieving substantive equality). Due to their connected importance to the topic of this study, the concepts economic development and socioeconomic development will also be discussed. Public policy (to highlight the meaning of public policy and what the public policy view on the economy, commerce and socioeconomic development is) and finally the constitutional vision (to explain what is meant by the constitutional vision).

There is a significant and intertwining relationship between legal certainty, economy, commerce, socioeconomic development, public policy and substantive equality. Therefore, chapter three relying on the wide body of available legal and economic literature will explore the importance of the economy and commerce on socioeconomic development. In particular, this chapter will look at the importance of the economy and commerce as drivers of socioeconomic development and reform. The relationship between economic and commercial growth, contractual certainty, public policy and the achievement of substantive equality will also be explored. This chapter will also identify some of the pertinent threats to realising the constitutional vision.

As discussed in the preceding sections, South African courts have in the past, long struggled to align competing values of fairness, reasonableness and good faith with the ideas of legal certainty and the contractual common law principle *pacta sunt servanda.*[183] The courts have been embroiled in much debate and legal argument on how to strike the correct balance between these competing values and the extent to which they (courts) should interfere in relationships involving contract law.[184] Furthermore, our courts have had to contend with the notion of when and how to

183 Hofmeyr A and Howard G "Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity" https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-24-june-Can-unfair-or-unreasonable-contracts-be-set-aside-The-Constitutional-Court-provides-clarity.html (Date of use: 09 December 2020); see also Hutchison & Pretorius (eds) *Law of Contract* 23.

184 Hofmeyr A and Howard G "Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity" https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-24-june-Can-unfair-or-unreasonable-contracts-be-set-aside-The-Constitutional-Court-provides-clarity.html (Date of use: 09 December 2020).

invalidate a contract when faced with competing constitutional values, common law principles and legal certainty.[185] This has led to many controversial debates in the South African law of contract, pertaining to the degree our courts are empowered to strike down or refuse enforcement of a contract or term, which the court may find is unduly harsh, unfair or unreasonable.[186] Throughout our jurisprudence history, it had generally become the norm for courts to refuse enforcement of contracts that are contrary to public policy. In retrospect, this norm had been applied only in the clearest of cases where the possibility of harm to the public was excessive.[187] Conventionally, this idea had echoed the loud call for sanctity of contract (where contracts between parties have been entered into freely) to be privileged over constitutional and common law values and to be enforced.[188] The enforcement of contracts that privileged *pacta sunt servanda* over constitutional values (such as human dignity, equality, freedom and *Ubuntu*) and common law values (such as good faith, which encompasses the ideals of justice, fairness and reasonableness) became problematic in the South African law of contract, creating much uncertainty. In addition, the excising of the *exceptio doli* (which was used by an innocent party to defend a contractual right that was unconscionable and inequitable) in *Bank of Lisbon*, added to these problems.[189] A number of cases in the past were met with strong resistance from the SCA, when they attempted to put forward the notion that good faith was a principle that informed contract law.[190] The *York Timbers* judgment for example, held that the abstract value good faith in contract, is given life in a number of contractual law rules and doctrines, and also moulds and controls the

185 Hofmeyr A and Howard G "Can unfair or unreasonable contracts be set aside? The Constitutional Court provides clarity" https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-24-june-Can-unfair-or-unreasonable-contracts-be-set-aside-The-Constitutional-Court-provides-clarity.html (Date of use: 09 December 2020).

186 Katz M Oosthuizen J and Hutchison D "South Africa: Fairness And Reasonableness Win The Day: The Beadica Judgment" https://www.mondaq.com/southafrica/franchising/960834/fairness-and-reasonableness-win-the-day-the-beadica-judgm (Date of use: 09 December 2020).

187 Katz M Oosthuizen J and Hutchison D "South Africa: Fairness And Reasonableness Win The Day: The Beadica Judgment" https://www.mondaq.com/southafrica/franchising/960834/fairness-and-reasonableness-win-the-day-the-beadica-judgm (Date of use: 09 December 2020).

188 Katz M Oosthuizen J and Hutchison D "South Africa: Fairness And Reasonableness Win The Day: The Beadica Judgment" https://www.mondaq.com/southafrica/franchising/960834/fairness-and-reasonableness-win-the-day-the-beadica-judgm (Date of use: 09 December 2020).

189 Hutchison & Pretorius (eds) *Law of Contract* 28; see also *Bank of Lisbon* 413, where Joubert JA stated that the *exeptio doli* had never become part of our law of contract.

190 See *Mort*; *Brisley, York Timbers* and *Afrox*, also see section 1.3 above.

legal development of contractual law.[191] The *York Timbers* judgement however argued, that good faith fails to give a court powers of discretion to refuse enforcement or to strike down what would be an otherwise valid contractual term.[192] It was common cause that the *pacta sunt servanda* principle enabled a party with a superior bargaining power, to manipulate the other party into concluding an unfair contract.[193] This brought about unfair contracts that benefitted only the party having a superior bargaining position, while the weaker party had to contend with the unfair terms of the contract.[194] The volleying of judicial opinion between privileging *pacta sunt servanda* alternatively normative values, created much uncertainty in the law of contract.

To overcome this undesirable situation in contractual jurisprudence, chapter 4 will attempt to show how the CC in the recent landmark *Beadica* case, considerately sought to harmonise and balance the abstract values and legal principles for interpreting contracts under the new South African constitutional dispensation, while simultaneously also acknowledging the importance of *pacta sunt servanda*, the constitutional and common law abstract values and creating legal certainty, for the realisation of the constitutional vision. Specifically, chapter 4 will critically address the CC's main pronouncements in *Beadica* about the importance of legal certainty; the constitutional and common law values, and the important role that these play in bringing about certainty in the law of contract.[195] These pronouncements will be viewed through the prism of legal certainty, economy, commerce, public policy and the constitutional vision. To set the background for further detailed discussion, the background and facts pertaining to this important case will be identified and briefly discussed. The discussion will focus principally on key aspects of the majority CC judgement as well as a brief discussion of the minority decisions of this case (to

191 *York Timbers* [27], also see Hutchison & Pretorius (eds) *Law of Contract* 30.

192 *York Timbers* [27]; also see Katz M Oosthuizen J and Hutchison D "South Africa: Fairness And Reasonableness Win The Day: The Beadica Judgment" https://www.mondaq.com/southafrica/franchising/960834/fairness-and-reasonableness-win-the-day-the-beadica-judgm (Date of use: 09 December 2020).

193 Katz M Oosthuizen J and Hutchison D "South Africa: Fairness And Reasonableness Win The Day: The Beadica Judgment" https://www.mondaq.com/southafrica/franchising/960834/fairness-and-reasonableness-win-the-day-the-beadica-judgm (Date of use: 09 December 2020).

194 De Villiers DJ "Judicial Control over Unfair Contracts" https://www.wylie.co.za/Articles/Read/42/Judicial%20Control%20over%20Unfair%20Contracts (Date of use: 09 December 2020).

195 As discussed in *Beadica* [80]-[90].

ensure completeness of this study),[196] and relying on the findings in the literature from the preceding chapters, the importance of legal certainty for promoting a substantive idea of human dignity, equality, and freedom, which promotes the achievement of equality and the longer-term fulfilment of the constitutional vision, will be critically evaluated and tested. In addition, to ensure completeness, this chapter will also briefly address the minority decisions in *Beadica* and how these decisions relate to legal certainty in the common law of contract.

Chapter 5 concludes the study by summarising the key findings and resulting conclusions that can be drawn from the study. This will be followed by providing an overview of the important contributions that this study makes to the existing body of knowledge in this important subject. A number of important recommendations for the future research in this interesting area of the South African law will also be provided.

196 The key aspects are contained in *Beadica* [80]-[90].

CHAPTER 2: THE IMPORTANCE OF THE RULE OF LAW, LEGAL CERTAINTY AND THE CONSTITUTIONAL AND COMMON LAW VALUES, IN THE SOUTH AFRICAN COMMON LAW OF CONTRACT, FOR PROMOTING THE CONSTITUTIONAL VISION

2.1 Introduction

Concepts provide the cognitive roadmap for our understanding of the world and are ubiquitous in both the social sciences and the law.[197] Mather posits the important notion that the study of law and society is anchored on the belief that legal rules must be contextually understood.[198] Whereas Ginsberg and Stephanopoulos submit that several key questions in social science, involves associations between different concepts.[199] For example, does liberal democracy lead to an increase in crime? Does freedom of the press stifle the rule of law? Does legal uncertainty in contract law hamper economic growth? It is important to note that each of these questions feature at least two dissimilar concepts that are either causal or correlative.[200] The central research question of this study is: is legal certainty in the South African common law of contract important for promoting the constitutional vision? This question involves both causal and correlative concepts and therefore it is important to understand the various concepts and how they are related to each other in this study.

This chapter, introduces and discusses several important and necessary concepts (such as the constitutional values rule of law, legal certainty as an expression of the rule of law, human dignity, equality, freedom and *Ubuntu*; the common law value of good faith and abstract notions of fairness, justice, reasonableness, equity and then lastly, public policy and the constitutional vision), for understanding the important role that each of these play with regards to the importance of legal certainty in the South African common law of contract for promoting the constitutional vision. These essential concepts will be set out, analysed and discussed, to establish a general understanding of these terms, what they mean and how they directly or indirectly

197 Ginsberg & Stephanopoulos 2017 *The University of Chicago Law Review* 150.

198 Mather *Law and Society* 1.

199 Ginsberg & Stephanopoulos 2017 *The University of Chicago Law Review* 150.

200 See Ginsberg & Stephanopoulos 2017 *The University of Chicago Law Review* 150.

relate to the importance of legal certainty in the law of contract for promoting the constitutional vision.

Much has been written about the subject "rule of law" in the available jurisprudential literature,[201] and there is little need to revisit these debates beyond simply explaining the sense in which this term is used within the context of this study. Only the most important and relevant concepts directly impacting on this study will be discussed. Therefore, beginning with the constitutional value rule of law,[202] and then legal certainty as an expression of the rule of law, this important principle will be discussed first. I begin by providing a basic definition of what is meant by the rule of law in this study, and then move on to explain the important legal certainty concept by discussing what is meant by legal certainty, how it forms part of being an expression of the rule of law in contract and why it is important in the law of contract. The critique levelled against legal certainty will also be briefly explored. Thereafter, the concepts human dignity, equality and freedom will be discussed from a substantive legal viewpoint.

A further critical requirement for understanding the importance of legal certainty in the South Africa common law of contract for promoting the constitutional vision is the important economic, commercial and socioeconomic development concepts. This study aims to show that legal certainty plays an important role for ensuring economic, commercial and socioeconomic development and the longer-term achievement of the greater constitutional vision. Therefore, these concepts will also be briefly described and explained in this chapter. This should smoothly facilitate their understanding in the later chapters of this study.

Public policy and *Ubuntu* are now deeply rooted in our law of contract and has become the lens through which judicial control of contractual terms is exercised.[203] Therefore, these important legal concepts will be set out and discussed to explain what it is and how it influences legal certainty and the constitutional vision. Lastly, the Constitution contains important long-term objectives that culminate in the

201 Zanghellini 2016 *Yale Journal of Law & the Humanities* 216.

202 Section 1(c) of the Constitution.

203 *Barkhuizen* [51]; [56]; [59]; [73]; *Beadica* [16]; [28]; [71]; see also section 1.5 in Chapter 1.

realisation of the constitutional vision. These objectives play an important role in understanding why legal certainty is so important in the South African law of contract, for realising the constitutional vision. An understanding of the constitutional vision will present an appropriate portal for further understanding the reasons why legal certainty in contractual relations is so important for the realisation of the constitutional vision, in the later chapters of this study.

2.2 The rule of law-what is it?

The phrase "rule of law" was first coined by Dicey in his book titled *Introduction to the study of the law of the constitution*.[204] Majuzi likens the rule of law concept to that of a Chameleon, which he explains changes "the colour of its skin…depending on where it finds itself" and suggests that this is the reason why the term rule of law continues to be challenged.[205] In its most basic form, the rule of law expresses the principle that no person is above the law,[206] and that the law should govern.[207] The rule of law arises from the notion that truth, and hence the law, is founded on important principles which are discoverable, but fail to be created through an act of will.[208] The important application of the rule of law which stands out, is the belief that state authority is justifiably exercised principally through inscribed and visible laws.[209] Such laws gain traction, are realised and their enforcement is established, mainly by following due procedural process.[210] These procedural processes aims to protect against arbitrary rule, regardless whether it be by dictatorship or through

204 Dicey *Introduction to the study of the law of the constitution* 107; see also Mbaku 2020 *GA. J. INT'L & COMP. L* 306-329.

205 Majuzi 2012 *AJHR* 91.

206 Stanford Encyclopaedia of Philosophy "The Rule of Law" https://plato.stanford.edu/entries/rule-of-law/ (Date of use: 30 September 2020); see also Deinhammer 2019 *Obnovljeni život* 34.

207 Deinhammer 2019 *Obnovljeni život* 34.

208 LexisNexis "What is the Rule of Law?" https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law (Date of use: 26 September 2020).

209 LexisNexis "What is the Rule of Law?" https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law (Date of use: 26 September 2020).

210 LexisNexis "What is the Rule of Law?" https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law (Date of use: 26 September 2020).

crowd rule.[211] Therefore, the rule of law is incompatible with either totalitarianism or anarchism.[212]

Despite its rising influence on the national and international fronts, the principle rule of law continues to be an elusive ideal,[213] and holds different meanings and is experienced differently by dissimilar people.[214] The rule of law however, remains an important leitmotif in development policy.[215] Kramer posits the rule of law as meaning nothing more than a system or "state of affairs that obtains when a legal system exists and functions."[216] Raz submits that laws are a component of a particular legal system and that the "law" gains recognition, when if it forms part of a particular legal system (such as for example an American legal system or South African legal system).[217] Deinhammer sees the rule of law as being one ideal among many, the others being "respect for autonomy and human rights, social justice and welfare, economic freedom or democracy."[218] Kramer[219] (citing Fuller)[220] submits that the rule of law refers to human conduct that acquiesces to the domination of laws, through the legal operating machinery of a legal system.[221] The United Nations (hereinafter referred to as UN) defines the rule of law as a:

> principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, **equality before the law**, **accountability to the law**, **fairness in the application of the law**, separation of powers, participation in decision-making, **legal certainty**,

211 LexisNexis "What is the Rule of Law?" https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law (Date of use: 26 September 2020).

212 LexisNexis "What is the Rule of Law?" https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law (Date of use: 26 September 2020).

213 Tamanaha *On the rule of law* 3; Onifade 2017 *African Journal of Rhetoric* 187-188; see also Majuzi 2012 *AJHR* 91 who makes the point that law changes depending on where it finds itself.

214 Domingo *Rule of law, politics and development* 9; see also Tamanaha *On the rule of law* 3.

215 Domingo *Rule of law, politics and development* 4-5; see also Trebilock 2016 *The University of Toronto Law Journal* 239.

216 Kramer 2004 *Cambridge Law Journal* 65.

217 Raz 1971 *California Law Review* 795.

218 Deinhammer 2019 *Obnovljeni život* 33.

219 Kramer 2004 *Cambridge Law Journal* 65.

220 Fuller *The Morality of Law* 33-94.

221 Kramer 2004 *Cambridge Law Journal* 65.

> **avoidance of arbitrariness**, and procedural and **legal transparency** (my emphasis).[222]

The rule of law, therefore, is essential for maintaining peaceful and secure relationships between nation states,[223] ensuring that security and political/economic stability is maintained both domestically and internationally, and is also necessary for ensuring the achievement of legal certainty.[224] Segal argues that

> The rule of law is a key factor for stable, broad-based economic growth. It encourages investment, both domestic and foreign, along with entrepreneurship and business development. In addition, confidence in the law and its application creates jobs and helps build prosperity.[225]

It also ensures the delivery of socioeconomic development within the government's available resources such as for example the right to housing,[226] right to health care, food, water and social security[227] and education.[228] The importance of the rule of law is perhaps better explained when member states of the United Nations declared that:

> the rule of **law and development are strongly interrelated and mutually reinforcing**, that the advancement of the **rule of law at the national and international levels is essential for sustained and inclusive economic growth**, **sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms**, including the **right to development**, all of which in turn reinforce the rule of law (my emphasis).[229]

In addition, the rule of law is instrumental and serves as a mechanism for the protection of human rights and the achievement of fundamental freedoms.[230] The rule of law ensures that society can access public services and puts the brakes on

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222 United Nations "What is the Rule of Law" https://www.un.org/ruleoflaw/what-is-the-rule-of-law/#:~:text=For%20the%20United%20Nations%20(UN,and%20which%20are%20consistent%20with (Date of use: 24 September 2020).

223 United Nations "Rule of Law and Peace and Security" https://www.un.org/ruleoflaw/rule-of-law-and-peace-and-security/ (Date of use: 24 September 2020).

224 Stewart 2004 *Macquarie Law Journal* 135.

225 Segal *Foreword*

226 See section 26 of the Constitution.

227 See section 27 of the Constitution.

228 See section 29 of the Constitution.

229 United Nations "Rule of Law and Development" https://www.un.org/ruleoflaw/rule-of-law-and-development/ (Date of use: 30 September 2020).

230 Mujuzi 2012 *AHRLJ* 91; Deinhammer 2019 *Obnovljeni život* 33.

corruption and the abuse and exploitation of arbitrary power.[231] It also forms the cornerstones for the creation of a "social contract" between the citizens of a country and the state.[232] The rule of law and development are strongly interlinked, and a society founded on a reinforced rule of law system, is one of the key outcomes for the UN 2030 Sustainable Development Goals (hereinafter referred to as SDGs).[233] Abioye, submits that the rule of law includes a number of ideas and thoughts that stretch between being "value-free to value-laden".[234] In this sense, the rule of law means different things to different people,[235] and despite its universal recognition as a fundamental value, there is little universal consensus as to what the term "rule of law" actually means.[236] Yet, the rule of law continues to be one of the foremost legitimating political ideals globally.[237] In addition, there is still no general understanding as to the way the rule of law can be reconciled with competing democratic values which are so necessary for governance in any democratically elected system.[238] Perhaps, one way to reconcile the rule of law with democratic values is to establish a working definition for the rule of law that contains universally accepted principles, as put forward by the World Justice Project (hereinafter referred to as WJP). The WJP works as an "independent, multidisciplinary organization working to advance the rule of law worldwide."[239] The work of the WJP's research and scholarship is directed towards supporting research initiatives that aim to establish the meaning of the rule of law, and the way that this concept gives meaning to "matters for economic, socio-political, and human development."[240]

231 Desai & Berg 2013 *Graduate Institute of International and Development Studies* 1.

232 Desai & Berg 2013 *Graduate Institute of International and Development Studies* 1.

233 United Nations "What is the Rule of Law" https://www.un.org/ruleoflaw/what-is-the-rule-of-law/#:~:text=For%20the%20United%20Nations%20(UN,and%20which%20are%20consistent%20with (Date of use: 24 September 2020).

234 Abioye 2011 *XLIV CILSA* 64; see also Domingo *Rule of law, politics and development* 8.

235 Gosalbo-Bono 2010 *University of Pittsburgh Law Review* 231; see also Domingo *Rule of law, politics and development* 4-5.

236 Gosalbo-Bono 2010 *University of Pittsburgh Law Review* 231; see also Zanghellini 2016 *Yale Journal of Law & the Humanities* 216-217.

237 Tamanaha *On the rule of law* 4.

238 Gosalbo-Bono 2010 *University of Pittsburgh Law Review* 231.

239 World Justice Project "What is the Rule of Law?" https://worldjusticeproject.org/about-us/overview/what-rule-law (Date of use: 21 September 2020).

240 World Justice Project "What is the Rule of Law?" https://worldjusticeproject.org/about-us/overview/what-rule-law (Date of use: 21 September 2020).

2.2.1 Four universal principles of law

The WJP describes four universal principles that create a working definition for the rule of law. According to the WJP, these principles have been verified by international experts and harmoniously accords to internationally accepted standards and norms.[241] The WJP describe the rule of law as being a robust system of laws, institutions, norms, and community commitment that delivers:

> (1) **Accountability** The government as well as private actors are accountable under the law. (2) **Just Laws** The laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the **security of persons and contract, property, and human rights**. (3) **Open Government** The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient. (4) **Accessible Justice** Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve (my emphasis).[242]

Formbad explains that these principles merit the function of both formal (minimalists) and substantive (maximalists) conceptions of the rule of law.[243] Minimalist notions of the law are concerned mainly with formal or procedural law and is often referred to as "thin" law.[244] Substantive conceptions of the law on the other hand, often referred to as "thick" or maximalist conceptions of the rule of law are concerned with the substantive content of the law.[245] Tommasoli suggests that "formal and substantive notions" of law are connected and goes on to say that

> some scholars argue against a thin/thick dichotomy, suggesting that, in situations of social and political change [such as in South Africa], both formal and substantive features of the rule of law may be 'thinner' or 'thicker'. However, in general terms, a focus on 'thin' definitions places emphasis on the procedures through which rules are formulated and

241 World Justice Project "What is the Rule of Law?" https://worldjusticeproject.org/about-us/overview/what-rule-law (Date of use: m21 September 2020).

242 World Justice Project "What is the Rule of Law?" https://worldjusticeproject.org/about-us/overview/what-rule-law (Date of use: 21 September 2020).

243 Fombad 2014 *AHRLJ* 418.

244 Fombad 2014 *AHRLJ* 418; Tommasoli M "Rule of Law and Democracy: Addressing the Gap Between Policies and Practices" https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices (Date of use: 31 October 2020).

245 Fombad 2014 *AHRLJ* 418.

applied, **whereas 'thick' definitions aim to protect rights and frame it within broader human development discourse** (my emphasis).[246]

These principles integrate ideas that throughout the centuries have conventionally come to be associated with the rule of law.[247]

2.2.2 Two faces of the rule of law

Zanghellini argues that there is generally widespread agreement on what characteristics the rules of a legal system should possess for complying with the rule of law, and submits that for any legal system to qualify as being compliant with the rule of law, it must at least possess the following salient features: it must be of general application; it must be clear and it must be relatively stable.[248] Waldron submits that the rule of law is one of the most important essences of our time, and goes on to say, it is one of a constellation of ideals of modern political morality, the others being "human rights, democracy, and perhaps also the principles of free market economy."[249] Nonetheless, there is still little agreement on the nature of the "institutional and procedural arrangements" required by the rule of law,[250] meaning here whether or not the rule of law contains an intrinsic value of morality that enforces a substantive constraint on the laws content.[251]

It is this dichotomy of opinion that segregates legal opinion into both "formal and substantive" conceptions of the rule of law.[252] According to the formal notion of law, the rule of law ideal is fulfilled when laws follow some formal kind of procedural principles.[253] Such as for example, that laws should have general application, they must be clear and non-contradictory, prospective, moderately stable, propagated etc.; and further that legal procedure must facilitate the correct application of legal

246 Tommasoli M "Rule of Law and Democracy: Addressing the Gap Between Policies and Practices" https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices (Date of use: 31 October 2020).

247 Fombad 2014 *AHRLJ* 418.

248 Zanghellini 2016 *Yale Journal of Law & the Humanities* 213.

249 Waldron 2008 *Georgia Law Review* 3.

250 Zanghellini 2016 *Yale Journal of Law & the Humanities* 213.

251 Zanghellini 2016 *Yale Journal of Law & the Humanities* 213; see also Raitio 2006 *Rechtstheorie* 397, where this author explains that the expectation of legal certainty *sensu largo* comprises two considerable elements (1) that arbitrariness must be circumvented which he calls – "formal legal certainty" (2) the outcome of the court's decision must be proper in the circumstances and be acceptable to all concerned which he calls "substantive legal certainty".

252 Zanghellini 2016 *Yale Journal of Law & the Humanities* 213

253 Maxeiner 2007 *Tulane J. of Int & Comp Law* 546.

rules by being fair, open, impartial and transparent and also by being applied and enforced by a judiciary that is independent.[254] For Zanghellini, formal ideas of the law are valuable to society mainly because irrespective of the laws content, the rules of law are properly circumscribed, directed and judged and this facilitates the predictability of judicial consequences and therefore public reliance on the law.[255] Thus, promoting the furtherance of individual autonomy and self-interest, which are so necessary and critically important for innovation and creativity in global commerce.[256]

The rule of law ideal remains incomplete however, when the application of law is strictly limited to only procedural and formal requirements[257] (such as was previously common under the South African common law of contract). The substantive face of the law is equally important.[258] The substantive concept of law stresses that while procedural and formal requirements are important and necessary, the rule of law also requires that the law must be substantively just.[259] Substantive justice underscores the need for the rule of law to pay serious attention to giving effect to and promoting fundamental rights.[260]

2.2.3 Defining the rule of law

From the above, it is indeed clear that if the important rule of law principle is to be understood in relation to its importance for promoting the constitutional vision, it is submitted that any universal definition of the rule of law must at least embrace the following key principles as espoused by Fuller[261] and explained by Kramer:[262] The law as:

> (1) a system of governance operates through general norms and all or most of the norms partake of the following properties (2) they are promulgated to the people who are required to comply with them; (3) they

254 Zanghellini 2016 *Yale Journal of Law & the Humanities* 213; see also Maxeiner 2007 *Tulane J. of Int & Comp Law* 545-546.

255 Zanghellini 2016 *Yale Journal of Law & the Humanities* 213; see also Ciongaru 2016 *Fiat Iustitia* 45.

256 Skippington *Harnessing the Bohemian* 67, on the topic of individual autonomy and how it works to reduce poverty; see also Kennerly Davis (Jr) 2017 *Center for Strategic and International Studies* 2-3; Maxeiner 2007 *Tulane J. of Int & Comp Law* 546.

257 Du Plessis *Harmonisation* 77-78; see also Albertyn 2007 *SAJHR* 258-259.

258 Du Plessis *Harmonisation* 77-78; see also Albertyn 2007 *SAJHR* 258-259.

259 Du Plessis *Harmonisation* 77-78; see also Albertyn 2007 *SAJHR* 258-259.

260 Du Plessis *Harmonisation* 77-78; see also Albertyn 2007 *SAJHR* 258-259.

261 See Fuller *The Morality of Law* 33-94, where these principles are discussed in detail.

262 Kramer 2004 *The Cambridge Law Journal* 65.

> are prospective rather than retrospective; (4) they are understandable rather than hopelessly unintelligible; (5) they do not contradict one another and do not impose duties that conflict; (6) they do not impose requirements that cannot possibly be fulfilled; (7) they persist over substantial periods of time, instead of being changed with disorienting frequency; and (8) they are generally given effect in accordance with their terms, so that there is a congruence between the norms as formulated and the norms as implement.[263]

Adding to the above and borrowing from Cordenillo and Sample[264] the rule of law must also be anchored on key democratic principles such as "equality before the law, accountability to the law" the "separation of powers and participation in decision making" and the protection of fundamental rights which include "security of persons and contract, property, and human rights."[265] In *Beadica* the CC correctly stated that the:

> rule of law requires that the law be clear and ascertainable… 'The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.' The application of the common law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties.[266]

Although these basic precepts of legality are never perfectly satisfied by any single regime of law, their fulfilment to a considerable degree is essential for the existence and smooth operation of any legal system.[267] The situation established by the substantial compliance with these principles, is accepted for the purposes of this study, to be the rule of law.

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263 Kramer 2004 *The Cambridge Law Journal* 65.

264 Cordenillo & Sample (eds) *A broad definition of the rule of law* 1.

265 Cordenillo & Sample (eds) *A broad definition of the rule of law* 1; World Justice Project "What is the Rule of Law?" https://worldjusticeproject.org/about-us/overview/what-rule-law (Date of use: 21 September 2020).

266 *Beadica* [81].

267 Kramer 2004 *The Cambridge Law Journal* 65.

2.2.4 Rule of law, legal certainty and the Constitution

In its founding provisions, the Constitution gives recognition to both the supremacy of the Constitution and the rule of law.[268] It, therefore, acknowledges that not only is the Constitution supreme but also gives recognition to and acceptance for the importance of the rule of law. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[269], the court stated that "the rule of law — to the extent at least that it expresses this principle of legality" is understood generally "to be a fundamental principle of constitutional law." In *Mighty Solutions*[270] the court stated that the reinforcement of the rule of law and legal certainty as an expression of the rule of law is a constitutional value and went on to state that "legal certainty is essential for the rule of law."[271] In *Beadica*, Justice Theron made it clear that "many of the rights promises made by our Constitution" are dependent on the economic development of South Africa.[272] She went on to say that "[c]ertainty in contractual relations" creates the "fertile environment for the advancement of constitutional rights" and that protecting the "sanctity of contract" is indispensable for achieving the "constitutional vision of our society."[273] She also alluded to the fact that the "constitutional project will be imperilled" if courts strip away the important "principle of *pacta sunt servanda*."[274]

2.3 Legal certainty

In several landmark cases[275] (as pointed out in chapter 1), the SCA and at the time of writing the CC in *Beadica* have justified their judicial decisions by relying on the

268 Section 1(c) of the Constitution.

269 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 12 BCLR 1458 (CC) [56]; see also *President of Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 10 BCLR 1059 (CC) [148]; *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) [17].

270 *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and another* 2016 1 BCLR 28 (CC) (hereinafter referred to as Mighty Solutions) [27].

271 *Mighty Solutions* [37].

272 *Beadica* [85].

273 *Beadica* [85].

274 *Beadica* [85]; the common law *pacta sunt servanda* principle means that agreements made must be honoured.

275 In this regard see *Bank of Lisbon*; *Brisley*; *Mort*; *Afrox*; *York Timbers*; *Barkhuizen*; *Mohameds Leisure Holdings*; *AB and another v Pridwin* (SCA); *Beadica*.

importance of legal certainty in the law of contract. This section seeks to explain the important legal certainty concept.

At first glance, the term "legal certainty" may appear to be deceptively unambiguous.[276] Coelho, submits legal certainty is a complex subject.[277] In the context of legal modernity, legal certainty as a principle promotes the notion that law must be adequately clear, so that those to whom the law applies, are able to regulate their own behaviour, and they must be able to protect themselves against the arbitrary use of public power.[278] This is the apex ideal behind legal certainty that gives commercial law its legitimating value.[279] Wrbka posits the notion that legal certainty "is undeniably one of the essential 'principles' of every modern legal system."[280] Fenwick and Wrbka submit that legal certainty plays an important part in establishing the "space of individual freedom",[281] while Waldon suggests that varying conceptions of the rule of law emphasise "legal certainty, predictability, and settlement" for determining those standards that are supported by society, as well as the reliable administration by the state,[282] stressing that law needs to be certain and predictable for it to be supported by society.

Hence, the ideal of legal certainty has occupied centre stage in constructing a stabilised society through the establishment of a normative framework that enables participants in a society to safely interact with one another.[283] At the same time it has been instrumental in defining the level of individual freedom and the extent to which political power can be exercised in contemporary society.[284] Furthermore, legal certainty has been fundamental for political tolerance, including the ideals and aspirations of political modernity.[285] This is especially true in South Africa where a number of persons have in the past made outrageous statements that border on

276 Wrbka *Comments on Legal Certainty* 11.

277 Coelho *2017 International Journal of Insolvency Law* 1.

278 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1; see also Brown *Legal certainty and competition law* 1; Raitio 2006 *Rechtstheorie* 397; *Beadica* [81].

279 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1.

280 Wrbka *Comments on Legal Certainty* 10.

281 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1.

282 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-3.

283 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-3.

284 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-3.

285 Consumer Protection Act 68 of 2008.

being inflammatory and the only reason why they have been able to do so, without retribution, is because the Constitution (supreme law of the land) guarantees freedom of expression.[286] In the same vein, it can be argued that criminals do not openly commit crime because the criminal legal system provides legal certainty. That is, should they commit a crime and be found guilty of these crimes then the Criminal Procedure Act[287] sets out the sanctions that will be meted out to them. In *sensu*, the law provides reasonable certainty and predictability that serves to deter criminals from committing crime and provides a certain measure of security to the public so that they can go about with their lives without fear.

In the South African common law of contract, cases such as *Barkhuizen*, *Mohameds Leisure Holdings*, *Pridwin and Beadica* have to some extent established a certain degree of reliability and certainty. It is clear from these cases, that public policy is now the instrument that our courts will rely upon to determine whether a contractual term is unfair.[288] Where it is found that, what at first appears to be an otherwise unfair contractual term is fair, and such contractual term passes the public policy scrutiny test, this term will be upheld by our courts.[289] The inverse is also true. Where a contractual term *prima facie* appears to be fair, but on applying the public policy test is found to be unfair, such term will unhesitatingly be struck down by the courts.[290] This persistent trend of balancing unfair contractual terms with constitutional values using public policy as a scale to establish constitutional compliance, serves as a deterrent for those who draft contracts containing unfair terms that do not comply with public policy imperatives. In addition, various legislative measures such as the Consumer Protection Act[291] also outlaws consumer contracts or contractual terms that are contrary to public policy. In this way, legal certainty (meaning legal predictability and stability) is maintained.

286 See section 16 of the Constitution.

287 Criminal Procedure Act 51 of 1977.

288 See *Barkhuizen*; *Pridwin* (CC); *Beadica*.

289 See *Barkhuizen* and *Beadica* in this regard.

290 See *AB and another v Pridwin* (SCA) [27], in this regard.

291 Consumer Protection Act 68 of 2008.

2.3.1 Predictability and stability- core features of legal certainty in contract

In *Path of Law* Holmes argued that for "the rational study of the law the black-letter man may be the man of the present" and went on to say for "man of the future is the man of statistics and the master of economics."[292] Hence, predictability and stability are core features of legal certainty.[293] Wade describes laws objective as the:

> uniformity of action, so that one member of the society may know how, in certain circumstances, another is likely to behave, this being the essence of security. Subsidiary to the concept of order is that of justice; for society needs first stability, and secondly (though this is a marked refinement) the kind of stability that gives a measure of protection to all its members.[294]

This is especially true for the law of contract. Thousands of contracts are signed every day. Each contract specifying the precise contractual obligations of the respective parties. These agreements are entered into on the premise that each party will fully honour their promise in future.[295] It is the rules of contract law and the reliance on reasonable legal certainty by each party, that enables the parties to securely contract.[296] That is, each party believing that the law will uphold their bargain.[297] Now, should the law fail to uphold their contract we may ask what will happen to commercial contracting?[298] It is generally known that where parties reasonably believe or foresee that the law will not uphold their contract, they would not, or otherwise strongly hesitate to enter contractual relations. Citizens of the state need "predictability" to be able to continue with their lives and as well as in their businesses,[299] as Waldron[300] explains:

> freedom is nevertheless [only] possible if people know in advance how the law will operate, and how they must act to avoid its [law] having a detrimental impact on their affairs. Knowing in advance how the law will operate enables one to plan around its requirements. And knowing that one can count on the law to protect certain personal rights and property

292 Holmes 1897 *Harvard Law Review* 469.

293 Holmes 1897 *Harvard Law Review* 458-460.

294 Wade 1941 *Modern Law review* 185.

295 Common law principle *pacta sunt servanda*; see also Hutchison & Pretorius (eds) *Law of Contract* 22-23.

296 See Naude 2003 *SALJ* 824; see also *Beadica* [81].

297 See Hutchison & Pretorius (eds) *Law of Contract* 22.

298 See Wallis 2016 *SALJ* 545; Lane 2015 *Without Prejudice* 52.

299 Waldron 2008 *Georgia Law Review* 6.

300 Waldron 2008 *Georgia Law Review* 6; see also Hutchison & Pretorius (eds) *Law of Contract* 22-27.

> rights enables each citizen to deal effectively with other people and the state.

In the landmark English case *Vallejo v Wheeler*[301] Lord Mansfield said that

> in all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon.

Thus, emphasising the importance of certainty and predictability in law.[302] The adherence to economic and fiscal regulation, laws of property, and the obligations that arise from contract law is generally recognised to depend on the ability of the state to enforce the law.[303] Society places its trust in the machinery of the state to impose corrective penalties for breach of the law, such as for example imprisonment (where crimes are committed), claim for cancellation and damages (in law of contract) and fines (for breaching environmental law, traffic rules, etc).[304] Conventionally, social scientists assume that in the absence of state compulsion or alternatively other non-legal methods for realising economic control and social order, such as social or reputational sanctions, lawlessness will prevail.[305] Differentiating law from social norms, Ellickson[306] argues that the law are the rules that government enforces rather than any adherence through social norms.

2.3.2 Does legal certainty mean absolute certainty?

Here, it is important to note legal certainty does not mean absolute certainty of the legal outcomes[307] because as Maxeiner alludes, absolute "legal certainty is neither possible nor desirable."[308] In fact, if such were the case according to Coelho, then there would be little or no need for legal practitioners, because the outcome of all disputes would be one hundred percent predictable.[309] Coelho reduces the legal

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301 *Vallejo v Wheeler* 1774 1 143 Cowp (hereinafter referred to as *Vallejo*) at 153.

302 See Naude 2003 *SALJ* 824.

303 Hadfield & Weingast 2013 *Journal of Law and Courts* 3.

304 Hadfield & Weingast 2013 *Journal of Law and Courts* 3.

305 Hadfield & Weingast 2013 *Journal of Law and Courts* 3.

306 Ellickson *Order without Law* 127.

307 Coelho 2017 *International Journal of Insolvency Law* 1; see also *Beadica* [216] where Victor AJ in a dissenting opinion stated "the concept of absolute certainty in contract is illusory … Absolute preordained certainty in the outcome of legal disputes can hardly be attained."

308 Maxeiner 2007 *Tulane J. of Int & Comp Law* 547; also see Boukema 1980 *Archives for Philosophy of Law and Social Philosophy* 474-475.

309 Coelho 2017 *International Journal of Insolvency Law* 1.

certainty concept to notions of judicial predictability of all legal decisions.[310] He uses an interesting, albeit important and simplistic, equation to define legal certainty. The legal certainty equation that Coelho adopts in his words is:

> the greater the predictability of judicial decisions, the greater the legal certainty; the greater the unpredictability, the lesser the legal certainty.[311]

He goes on to point out that there is no reliable means for predetermining a judicial decision in each and every case.[312] However, he argues it is possible to reasonably foresee what the most possible outcome of a court decision will be in most cases (such as currently is the case in the South African law of contract – where a term of a contract is contrary to public policy or constitutional values it will fail the judicial scrutiny test). In a very small number of cases he argues, the judicial outcome of a case will unavoidably emerge as a surprise or be unpredictable.[313] Coelho calls this "predictable unpredictability", which according to him refers to the very small number of cases where the courts will not apply the law in accordance with reasonable expected outcomes.[314] Accordingly, Coelho correctly argues for as long as the level of unpredictable decisions remains within "the predictable unpredictability margin, it does not affect legal certainty."[315]

Hence, legal uncertainty only emerges when the number of cases of unpredictable decisions is high and exceeds the predictable unpredictability level.[316] Here it is important to note what predictability means. Predictability does not mean that unfair contractual terms will be upheld. Nor does it mean that where contracts involve an unfairly disproportionate bargaining power, are contrary to constitutional values or are objectively unconscionable the contract will survive constitutional scrutiny. Predictability means that where contractual terms are unconscionable, contrary to constitutional values and fail to pass the constitutional test in terms of public policy requirements such contracts will persistently be struck down by our courts.

310 Coelho 2017 *International Journal of Insolvency Law* 1.
311 Coelho 2017 *International Journal of Insolvency Law* 1.
312 Coelho 2017 *International Journal of Insolvency Law* 1.
313 Coelho 2017 *International Journal of Insolvency Law* 1.
314 Coelho 2017 *International Journal of Insolvency Law* 1.
315 Coelho 2017 *International Journal of Insolvency Law* 1.
316 Coelho 2017 *International Journal of Insolvency Law* 1.

Conversely, where a party to a contract fails to convince a court that the contract or contractual terms of a contract are unconscionable, unconstitutional or where such party fails to provide adequate substantive reasons for failing to comply with its contractual obligations our courts will refuse, not to enforce the contract.[317] The persistent and uniform outcomes of court decisions establishes reasonable predictability and stability and therefore affirms legal certainty in the law of contract.

These observations are highly significant, because "global entrepreneurs" that want to expand their businesses geographically, rely on both economic and legal calculations in concluding investment decisions.[318] In such cases, as pointed out by Coelho, these global entrepreneurs will make legal calculations taking into consideration the laws existent in each potential investment jurisdiction.[319] In addition, he argues these entrepreneurs will also pay exacting attention to the way the law has been applied by the courts in these jurisdictions.[320] In the same way, we can apply Coelho's equation to business decision making in South Africa. South African businesses also conduct risk return calculations, factoring in both economic and legal risks. Where the legal risk is high (the number of investors will be small or less) these businesses may opt for higher economic returns or alternatively look elsewhere to invest their capital, in those jurisdictions where there is legal certainty, and the degree of legal risk is small or less. From this we can conclude that if we have high levels of legal uncertainty in South Africa, investment in local business initiatives will be lower and there will be a definite flight of capital away from South Africa to less riskier destinations. Lower capital investment means lower economic growth, fewer jobs, less savings, lower taxes for the state and less or no investment in basic infrastructure, education and general public goods.[321] This will have an overall negative effect on the overall economy and socioeconomic development.[322] This will have a serious negative impact on the realisation of the constitutional vision.

317 See *Barkhuizen*; *Mohameds Leisure Holdings*; *Pridwin* (CC); *Beadica*.

318 Coelho 2017 *International Journal of Insolvency Law* 1.

319 Coelho 2017 *International Journal of Insolvency Law* 1.

320 Coelho 2017 *International Journal of Insolvency Law* 1.

321 See Nwanne 2016 *European Journal of Accounting Auditing and Finance Research* 31; Meyer et al 2017 *JARLE* 1844.

322 See chapter 3 for a discussion on the role and importance of the economy on national socioeconomic development.

2.3.3 Legal certainty and predictability for business decision-making

The level of legal certainty in each geographic location, determines the kinds of international investments that flow into a particular jurisdiction.[323] Those jurisdictions having high levels of legal uncertainty Coelho argues, will naturally attract risk-taking investors but the number of investors will be small, while risk sensitive or "conservative entrepreneurs" will have higher numbers of investors, but will be inclined not to invest or will invest in those less legal risky jurisdictions.[324]

Here one must bear in mind that the number of risk-taking investors is much smaller than the number of conservative investors. In its most basic economic form, higher risks demand higher returns.[325] Malkiel, highlights that "risk is the chance" that return expectations will fail to come to fruition.[326] This is a natural phenomenon of the rules governing supply and demand of concern to the subject economics. Therefore, it is generally accepted that the number of investors attracted to risky investments will be much lower than the number of conservative risk investors, ultimately resulting in much less capital investment flowing into riskier businesses.[327]

2.3.4 Legal certainty and foreign direct investment

In the case of those businesses seeking lower legal and investment risk, there will be many potential investors and the economic rate of return on investment (because of lower legal and economic risk) will obviously be less.[328] In cases of those businesses that are risk averse, there will be a much smaller number of investors, thus ensuring higher economic returns (due to higher investment and legal risk).[329] In countries that have a lower degree of legal certainty, investment risk will be much higher and the pool of investors needing higher returns and willing to take on economic and legal risk, will be much smaller.[330] The outcome of this, is that those countries having lower legal certainty will attract fewer international investments and

323 Coelho 2017 *International Journal of Insolvency Law* 1.

324 Coelho 2017 *International Journal of Insolvency Law* 1.

325 Malkiel *Risk and Return* 27-28.

326 Malkiel *Risk and Return* 28; see also Senthilnathan 2016 *International Journal of Science and Research* 705; Campbell 1996 *Journal of Political Economy* 299.

327 Basic economic theory of supply and demand and financial risk.

328 Coelho 2017 *International Journal of Insolvency Law* 1.

329 Coelho 2017 *International Journal of Insolvency Law* 1.

330 Coelho 2017 *International Journal of Insolvency Law* 1.

less foreign direct investment (hereinafter referred to as FDI) flow.[331] FDI flows assists the necessary investment required to increase economic growth at a rapid pace and also assist with the achievement of attaining macroeconomic stability within the economy.[332] Lower investment risk in countries that have greater legal certainty, attracts more FDI. More FDI, in its most elementary sense means greater investment, more businesses, higher employment and an increase in the tax base to deliver on government objectives and socioeconomic development.[333]

It is well known; the global economy is an investment destination and countries throughout the world compete for limited FDI. Legal certainty is a significant factor for investors and one of the most important instruments for attracting investment.[334] Coelho correctly points out that countries that want to improve their competitive positioning for attracting FDI and for enhancing their "position in the global economy must be concerned with strategies to increase their legal certainty."[335] This means that these countries must pay serious attention to ensuring that there is greater predictability of judicial decisions because the greater the predictability of judicial decisions, the greater will be the legal certainty; the greater the unpredictability, the lesser the legal certainty.[336]

2.3.5 Conflict between legal certainty, clarity and predictability

Fenwick and Wrbka point out clarity of the law and predictability can sometimes clash with other significant legal principles such as substantive justice and public policy.[337] Despite this conflict, these authors argue that legal certainty has worked well as a "core value and aspiration that has structured normative debates" at the "national, regional and international" levels.[338] The requirement of certainty in law is an explicit constitutional principle in most domestic constitutions including South Africa.[339] In *Mighty Solutions* the court stated that "legal certainty is essential for the

331 Coelho 2017 *International Journal of Insolvency Law* 1.

332 Ullah Shah and Khan 2014 *Economics Research International* 1.

333 See Ali *Economic environment* 203-204.

334 Coelho 2017 *International Journal of Insolvency Law* 1.

335 Coelho 2017 *International Journal of Insolvency Law* 1.

336 Coelho 2017 *International Journal of Insolvency Law* 1.

337 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

338 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

339 *Mighty Solutions* [27].

rule of law – a constitutional value."[340] Legal certainty also functions as a fundamental principle in multiple international organizations such as the European Union (hereinafter referred to as EU) as well as the European Court of Human Rights (hereinafter referred to as ECHR) who both regard legal certainty as a key legal principle essential to the rule of law.[341]

2.3.6 Legal certainty critique

Despite the legal certainty principal being pivotal for the establishment of a contemporary legal order, there have been a number of academic critiques directed at levelling the "law's aspirations to legal certainty."[342] Beginning with the American Realist school of thinking and ending with the fresher work of the Critical Legal Studies, sequential groups of scholars have questioned the prevailing formalism of modern law and the pursuit of certainty.[343] One significant effect of such critique has been the introduction of what Fenwick and Wrbka call the "Counter-concept" to that of legal certainty, namely that the law is "indeterminate."[344] Scholars following the indeterminacy school of thought, see indeterminacy in its most elementary form, as the law always being indefinite and that any results of legal adjudication is justifiable by referring to a specific norm.[345] Advocates promoting the indeterminacy school of thought, argue that while the law compels the "actors" operating in a legal system, it fails to "uniquely determine outcomes."[346]

Fenwick and Wrbka see this view of law as being "just politics in disguise."[347] These authors point out that criticism by proponents of indeterminacy has not had any major impact on the practise of law, or at least, as they put it "in terms of the commitment to legal certainty".[348] They go on to highlight that it does however cast light on the greater changes afflicting the legal certainty ideal.[349] Although notions of

340 *Mighty Solutions* [27].

341 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

342 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

343 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-3; see also Kress 1989 *California Law Review* 285.

344 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-2.

345 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-2.

346 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

347 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

348 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

349 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-2.

legal certainty, have had to face increasing competing demands arising from legal modernity.[350] Such demands include *inter alia* the notion that law should be more flexible and sensitive to the rapidly changing socioeconomic and technological environments. This is especially so, because critiques argue the law operates across international boundaries. Furthermore, they point out that the law needs to be able to regulate ever transformative "spheres of social life" which has resulted in new degrees of uncertainty about legal certainty.[351] These social and economic transformations raise difficult questions regarding both the meaning of legal certainty, as well as its possibility and desirability.[352] Critiques of legal certainty however fail to realise the importance that legal certainty (in the sense of legal predictability and stability) has for business decision making and the economy as a whole.[353]

2.3.7 Importance of legal certainty

Cameron Stewart (citing JM Barrie's fairy tale story Tinkerbell)[354] relies on the moral of this fairy tale to contrast and associate the rule of law to the story of Tinkerbell. Stewart goes on to explain that in the story Peter Pan relies on his imagination and belief to save Tinkerbell from poisoning.[355] He goes on to say that according to the "laws of Barrie's tale, fairies cannot exist unless we believe in them" and goes on to explain that even if we believe in them at first, but come to doubt them later, they will die.[356] Borrowing this idea from Stewart, the same moral can be applied to the importance of legal certainty in the common law of contract. Since time immemorial, contractual relations that are dependent on some future promise for fulfilment of obligations have always relied on the belief of certainty for such fulfilment of the promise.[357] In the future, if we lose faith in legal certainty for the fulfilment of the contractual promise the concept will die. The death of legal certainty will imperil commercial and economic trade and may very well result in chaos and the collapse

350 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

351 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-3.

352 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 2.

353 See chapter 3 where this topic is discussed in greater detail.

354 Barrie Peter *Pan Chapter 13: Do you believe in Fairies?*

355 Stewart 2004 *Macquirie Law journal* 135.

356 Stewart 2004 *Macquirie Law journal* 135.

357 See Hutchison & Pretorius *Law of Contract* 22, see also Du Bois (ed) *Principle of South African Law* 736.

of the entire economic ecosystems that have developed so well over time. Furthermore, global trade and technological progress have made our reliance on certainty of contract even more pertinent.

2.4 Human dignity, equality and freedom

Nowhere is social transformative law more apparent than in South Africa, which is undergoing a transformation from what Goolam refers to as "formal, positivistic vision of law to a substantive, natural law vision of law."[358] From legal perspective constitutional values have one of the most important influences in this transformative process.[359] The Constitution makes reference to the Bill of Rights as:

> a cornerstone of democracy in South Africa [that] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[360]

In addition to their inclusion in the founding values of the new state, human dignity, equality and freedom are entrenched as separate and distinct rights in the Bill of Rights, and have a special role to play in its interpretation and application. In *Grootboom*[361] Justice Yacoob stated the Bill of Rights must be contextually interpreted,[362] and went on to say that this "requires the consideration of two types of context" (1) rights must be interpreted in its "textual setting" which will involve considering the Bill of Rights of the Constitution, as well as the whole Constitution (2) rights also have to be considered and understood against "their social and historical context." It is important to remember that all the rights and values contained in the Bill of Rights are related to one another and support each other mutually.[363] Goolam submits that amongst this triad of constitutional values, human dignity takes centre stage.[364] Therefore beginning with human dignity, each of these

358 Goolam 2001 *PELJ* 1.

359 Goolam 2001 *PELJ* 1.

360 Section 7(1) of the Constitution.

361 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) (hereinafter referred to as *Grootboom*)

362 *Grootboom* [21]; [22].

363 *Grootboom* [23].

364 Goolam 2001 *PELJ* 1.

conceptual values as they apply to the research problem is explored and discussed next.

2.4.1 Human dignity

The Constitution recognises the right to human dignity.[365] Steinmann argues that law, and more "specifically public law" fails to give a moral definition for human dignity.[366] Steinmann goes on to point out that under our modern law, the ideal of dignity presents itself as having a multifarious character, between what Steinmann (citing Habermas)[367] refers to as "the so-called is ought dilemma in law" and the blending of laws "moral content with coercive law".[368] She goes on to say that dignity represents:

> a metaphysical notion which implies an objective moral principle on the one hand and on the other hand legal recognition of equal human rights. As a moral view, dignity represents the essence of what it means to be a human being; as a recognition of a human right, it legalises the notion that the essence of humanity must be recognised and respected in equal quantum.[369]

In *Teddy Bear*[370] Khampepe J stated dignity gives recognition to the "the inherent worth of all individuals."[371] In its most elementary form, dignity expresses the standing of a person in relation to their status and the way others see her/him, which entitles such person to "respect or induces or ought to induce such respect: its excellence or incomparability of value."[372] Lebech postulates the notion that:

> *Dignitas* is understood to be self-imposing, important by virtue of itself; and **even if it relies on something else that has given it, or that guarantees its status, it is understood to impose *itself*, in and through the authority given**. …The *idea* of human dignity conceptualises or embraces this experience of recognition, and the *principle* of human dignity is the affirmation that the experience is

365 Section 10 of Constitution; see also *Du Plessis and others v De Klerk and another* [158]; [159].

366 Steinmann 2016 *PELJ* 2.

367 Habermas 2010 *Metaphilosophy* 470.

368 Steinmann 2016 *PELJ* 2.

369 Lebech 2004 *Maynooth Philosophical Papers* 59.

370 *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another (Justice Alliance of South Africa and others as amici curiae)* 2013 12 BCLR 1429 (CC) (hereinafter referred to as *Teddy Bear*).

371 *Teddy Bear* [52].

372 Lebech 2004 *Maynooth Philosophical Papers* 59-60; see also Steinmann 2016 *PELJ* 2.

> possible in relation to all human beings. When formulated, the principle affirms the fundamental value of every human being, or of human beings as such. It enjoys general acceptance all-round the globe as a basic ethical and legal principle because it draws upon the universal experience of the dynamics of recognition. It clearly is in everyone's interest to be respected as having human dignity, i.e., as having the highest value due to an inalienable humanity (my emphasis).[373]

Du Plessis (finding support from Beyleveld and Brownsword)[374] refers to the twin nature of dignity and argues that human dignity in its form as empowerment consists of two aspects: (1) it serves to protect against "direct attacks" such as for example slavery, torture, verbal abuse, discrimination etc., and (2) for creating the necessary conditions for a person to realise their human dignity in terms of having the right to receive assistance and support and to enable such persons to embellish as a human being.[375] One such example according to Du Plessis, is the socioeconomic rights given to citizens in the Bill of Rights of the Constitution, which must be both promoted as well as protected by the state.[376] In *Makwanyane*[377] Justice O'Reagan stated:

> Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus, recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution.

Late Justice Chaskalson[378] eloquently referred to the essence of human dignity in the following way:

> As an abstract value, common to the core values of our Constitution, **dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony**. It too, however, must find its place in the constitutional order. **Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution**. These rights are **rooted in respect for human dignity,**

373 Steinmann 2016 *PELJ* 2.

374 Beyleveld & Brownsword 2004 *Human dignity in bioethics* 26.

375 Du Plessis *Harmonisation* 215-217.

376 Du Plessis 2019 *CCR* 413-414; see also Du Plessis *Harmonisation* 216.

377 *Makwanyane* [329].

378 Chaskalson 2000 *AJHR* 204.

> **for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves**, without appropriate assistance. In the **light of our history the recognition and realisation of the evolving demands of human dignity in our society - a society under transformation - is of particular importance for the type of society we have in the future** (my emphasis).

The crux for achieving human dignity in a substantive sense and its dependencies as it applies in South African jurisprudence, has been succinctly articulated by the CC in several landmark cases.[379] In *Soobramoney*[380] for example, Chaskalson P stated:

> We live in a **society in which there are great disparities in wealth**. **Millions of people are living in deplorable conditions and in great poverty**. **There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services.** These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. **For as long as these conditions continue to exist that aspiration will have a hollow ring** (my emphasis).

Recognising that the provision of all socioeconomic services (and the restoration of human dignity, equality and freedom) requires resources Chaskalson P went on to say that:

> the obligations imposed on the State by ss 26 and 27 in regard to **access to housing, health care, food, water, and social security are dependent upon the [economic] resources available for such purposes**, and that the corresponding **rights themselves are limited by reason of the lack of [economic] resources**. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified **obligation to meet these needs would not presently** be capable of being fulfilled (my emphasis).[381]

Unarguably, the provision of substantive human dignity and its achievement in the South African context is highly dependent not only on collective action as Justice

379 See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC) (hereinafter referred to as *Soobramoney*); *Makwanyane*; *Grootboom*.

380 *Soobramoney* [8].

381 *Soobramoney* [11].

Yacoob contends,[382] but also on the provision of vast amounts of economic resources which are in turn dependent on a stable and predictable legal and economic environment.[383] Adams postulates that most economists would agree that rising per capita "incomes or expenditures" reduces poverty in the developing world,[384] such would be the case in South Africa for example. Significantly, Adams and others also found that economic growth reduces poverty.[385] The late Justice Langa argued that the persistence of continued poverty is deeply connected to a "lack of education and is tied to a lack of economic growth and opportunities."[386] Furthermore as Justice Langa declared, the quest to eradicate poverty has considerable implications for South Africa's reconciliatory future,[387] correctly implying that the constitutional project (realisation of the constitutional vision) will be endangered if we fail to erase poverty. Justice Theron acknowledging the importance of the economy and contractual certainty in *Beadica* also correctly made a similar point when she stated that our constitutional project would be "imperilled".[388]

2.4.2 Harmonising human dignity with socioeconomic development

In *Du Plessis and Others v De Klerk and another*[389] the learned Kentridge AJ (citing late Justice Mahomed in *Makwanyane*)[390] stated past policies enacted by apartheid had:

> accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour.

In fact, these historical policies has left deep wounds in South Africa's reconstruction and development construct, resulting in many areas of the country lacking in basic

382 Yacoob 2018 "No freedom without dignity" https://www.wits.ac.za/news/latest-news/graduations/2018/no-freedom-without-dignity-and-equality.html (Date of use: 14 October 2020).

383 See section 2.3 above.

384 Adams 2004 *World Development* 2011; the relationship between economic growth, socioeconomic development and poverty reduction will be explored in greater detail in Chapter 3

385 Adams 2004 *World Development* 2011.

386 Langa 2011 *Stell LR* 447-448.

387 Langa 2011 *Stell LR* 447-448.

388 *Beadica* [85]

389 *Du Plessis and Others v De Klerk and another* [158]; [168].

390 *Makwanyane* [262].

socioeconomic development.[391] To add to this, large portions of the population are living in abstract poverty while many lack basic education, skills and the necessary financial resources to enable them to break the never ending cycle of poverty, leaving them with little hope for a better future, and they have been forced into an undignified life stuck in a quagmire of utter misery.[392]

To break away from this undignified life, retired Justice Yacoob proclaimed a social revolution is needed.[393] Undeniably, many would argue further that to achieve this social revolution and to give momentum to improving the quality of life of all South Africans, what is also required is an economic and socioeconomic revolution (one that is able to attract foreign and local investment; increase job creation and the tax base; provide wide scale housing for the indigent, accelerate education and skills levels; reduce crime; stump out corruption by securing the rule of law which gives expression to and enforces legal certainty; provide food, clean running water and sanitation for all) capable of absorbing large portions of the population into a dignified life where everyone can participate fully and equally. A life where we can heal the divisions of our past[394] and build a robust and prosperous society set on a strong foundation of democratic values, rule of law, the achievement of social justice and fundamental human rights.[395] Such achievement will result in the emergence of a truly egalitarian and prosperous society deeply embedded and settled on a foundation of equality, true freedom and the realisation of the constitutional vision.

2.5 Equality and freedom

Du Plessis correctly points out that "equality is enshrined in the Constitution as both a founding constitutional value and a substantive right."[396] The ideal of equality in the formal sense is highlighted under section 9(1)[397] of the Constitution which provides that "[e]veryone is equal before the law and has the right to equal protection

391 *Du Plessis and Others v De Klerk and another* [168].

392 Manuel *Foreword* 1.

393 Yacoob 2018 "No freedom without dignity" https://www.wits.ac.za/news/latest-news/graduations/2018/no-freedom-without-dignity-and-equality.html (Date of use: 14 October 2020).

394 See Preamble of the Constitution.

395 See Preamble of the Constitution.

396 Du Plessis *Harmonisation* 302; see also Albertyn 2007 *SAJHR* 254.

397 Section 9(1) of the Constitution.

and benefit of the law". The focus of this study is on the substantive role played by equality and freedom as foundational constitutional values, in terms of enabling the achievement of appropriate protection and the advancement of all persons or groups or categories of persons disadvantaged for realising the constitutional vision.[398] In *Minister of Finance v Van Heerden*[399] Moseneke J referring to section 9 of the Constitution stated:

> The overall effect of section 9(2), then, is to anchor the equality provision as a whole around the need to dismantle the structures of disadvantage left behind by centuries of legalised racial domination, and millennia of legally and socially structured patriarchal subordination. In this respect it gives clear constitutional authorisation for pro-active measures to be taken to protect or advance persons disadvantaged because of ethnicity, social origin, sexual orientation, age, disability, religion, culture and other factors which have operated and continue to operate to disadvantage persons or categories of persons...The section functions in a manner that gives a clear constitutional pronouncement on issues which have divided legal thinking throughout the world in relation to problems concerning equal protection under the law. **The whole thrust of section 9(2) is to ensure that equality be looked at from a contextual and substantive point of view, and not a purely formal one.** As this Court has frequently stated, our Constitution rejects the notion of purely formal equality, which would require the same treatment for all who find themselves in similar situations. Formal equality is based on a status-quo-oriented conservative approach which is particularly suited to countries where a great degree of actual equality or substantive equality has already been achieved. It looks at social situations in a neutral, colour-blind and gender-blind way and requires compelling justification for any legal classification that takes account of race or gender. **The substantive approach, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved.** In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in

398 For a discussion of the substantive component of the law see Albertyn 2007 *SAJHR* 253-255.

399 *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) (hereinafter referred to as *Minister of Finance v Van Heerden*) [141]; [142].

> helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers (my emphasis).

The promotion of substantive equality and freedom gains full support from the Preamble of the Constitution under sections 1(a)[400] and 9(2)[401] of the Constitution and the many socio-economic rights deeply embedded in the Bill of Rights. Substantive equality and freedom *in sensu* refers to creating an enabling environment for the establishment of an egalitarian South African society, such environment that would facilitate the equal enjoyment of all rights and the provision of true freedoms by levelling the playing field between all members of society.[402] In addition, the notion of achieving substantive equality and freedom requires an understanding of the socioeconomic conditions that facilitate and promote social inequality, and understanding the important role that legal certainty in the law of contract plays in eradicating these socioeconomic conditions. This requires a contextual investigation into prevailing socioeconomic conditions and the very important role that predictable and stable commercial and economic development plays in reducing inequality and extending substantive freedom, in sharp contrast to chaos and unpredictability.[403] Du Plessis (citing Albertyn and Goldblatt)[404] argues that notions of substantive equality as exposed in the Constitution fails to explain what equality means.[405] Relying on Albertyn and Goldblatt, Du Plessis highlights the important fact that:

> the constitutional value of equality should at least embrace both the ideas of 'equality of opportunities' and 'equality of outcomes' which would entail the 'redistribution of power and resources and the elimination of material disadvantage'.[406]

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400 Through the words "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" and "[i]mprove the quality of life of all citizens and free the potential of each person".

401 Section 9(2) states: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

402 See Albertyn 2007 *SAJHR* 254.

403 See Albertyn 2018 *SAJHR* 456-457 where this author explains that "substantive equality in law" is recognising that "equality is not a formal requirement of equal treatment that equates differential treatment to irrational discrimination." She goes on to say that substantive equality is concerned "with the actual impact or results of social and legal classifications: the problem is not differentiation, per se, but the (systemic) harm that might flow from it. To evaluate the harm, the matter must be examined contextually".

404 Albertyn & Goldblatt "Equality" in Woolman & Bishop (eds) *Constitutional law* at 35.1(*a*)-(*b*).

405 Du Plessis *Harmonisation* 303.

406 Du Plessis *Harmonisation* 303.

It is important to bear in mind that the creation of the necessary fertile conditions for creating equal opportunities and promoting substantive equality and freedom, and to bring about a "redistribution of power and resources" and the "elimination of material disadvantage", is equally reliant on a robust and thriving economy that needs strong investment flows and that is itself, reliant on legal certainty in contract law to sustain itself.[407]

2.6 Ubuntu

According to Bennet, apartheids end, and the birth of a new democratic Constitution paved the way for South Africa's indigenous legal systems (as embodied in African customary law) to be included into South African law.[408] Historically this was the first occasion in the history of South African jurisprudence where *Ubuntu* "a typically African concept" was accepted into the "general law of the law of the land."[409] Davis and Klare correctly argue that South Africa has an advanced Constitution that is enlightened by "the values of social interdependence and ubuntu".[410] In *Everfresh* Justice Yacoob stated:

> The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. **The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce.** And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone (my emphasis).[411]

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407 See section 2.2 above for a discussion of what legal certainty entails, particularly that most investment flow requires legal certainty and that the more legal certainty a country has the greater will be investment flow into that country. This will add momentum to domestic economic growth.

408 Bennet 2011 *PELJ* 30.

409 Bennet 2011 *PELJ* 30.

410 Davis & Klare 2010 *SAJHR* 403.

411 *Everfresh* [23].

Ubuntu can be described as the capacity in an African culture to express compassion, reciprocity, dignity, humanity and mutuality in the interests of building and maintaining communities with justice and mutual caring.[412] The conceptual understanding of *Ubuntu* must be understood within the contextual understanding of indigenous people.[413] Indigenous people believe that the conservation of social harmony lies in linking the individual interests with that of the society.[414] In other words, the individuals interest is collectively weaved to the best interest of the community.[415] Although *Ubuntu* recognises individual interest, it fosters the broader idea that dignity, health and social welfare of the society takes priority and must be protected.[416] Despite man being central to his surroundings, *Ubuntu* prescribes that a person can only be a person in relation to others in society.[417] On the other hand community recognition can only be achieved through the individual members of society.[418] The vision of the Constitution articulates the creation of an egalitarian society where everyone benefits mutually.[419] The vision of the Constitution therefore aligns well to the concept *Ubuntu* in that the best interest of society is promoted, advanced and protected.

2.7 Abstract notions of fairness, justice, reasonableness and equity

Abstract notions about fairness, justice, reasonableness and equity, has long occupied the minds of civilization in the western world.[420] In reality there is no other ideal that has persistently been linked to ethics and morality than the concepts fairness and justice.[421] Since Plato's book the *Republic* to the more comparatively

412 Kusemwa E Kusemwa C "Ubuntu Philosophy: an old solution for contemporary problems" http://kubatana.net/2018/11/12/ubuntu-philosophy-old-solution-contemporary-problems/ (Date of use: 21 October 2020).

413 Van Niekerk 1998 *CILSA* 168.

414 Kusemwa E Kusemwa C "Ubuntu Philosophy: an old solution for contemporary problems" http://kubatana.net/2018/11/12/ubuntu-philosophy-old-solution-contemporary-problems/ (Date of use: 21 October 2020).

415 Van Niekerk 1998 *CILSA* 168.

416 Van Niekerk 1998 *CILSA* 168; also see *Makwanyane* [308]; Cornell & Van Marle 2005 *AHRLJ* 206, where these authors state "The community is not something 'outside', some static entity that stands against individuals. The community is only as it is continuously brought into being by those who 'make it up'... The community, then, is always being formed through an ethic of being with others, and this ethic is in turn evaluated by how it empowers people."

417 Van Niekerk 1998 *CILSA* 168.

418 Van Niekerk 1998 *CILSA* 168.

419 See section 2.10 below.

420 Manuel Velasquez, Claire Andre, Thomas Shanks and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

421 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

recent writings of John Rawls *A Theory of Justice*, major writings on the subject ethics, have argued that justice lies at the heart of morality.[422] In simplified form, the essence of justice is to give to each man what is due to her/him.[423] The concepts justice and fairness are intrinsically linked to each other and these terms are used "interchangeably" in everyday language. In its more technically correct meaning, justice is used to refer the degree of righteousness, while fairness has reference to impartial adjudication without influence by one's feelings.[424] Fairness is also employed when passing judgements on matters and refers to the ability to make concrete and specific judgments that concern a particular case. A central idea of these two concepts is the notion that everyone should be treated fairly and in a way that they deserve to be treated.[425]

2.7.1 The determination of fairness in the law of contract

In *Barkhuizen* Ngcobo J outlined two questions that must be asked to establish whether a contractual term was fair.[426] The first question to be asked is: is the contractual clause unreasonable? If it is found that the clause is reasonable, the second question to be asked is: should it be enforced under the background circumstances which caused noncompliance of the clause.[427] Answering the first question requires the scaling and balancing of two key considerations. Firstly, public policy as directed by the Constitution generally requires that contractual parties who have freely and voluntarily contracted must comply with their contractual obligations.[428] This ideal takes expression from the maxim *pacta sunt servanda* which the SCA has on a number of occasions stated "gives effect to the central constitutional values of freedom and dignity."[429] Ngcobo J went on to say that "Self-autonomy, or the ability to regulate one's own affairs" even if this results in "one's

422 Velasquez M Andre C Shanks T and Meyer MJ Meyer "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

423 Velasquez M Andre C Shanks T and Meyer MJ Meyer "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

424 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

425 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

426 *Barkhuizen* [56].

427 *Barkhuizen* [57].

428 *Barkhuizen* [57].

429 *Barkhuizen* [57].

own detriment, is the very essence of freedom and a vital part of dignity."[430] In determining fairness, the degree to which "the contract was freely and voluntarily concluded" is a critical factor for determining the "weight that should be afforded to the values of freedom and dignity."[431]

The second question revolves around inquiring into the background circumstances that caused the party to fail to comply with the contractual clause.[432] Where the clause is found to be unreasonable or impossible for a party to comply with, this would necessitate special circumstances and fairness would require that the court restrict enforcement of the clause.[433] However, the party that wishes to avoid enforcement of the clause bears the burden of proving that the clause is unreasonable or impossible to comply with.[434] More simply stated this means after having established that the clause fails to be contrary to public policy and non-compliance has been established, the party seeking non enforcement of the clause must show that under the circumstances of the case there was a very good reason why it failed to comply with its contractual obligations.[435] This approach in the current common law of contract to a certain degree establishes fairness, reasonableness and predictability in the law of contract.

2.7.2 Multiple faces of Justice

One of the central issues of importance to philosophy, has been justice.[436] For time immemorial philosophers such as Plato and Aristotle, have grappled with defining justice.[437] Justice is generally seen to be action in accordance with the requirements of some law.[438] Whether these rules are grounded in human consensus or societal norms, they are supposed to ensure that all members of society receive fair

430 *Barkhuizen* [57].
431 *Barkhuizen* [57].
432 *Barkhuizen* [58].
433 See *Barkhuizen* [58].
434 *Barkhuizen* [58].
435 *Barkhuizen* [58].
436 Hamedi 2014 *Mediterranean Journal of Social Sciences* 1163.
437 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).
438 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

treatment.[439] Issues of justice arise in several different spheres and play a significant role in causing, perpetuating, and addressing conflict.[440] Justice has multiple faces[441] and can be divided into the following key compartmental forms: (1) distributive justice, (2) retributive or corrective justice and (3) compensatory justice.[442] Corrective or retributive justice finds expression in the degree to which punishment is meted out. That is, the level to which justice served is just and fair.[443] In this regard, punishment that is meted out is regarded as just when it is counterbalanced against appropriate standards such as the seriousness of a crime and criminal intent. The next form of justice is compensatory justice.[444] Compensatory justice takes root in the manner that individuals in a society, receive fair compensation for the injuries that they sustain from the injuring party. The degree of justice is demonstrated by the amount of compensation received by the injured party in relation to the injury inflicted on an individual.[445] The form of justice that is of concern to us in this study is economic or distributive justice which is discussed next.

2.7.2.1 Distributive-economic justice

Distributive justice alternatively known as economic justice, is deeply grounded on notions that all the members of society should participate in and receive an equitable share of the resources and benefits accessible for the community.[446] There is general widespread agreement that economic wealth belonging to a society should be evenly distributed. However, there is much dissent as to what constitutes an

439 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

440 Maiese M & Burgess H "Types of Justice" https://www.beyondintractability.org/essay/types_of_justice (Date of use: 20 October 2020).

441 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

442 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

443 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

444 Maiese M & Burgess H "Types of Justice" https://www.beyondintractability.org/essay/types_of_justice (Date of use: 20 October 2020).

445 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

446 Maiese M & Burgess H "Types of Justice" https://www.beyondintractability.org/essay/types_of_justice (Date of use: 20 October 2020).

equitable distribution.[447] It is generally accepted that resource distribution should be based on criteria such as equality, equity, and social need. In this sense, equity implies that rewards should be commensurate with the level of contribution made while equality suggests receiving the same irrespective of one's contribution.[448] Socioeconomic delivery that is needs based, implies that those who have a greater need should receive a greater proportionate share of resources than those who have less need.

The fair and equitable distribution of economic and other social resources otherwise termed economic justice is instrumental for ensuring a stable, balanced and prosperous society.[449] It is important to note that when economic justice is unjustifiably neglected, insufficiently addressed or withheld and such resource is highly valued by the community, obstinate conflict for the scarce resources is bound to raise its head.[450] This position is reflective of the large-scale public demonstrations (concerning a lack of service delivery and job creation) currently transpiring in many parts of South Africa.[451] The cornerstones of the justice concept are founded in ideas of "social stability, interdependence, and equal dignity."[452] Social stability rests on the degree that the members of society sense that their treatment is fair and just.[453]

447 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

448 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

449 See Hayes A "Economic Justice" https://www.investopedia.com/terms/e/economic-justice.asp (Date of use: 21 October 2020) where this author discusses the basic idea around economic justice which according to him is "a set of moral and ethical principles for building economic institutions" and "where the ultimate goal is to create an opportunity for each person to establish a sufficient material foundation upon which to have a dignified, productive, and creative life."

450 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

451 See Ngcamu 2019 The Journal for Transdisciplinary Research in Southern Africa 1-10; Ngumbela 2020 The Journal for Transdisciplinary Research in Southern Africa 1-10; Gouws N "Service delivery protests are on the rise this year, warn experts" 1-10; https://www.timeslive.co.za/news/south-africa/2019-06-11-service-delivery-protests-are-on-the-rise-this-year-warn-experts/ (Date of use: 31 December 2020); ProBono "Service Delivery Protests in SA" https://www.probono.org.za/service-delivery-protests-in-sa/ (Date of use: 31 December 2020).

452 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

453 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

In cases where the members of society believe that they are being treated unequally, the seeds for dissention will be planted and social unrest will take root.[454]

2.8 Public policy

Pre-constitutionally public policy and its importance have always been part of our common law of contract. In *Schierhout v Minister of Justice*[455] Kotze JA stated:

> If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land.

In *Sasfin* the court recognising public policy compliance as a yardstick for judicial enforcement, struck down a deed of cession because it found that multiple clauses contained in the agreement were grossly inequitable; "incompatible"; "unconscionable" and "exploitive", so much so, that it "must inevitably offend against the *mores* of the public" and therefore could not be endured.[456] Hence, making it clear that contracts contrary to public policy are not recognised in our law.[457] Here, although recognising that public policy favours "utmost freedom of contract",[458] the court also pointed out that public policy required taking into account the "doing of simple justice between man and man".[459] Smalberger JA giving recognition to the importance of public policy considerations[460] as a controlling mechanism for contractual agreements warned, the power to strike down contracts that are contrary to public policy should be exercised "sparingly" and only in the "clearest of cases" so as to avoid uncertainty as to the validity of contracts.[461]

Post-constitutionally in *Barkhuizen*, Ngcobo pointed out that ideas of "fairness, justice and equity, and reasonableness cannot be separated from public policy."[462]

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454 Velasquez M Andre C Shanks T and Meyer MJ "Justice and Fairness" https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/ (Date of use: 16 October 2020).

455 *Schierhout v Minister of Justice* 1925 AD 417 at 424.

456 *Sasfin* 357-359.

457 *Sasfin* 357.

458 *Sasfin* 351.

459 *Sasfin* 352.

460 *Sasfin* 350.

461 *Sasfin* 351.

462 *Barkhuizen* [51].

Ngcobo J confirmed that the underlying values as expressed in the Bill of Rights must be considered when determining the fairness of a contractual clause.[463] "Fairness, justice and equity, and reasonableness" he articulated, are inseparable "from public policy" and public policy personifies "the legal convictions of the community."[464] Public policy symbolises the values that society value most while also recognising the need to "do simple justice between individuals" while at the same time being "informed by the concept of *ubuntu"*.[465] What public policy is and whether a term in a contract is conflicting to public policy now has to be established by referring to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights.[466] Hence, any contractual term that is in conflict with our constitutional values as enshrined in the Constitution, is contrary to public policy and therefore cannot be enforced.[467] However it is also important to remember that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly restrained by restrictions on that freedom, provided that such freedom does not trammel constitutional values and rights.[468]

In *Bafana Finance Mabopane v Makwakwa and another* [469] the SCA had to decide on the public policy implications of a contractual term that restricted access to our courts. Cachalia AJA in a unanimous judgement stated:

> a court may not enforce an agreement because **the objective it seeks to achieve is contrary to public policy is firmly part of our law**. And in this determination 'public policy' **is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms**. [O]ur Courts have had no difficulty in declaring contracts contrary to public policy where their tendency…is to restrict or prevent a person from vindicating his or her rights in the courts (my emphasis).

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463 *Barkhuizen* [29], [30].

464 *Barkhuizen* [28].

465 *Barkhuizen* [28]; [51]; [73].

466 *Barkhuizen* [28]; [29].

467 *Barkhuizen* [29].

468 *Barkhuizen* [57]; [159].

469 *Bafana Finance Mabopane v Makwakwa and another* 2006 4 All SA 1 (SCA) (hereinafter referred to as *Bafana Finance*).

In *Beadica* Theron J pointed out that there "is only one system of law in our constitutional democracy."[470] She went on to say that this

> system of law is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. The determination of public policy is now rooted in the Constitution and the objective, normative value system it embodies. Constitutional rights apply through a process of indirect horizontality to contracts. **The impact of the Constitution on the enforcement of contractual terms through the determination of public policy is profound. A careful balancing exercise is required to determine whether a contractual term, or its enforcement, would be contrary to public policy**. ….[that] [t]here can be no doubt that public policy is now deeply entrenched in our law of contract. **Public policy is clearly grounded in our constitutional values of dignity, equality and freedom and the achievement of an equal and egalitarian society.** The tone has been set on the public policy view that will be taken by our courts in the law of contract. Where a clause is unfair or unconstitutional or alternatively aims to deprive or restrict a party of their right to approach a court to seek redress, our courts have made it clear that this will be viewed as offensive to the sense of justice and will be inimical to the public interest. **It is clear that public policy imports values of fairness, reasonableness and justice. *Ubuntu*, which encompasses these values, is now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informs public policy**. These values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy (my emphasis).[471]

Theron J also makes it clear that although these values play an important part in "public policy analysis" these common law values also perform "creative, informative and controlling functions" by finely informing our "substantive law of contract" and that a number of conventional doctrines of "contract law are themselves the embodiment of these values."[472] Theron J points out that these values are fundamental to the way that they are applied to the development of the common law of contract.[473] Our courts are directed through section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when developing the

470 *Beadica* [72].

471 *Beadica* [71]; [72].

472 *Beadica* [73].

473 *Beadica* [73].

common law.[474] In situations where the common law diverges from the spirit, purport and objects of the Bill of Rights, courts are assigned to develop it and to rectify such deviation so that the common law aligns to the Constitution.[475]

In developing the common law of contract, it is important to remember the transformative mandate of the constitution, which is embodied in the constitutional vision. When adjudicating cases our courts are required to pursuit substantive justice, which is contingent to the foundational values of the Constitution which seeks transformation.[476] Theron J states that these underlying values should be creatively employed by the courts "to draw normative impetus and develop new doctrines that address deficiencies in the law of contract."[477] Recognising the necessity for both transformation and certainty in the law of contract Theron J points out that the CC has recognised the need to infuse the common law of contract with the necessary constitutional values, while at the same time cautioning that this must be done with "both resourcefulness and restraint" and that the development of the common law of contract must be exercised in an incremental fashion as the facts of each case require.[478] Theron J highlights the importance that

> [t]he development of new doctrines must also be capable of finding certain, generalised application beyond the particular factual matrix of the case in which a court is called upon to develop the common law. While abstract values provide a normative basis for the development of new doctrines, prudent and disciplined reasoning is required to ensure certainty of the law.[479]

Public policy also favours freedom of contract and the advancement and promotion of human dignity, equality, freedom, and the advancement of society. At the same time public policy also regards commercial transacting as important and as such, it should not be unduly restrained by restrictions on freedom of contracting,[480] because public policy generally favours the advancement of society. The advancement of society however, can only be brought about by a vibrating and pulsating economic

474 See section 39(2) of the Constitution.

475 *Beadica* [73].

476 *Beadica* [74].

477 *Beadica* [75].

478 *Beadica* [76].

479 *Beadica* [76].

480 *Barkhuizen* [159].

and commercial environment, that at the same time, respects and promotes human rights. As stated in *Barkhuizen* (citing *Sasfin*) the community or public interest is of the highest importance with respect to the public policy concept.[481] Contractual agreements that go against the grain of the communal interest or are contra "morality" or the law, or go against "social or economic expedience, will accordingly, on the grounds of public policy, not be enforced."[482]

2.9 Economic and socioeconomic development

The conceptualisation of economic and socioeconomic development, revolves around improving the well-being of every individual in society so they can achieve their full potential.[483] Litwiński (citing Stemplowski[484]; Chojnicki[485] and the UNDP[486]) defines socioeconomic development as the "process of quantitative, qualitative and structural changes that are a result of actions of subjects taken within social and economic practices.[487] These changes according to Litwiński, alters and exerts influence on peoples living conditions in the areas of:

> material conditions (possibility to satisfy needs associated with consumption of goods and services; it is related with the phenomena of economic growth), economic structure and entrepreneurship, access to public goods and services (that results in changes of education level, a way of taking care of someone's health etc.), relations within social system (integration between individuals, trust, security, social conflicts), environment condition, and life satisfaction.[488]

The government of New Brunswick in Canada correctly views socioeconomic development as being linked "to the well-being of each and every citizen" and a means to "investing in people."[489] Significantly so, socioeconomic development necessitates the grazing of invisible barriers (such as creating legal uncertainty) so

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481 *Barkhuizen* [158].

482 *Barkhuizen* [158]; see also *Sasfin* at 350.

483 New Brunswick "What is social development?" https://www2.gnb.ca/content/gnb/en/departments/esic/overview/content/what_is_social_development.html (Date of use: 13 October 2020); this same idea is also expressed by *Ubuntu*; also see section 3.3.1 of Chapter 3.

484 See Stemplowski *Rozwój jako przedmiot dyskusji* 5.

485 See Chojnicki 2010 *Quaestiones Geographicae* 7-17.

486 United Nations Development Programme (hereinafter referred to as UNDP).

487 Litwiński 2017 *Ecomomics and Law* 450.

488 Litwiński 2017 *Ecomomics and Law* 450.

489 New Brunswick "What is social development?" https://www2.gnb.ca/content/gnb/en/departments/esic/overview/content/what_is_social_development.html (Date of use: 13 October 2020).

that the citizens of a country are able to realise "their dreams with confidence and dignity."[490] They express the notion that socioeconomic development is "about refusing to accept that people who live in poverty will always be poor", and go on to say that it involves assisting citizens to move forward on their path to self-sufficiency.[491] The government of New Brunswick, express the importance of investing in people, which they correctly argue will contribute to the economic prosperity of society and result in job creation, healthy citizens and an active and safe and secure community.[492] Applying the same ideas to the South African situation hold true and can be realised for South Africa's visionary transformation. Much has been said about the constitutional vision of South Africa, but what is the constitutional vision? In the next section the vision of the Constitution will be discussed.

2.10 The vision of the Constitution- linkages

Peter Senge[493] in his revolutionary book *The fifth Discipline*, describes the term "vision" as being a mental picture of where we are and what we want to be, at some future point in time (preferred state).[494] He describes the journey of getting to the vision as the determination of where we are at any given point in time, and then establishing what actions (objectives) needs to be completed to get us to where we want to be in the future.[495] Senge, describes this transition as "creative tension".[496] Davis and Klare point out that:

> The 'Constitution is a document committed to social transformation', as the Constitutional Court …… 'has emphasised on many occasions'. The 'Constitution has set itself the mission to transform society in the public and private spheres'. The Constitution of the Republic of South Africa,1996 embraces an aspiration and an intention to realise in South

490 New Brunswick "What is social development?" https://www2.gnb.ca/content/gnb/en/departments/esic/overview/content/what_is_social_development.html (Date of use: 13 October 2020).

491 New Brunswick "What is social development?" https://www2.gnb.ca/content/gnb/en/departments/esic/overview/content/what_is_social_development.html (Date of use: 13 October 2020).

492 New Brunswick "What is social development?" https://www2.gnb.ca/content/gnb/en/departments/esic/overview/content/what_is_social_development.html (Date of use: 13 October 2020); see also Sen *Development as freedom* 3 where this author views development as an instrument to develop people so that they can improve their abilities and chances of living a better life.

493 Senge *Fifth Discipline* 413.

494 Senge *Fifth Discipline* 413.

495 Senge *Fifth Discipline* 413.

496 Senge *Fifth Discipline* 413.

> Africa a democratic, egalitarian society committed to social justice and self-realisation opportunities for all.[497]

Justice Yacoob in similar vein, explains that the Constitution is a vision of a future society that South Africans needs to create and nurture by mutually contributing and working together.[498] The late Justice Langa[499] also explained that the Preamble of the Constitution, provides a vivid description of the vision of the Constitution and citing the Preamble of the Constitution stated that the vision of the Constitution is embodied in the following words:

> We, the people of South Africa, **Recognise the injustices of our past**; **Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country**; and **Believe that South Africa belongs to all who live in it, united in our diversity**. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - **Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights**; Lay the foundations for a democratic and open society in which government is based on the will of the people and **every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person;** and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations (my emphasis).

Langa goes on to say that this is a "far reaching vision"[500] and is indicative of the creative tension that Senge referred to above. Justice Yacoob also pointed out that the Constitution places an active duty on South African society to make a sustained contribution to creating the "society contemplated" in the Preamble of the Constitution.[501] Hence, we need to evaluate the objectives that the vision of the Constitution aspires to, and urges us to achieve, by looking closely at the words of the Preamble. Firstly, the Preamble of the Constitution says that we need to "[h]onour those who suffered for justice and freedom in our land"[502] and also urges us to "[r]espect those who have worked to build and develop our country.[503] It also

497 Davis & Klare 2010 *SAJHR* 404.

498 Yacoob 2016 *S Afr J Sci* 2.

499 Langa 2003 *SALJ* 670.

500 Langa 2003 *SALJ* 670.

501 Yacoob 2016 *S Afr J Sci* 2.

502 Preamble of the Constitution.

503 Preamble of the Constitution.

asks that we "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". Furthermore, it urges us to cast the "foundations for a democratic and open society" and to "[i]mprove the quality of life of all citizens and free the potential of each person". It proposes that by doing all of this, we will be able to "Build a united and democratic South Africa" that will be capable of taking "its rightful place as a sovereign state" in the world.[504] More simply put, the vision that the Constitution foresees, is a future South Africa that is personified in a truly egalitarian society.

So how does all the above tie in with the importance of legal certainty in the common law of contract for promoting the constitutional vision. In this regard, I revert back to the words of late Justice Chaskalson who stated that our society is one in which there are great disparities in wealth and further pointed that "[m]illions of people are living in deplorable conditions and in great poverty."[505] This situation he stressed is compounded by "high level[s] of unemployment, inadequate social security," and he went on to say that many South Africans "do not have access to clean water or to adequate health services."[506] Furthermore he acknowledged that such conditions was already existent at the time "the Constitution was adopted" and that a promise was made to attend to these serious issues and to "transform our society into one in which there will be human dignity, freedom and equality", values that are foundational to our "new constitutional order".[507] It is self-evident that as Chaskalson opined "as long as these conditions continue to exist that aspiration will have a hollow ring."[508]

To resolve the socioeconomic crisis that afflicts South African society and to fulfil the objectives of the constitutional vision, there will have to be a major thrust forward in providing socioeconomic development to give dignity, equality and freedom to society at large, in the areas of housing, healthcare, employment, sanitation, skills development and importantly education.[509] The provision of each of these services

504 Preamble of the Constitution.

505 *Soobramoney* [8].

506 *Soobramoney* [8].

507 *Soobramoney* [8].

508 *Soobramoney* [8].

509 See National Planning Commission *National Development Plan* 2030.

relies on a vibrant and pulsating economy and robust commercial activity, which is in turn dependent on legal certainty in the law of contract. In the next chapter, the importance of economy, commerce, and socio-economic development for promoting the constitutional vision will be addressed.

2.11 Conclusion

This chapter introduced and discussed several important and necessary concepts (such as the constitutional values rule of law, legal certainty as an expression of the rule of law, human dignity, equality, freedom and *Ubuntu*; the common law values of good faith and abstract notions of fairness, justice, reasonableness, equity and then lastly, public policy and the constitutional vision). Understanding these concepts is important to determine the very important role, that each of these play with regards to the importance of legal certainty in the South African common law of contract, in promoting the constitutional vision. In this chapter, these essential concepts were identified, set out, analysed, and discussed to establish a general understanding of these terms in relation to what they mean and how they directly or indirectly relate to the importance of legal certainty in the law of contract for promoting the constitutional vision. The next chapter will look at the importance of the economy and commerce as drivers of socioeconomic development and reform. The intertwining relationship between economic and commercial growth and socioeconomic development, contractual certainty, and public policy for achieving substantive equality and the realisation of the constitutional vision, will also be explored and discussed.

CHAPTER 3: CERTAINTY AND THE IMPORTANCE OF ECONOMY, COMMERCE AND SOCIOECONOMIC DEVELOPMENT FOR PROMOTING THE CONSTITUTIONAL VISION

3.1. Introduction

In a developing unequal society such as South Africa,[510] the importance of economic development, commerce, socioeconomic development, substantive equality, and the realisation of the constitutional vision cannot be overstated. Economic development, coupled to socioeconomic development and substantive equality that will lead the way to the creation of wealth and freedom from material need for all citizens,[511] is key to realising the constitutional vision. Economic and socioeconomic growth and development and a robust commercial sector which relies on contractual certainty are all critical factors required for reducing poverty, eliminating inequality, creating more jobs, developing markets, promoting the development of small, medium, and micro enterprises (SMMEs)[512] and for ensuring community and nation building.[513]

Therefore, there is a significant interweaving relationship between economy, commerce, socioeconomic development, legal certainty, substantive equality, and the achievement of the constitutional vision. This chapter will explore the importance of the economy and commerce on socioeconomic development. This chapter looks at the importance of the economy and commerce and the important role these play, in driving and contributing to socioeconomic development and reform and the achievement of substantive equality. Beginning with an explanation of the basic circular flow of money model in a simple mixed economy this chapter aims to highlight and discuss the very important role that economic and commercial

510 See Webster D "Why South Africa is the world's most unequal society" https://mg.co.za/article/2019-11-19-why-sa-is-the-worlds-most-unequal-society/ (Date of use 22 December 2020); Hundenborn Woolard & Jellema 2019 International *Tax and Public Finance* 1019; see also TPS "Inequality and Economic Inclusion" https://www.tips.org.za/research-archive/inequality-and-economic-inclusion (Date of use: 04 January 2021)

511 See Philip Mbofholowo & Zwane *Social Economic Inequality* 11-19.

512 See Stan 2014 *Studies and Scientific Researches Economics* 165-166, for a discussion on the important role of Small Medium and Micro enterprises in an economy.

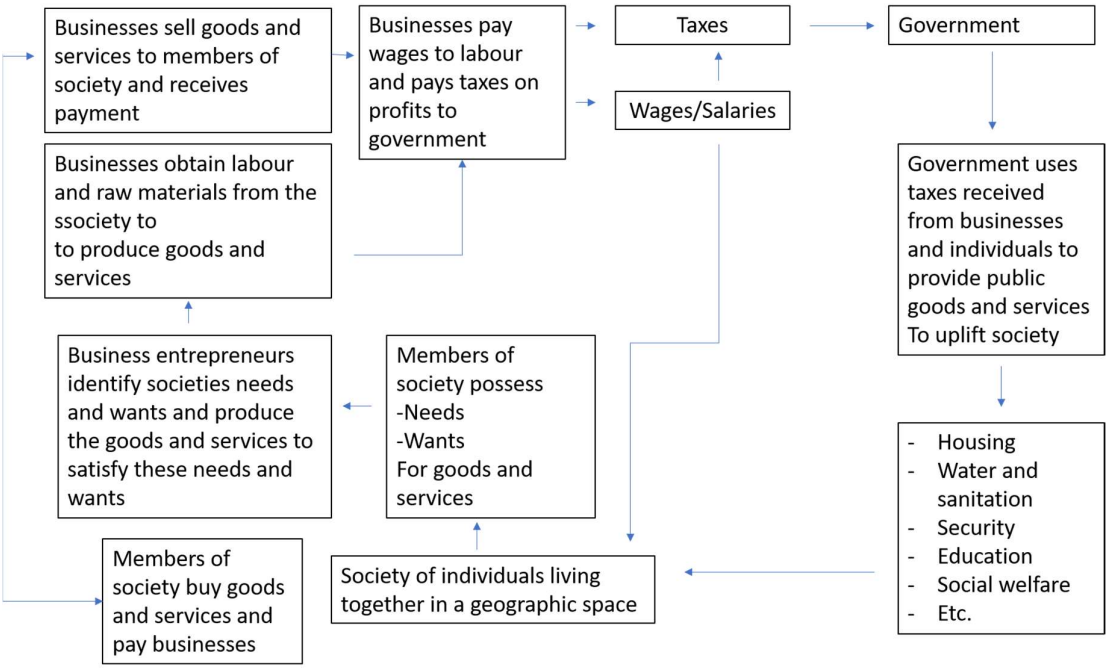
513 See Wyngaard *An introduction to Economic Development* 2, where this author discusses the importance of economic development for the Western Cape. The same extrapolations can be made for national economic development; due to length constraints of this dissertation it was not possible to discuss nation building in detail, for a comprehensive discussion of nation building see Rhoodie & Libenberg (eds) *Democratic nation-building in South Africa* 25-39; see also Singh & Chudasama 2020 *PLoS ONE* 1-3, where these authors discuss a number of policy alleviation strategies for reducing poverty.

developments play in the development of an egalitarian society. The very important role of business and the business need for legal certainty in contractual relations is also critically evaluated and discussed.

3.2 Basic economic model of the circular flow of money in a simple mixed economy

Figure 1 below, describes the mechanics of how money flows in a basic mixed economy. A mixed economy refers to an economy where the allocation of resources, commerce, and trade occurs with government intervention.[514]

Figure 1: Circular flow of money in a simple mixed economy



A mixed economy arises when the government of a country intervenes in the economy to upset the natural working of free market principles through the introduction, ownership and management of state-owned enterprises (such as electricity, provision of public health and education), the introduction of various

514 Encyclopaedia Britannica "Mixed economy" https://www.britannica.com/topic/mixed-economy (Date of use: 15 November 2020); for more detailed discussions of mixed economic systems see Leonard 1985 *Eastern Economic Journal* 190-199; Nelson 1987 *Journal of Policy Analysis and Management* 541-557; Hyman 1978 *Management International Review* 59-71.

regulations, tax measures, trade and other tariffs, state subsidies, etc.[515] A mixed economy may also come about when a socialist government makes allowance for private ownership of some public services such as telecommunications (MTN Group Ltd; Vodacom (Pty) Ltd; Cell C Ltd) or may partner with the private sector to provide a public service (Telkom SA SOC) so that it benefits economically from "private ownership and free market incentives."[516] A combination of free market principles of private contracting and socialist principles of state ownership or planning is common to all mixed economies.[517]

The circular flow of money in a mixed economy begins with and is driven by the needs and wants of all the members of the society.[518] All members in a society have basic needs and wants for goods and services. These needs and wants are translated into consumer demand, which in turn is satisfied by business enterprises in return for profit.[519] In order to fulfil societies needs and wants, entrepreneurial individuals in business enterprises (using their knowledge skills and resources) identify the particular needs of the society; invest capital to secure manufacturing equipment and other resources, recruit and employ staff from the society and from these inputs, create the required products and services to fulfil these needs and wants.[520] The businesses sell the finished products and services to members of the society to make a profit.[521] In return for their labour input services to the business, employees receive payment in the form of wages and salaries.[522]

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515 Encyclopaedia Britannica "Mixed economy" https://www.britannica.com/topic/mixed-economy (Date of use: 15 November 2020); see also Corporate Finance Institute "What is an Economic System?" **https://corporatefinanceinstitute.com/resources/knowledge/economics/economic-system/** (Date of use: 30 December 2020) for a basic explanation of the different economic systems available to governments to enable them to distribute resources in the economy of a country.

516 Encyclopaedia Britannica "Mixed economy" https://www.britannica.com/topic/mixed-economy (Date of use: 15 November 2020).

517 Encyclopaedia Britannica "Mixed economy" https://www.britannica.com/topic/mixed-economy (Date of use: 15 November 2020).

518 Study.com "Circular Flow Diagram in Economics: Definition & Example" https://study.com/academy/lesson/circular-flow-diagram-in-economics-definition-example.html (Date of use: 12 November 2020); see also Skripak *Fundamentals of Business* 32-33; see also McGregor Camfield & Woodcock *Applied Research Quality Life* for an interesting and concise explanation of needs and wants and quality of life 135-154.

519 Skripak *Fundamentals of Business* 24; Bola & Bosede 2014 *Journal of Business Management and Economics* 91; Allaire Y "What is the role of business?" https://www.weforum.org/agenda/2014/01/role-business/ (Date of use: 17 November 2020).

520 Skripak *Fundamentals of Business* 32-33; see also Zvavahera Chigora & Tandi 2018 *International Journal of Academic Research in Business and Social Sciences* 58-59; Kritikos 2014 *IZA World of Labor* 1-9, for a discussion of the important role of entrepreneurship in creating jobs and promoting economic growth.

521 Skripak *Fundamentals of Business* 32-33; see also Bola & Bosede 2014 *Journal of Business Management and Economics* 91.

522 Skripak *Fundamentals of Business* 33.

The employees pay taxes on the income they earn, which is paid over by the business to the government.[523] The balance of income after taxes paid, is the disposable household income (income after taxes) which accrues to the different households in the community.[524] The household disposable income in turn, is used to pay businesses for the goods and services which the households demand, while the income earned from the sale of products and services by the businesses in turn, is also used to pay taxes levied on the profits made by the businesses and value added tax (hereinafter referred to as VAT) to government. Hundenborn Woolard and Jellema state that during the 2016/2017 tax year taxes collected by the South African government was twenty-six-point two percent (26.2%) of South Africa's total GDP. These authors also point out, that from this amount of GDP collected, sixty percent (60%) was derived from direct taxes, while forty percent (40%) came from indirect taxes.[525] They further expand on this, by stating that of the taxes collected by government "direct taxes" made up a little more than sixty six percent driving home the point that "roughly two-thirds come from personal income tax."[526]

Government uses the taxes it receives from individuals and businesses to provide public goods (goods that are provided without profit for the benefit all members of society which include *inter alia* services such as education, water and sanitation, security, social services, housing, etc).[527] Taxes received from businesses and individuals besides paying for public goods and services, also form a major component for securing the social contract between citizens and the economy.[528] The way that governments raise taxes can determine the legitimacy of

523 Vuku'zenzele "Where does Government money come from? How is it spent?" https://www.vukuzenzele.gov.za/where-does-government-money-come-how-it-spent (Date of use: 13 November 2020).

524 Chaplin *Economics* 4; see also Inchauste et al 2015 *World Bank Group Policy Research Working Paper* 3, where these authors explain that personal disposable income equates to gross income less exemptions and allowable deductions and point out that government also levies tax on capital gains. They point out that individuals receive income in the form of "salary/wages, pension/annuity payments and investment income (interest and dividends)"; see also Hundenborn Woolard & Jellema 2019 *International Tax and Public Finance* 1022-1023, for a brief but excellent discussion on the tax system in South Africa.

525 Hundenborn Woolard & Jellema *International Tax and Public Finance* 1022.

526 Hundenborn Woolard & Jellema *International Tax and Public Finance* 1022.

527 Vuku'zenzele "Where does Government money come from? How is it spent?" https://www.vukuzenzele.gov.za/where-does-government-money-come-how-it-spent (Date of use: 13 November 2020).

528 World Bank "Paying taxes why it matters?" https://www.doingbusiness.org/en/data/exploretopics/paying-taxes/why-matters (Date of use: 13 November 2020).

government.[529] By levying higher personal income taxes on higher wage earners and lower taxes on lower wage earners the distribution of wealth in the economy is transferred.[530] The principle purpose for taxation is to reallocate economic resources "from one group to another one" with the primary objective of achieving "certain development objectives without jeopardizing economic goals."[531] Szarkowská correctly describes taxation equity as having what she describes as "both horizontal and vertical components."[532] She goes on to say that "horizontal equity" is achieved when tax payers who have "equal ability to pay taxes" are treated equally and share an equal burden to pay taxes.[533] While "vertical equity" on the other hand she argues, relates to the "tax burdens" that individual having unequal ability and capacity to pay tax, are treated differently.[534] Such would be the case in South Africa for example.

In this way the quality of life of everyone (especially the poor) in the society is improved and uplifted and the substantive notion of human dignity, equality and freedom is restored.[535] Government expenditure on the provision of public goods such as education, skills development, social services and healthcare provide a safety net for the poor that results in the longer term upliftment of poor communities who are then able to participate meaningfully in the economy and improve their living conditions.[536] Hence, it is vital that the circular flow of money in the economy continues to flow and grow, if government is to meet societies expectations of a better life for all.

3.3 Economic growth and its impact on socioeconomic development

In a mixed economic system, the economy plays a critically important role for providing citizens with the required goods and services they need (such as clothing, food, motor vehicles, cell phones, housing, etc.), as well as providing the government with much needed financial resources to provide the necessary public

529 World Bank "Paying taxes why it matters?" https://www.doingbusiness.org/en/data/exploretopics/paying-taxes/why-matters (Date of use: 13 November 2020).

530 Joumard Pisu & Bloch 2012 *OECD Journal: Economic Studies* 2-4.

531 Szarkowská 2014 *Procedia Economics and Finance* 663.

532 Szarkowská 2014 *Procedia Economics and Finance* 663.

533 Szarkowská 2014 *Procedia Economics and Finance* 663.

534 Szarkowská 2014 *Procedia Economics and Finance* 663.

535 See section 2 of chapter 2.

536 See Monchuk *Reducing Poverty* 16-17.

goods (to satisfy the socioeconomic development and public good needs of the society).[537] To measure the performance of an economy, economist rely on a commonly used measure of total output of the economy as a whole, referred to in economic terms as gross domestic product (GDP).[538] Skripak defines GDP as:

> the market value of all goods and services produced by the economy in a given year. The GDP includes only those goods and services produced domestically; goods produced outside the country are excluded. The GDP also includes only those goods and services that are produced for the final user; intermediate products are excluded. For example, the silicon chip that goes into a computer (an intermediate product) would not count directly because it is included when the finished computer is counted.[539]

GDP on its own fails to provide information about the health status of an economy or the direction that the economy is moving in.[540] However as Skripak points out, changes in the GDP measure provides important information about the direction of the economy.[541] Skripak correctly points out that where the measure of GDP after subtracting for inflation (inflation is defined as a sustained increase in the general price level in an economy rises, this provides an indication that the economy is in a growth phase"[542]). Inversely, where the GDP moves lower, it indicates that the economy is contracting.[543] It is important to bear in mind that as consumers needs and wants increase this leads to an overall increase in goods and services produced to satisfy these needs and wants. This in turn, leads to economic growth which leads to the creation of more jobs and higher wages and salaries in the longer term. According to the Department for International Development (hereinafter referred to as DFID),[544]

> Economic growth is the most powerful instrument for reducing poverty and improving the quality of life in developing countries. Both cross-

537 Skripak *Fundamentals of Business* 43.

538 Skripak *Fundamentals of Business* 43.

539 Skripak *Fundamentals of Business* 43; see also Wyngaard *An introduction to Economic Development* 6.

540 Skripak *Fundamentals of Business* 43; see also Fraumeni 2017 *IZA World of Labor* 1-2, for a discussion on some of the shortfalls and limitations of GDP as an economic measurement tool.

541 Skripak *Fundamentals of Business* 43; Fraumeni 2017 *IZA World of Labor* 1-2.

542 Pettinger T "Definition of Inflation" https://www.economicshelp.org/macroeconomics/inflation/definition/ (Date of use: 19 November 2010).

543 Skripak *Fundamentals of Business* 43, see also Hundenborn Woolard & Jellema 2019 *International Tax and Public Finance* 1021.

544 The DFID was the government department of the United Kingdom that was responsible for the administration of foreign aid in the United Kingdom. Its main objectives were the promotion of sustainable development and the elimination of global poverty. In 2020 the DFID was merged with the Foreign Office thereby establishing the Foreign, Commonwealth and Development Office in the United Kingdom.

> country research and country case studies provide overwhelming evidence that rapid and sustained growth is critical to making faster progress towards the Millennium Development Goals... Growth can generate virtuous circles of prosperity and opportunity. Strong growth and employment opportunities improve incentives for parents to invest in their children's education by sending them to school. This may lead to the emergence of a strong and growing group of entrepreneurs, which should generate pressure for improved governance. Strong economic growth therefore advances human development, which, in turn, promotes economic growth.[545]

Moreover, increases in wages and salaries results in higher household incomes and more taxes collected by government to deploy on public goods and social services. Government spending is also important for economic growth and makes up a large portion of economic policy.[546] Ahuja and Pandit suggest government spending is used by government "as an operative policy tool to promote strong and sustainable growth."[547] These authors argue that the purpose of government spending (what they term "expenditure") is to stimulate economic growth.[548] Increased government spending on public services results in greater inflows of money into the economy, and more spending on public goods and services and therefore greater socioeconomic development, resulting in improved quality of lives and higher standards of living for all citizens. Less spending by government on public goods and services results in less money flowing into the economy and less spending on public goods and services, resulting in lowering the quality of life and lower standards of living for the average citizen.[549]

3.3.1 Inclusive economic growth

Recently there has been a growing interest in the body of literature that points out that economic growth while important is insufficient to eliminate poverty. Ali and Son for example argue that the effects of economic growth can negatively affect reducing poverty levels, the outcome of which according to them, will manifest in negative

545 DFID "Growth Building Jobs and Prosperity in Developing Countries" available at https://www.oecd.org/derec/unitedkingdom/40700982.pdf (Date of use: 27 August 2020).

546 Ahuja & Pandit 2020 *FIIB Business Review* 228.

547 Ahuja & Pandit 2020 *FIIB Business Review* 228.

548 Ahuja & Pandit 2020 *FIIB Business Review* 228.

549 Rodrik 2014 *Challenge* 9-10, defines the "average" citizen as the "person in the middle of the global income distribution—that is, the individual who receives the median level of income in the global economy".

"political stability and social cohesion" important factors which are required to achieve "sustainable growth."[550] The Organization for Economic Cooperation and Development (hereinafter referred to as OECD) succinctly define inclusive growth as

> economic growth that is distributed fairly across society and creates opportunities for all.[551]

Importantly, this is what the constitutional vision foresees for South Africa. Van Niekerk correctly argues there is rising

> concern …that economic growth in and of itself is not sufficient to bring about a wider and more equal spread of benefits to all sectors and social groups. Growth can easily bypass the poor, low-skilled and other marginalised groups.[552]

Nobel prize winner and renowned welfare economists and philosopher Amartya Sen was the first to conceptualise the capability and development approach during the 1980's.[553] Sen has been a strong champion for agitation against forms of global inequality.[554] Walker and Unterhalter point out Sen's "ideas on evaluation, equality, freedom, and rights stand at the center of the capability approach".[555] Sen's development approach which has gained much popularity since then, has been used by organisations such as the UNDP and offers an alternative measurement to GDP per capita, to measure economic growth.[556]

According to Sen's development and capabilities approach "poverty" is understood as deprivation in the capability to live a good life, and "development" is understood

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550 Ali & Son 2007 *Asian Development Bank Economics Research Department Working Paper Series* 1.

551 OECD "Inclusive Growth" https://www.oecd.org/inclusive-growth/ (Date of use: 30 December 2020); see also Munir & Ullah 2018 *The Pakistan Journal of Social Issues* 150, where these authors similarly express the notion that "[i]nclusive Growth deals with the idea that economic growth is important but not sufficient to generate sustained improvements in welfare, unless the dividends of growth are shared fairly among individuals and social groups. Inclusive growth as about raising the pace of growth and enlarging the size of the economy by providing a level playing field for investment and increasing productive employment opportunities."; Van Gent 2017 *INCLUDE* 7-10.

552 Van Niekerk 2020 *Development Southern Africa* 1.

553 Internet Encyclopedia of Philosophy "Sen's Capability Approach" https://iep.utm.edu/sen-cap/ (Date of use: 30 December 2020); It should be clear that it is not possible for me to extensively deal with Sen's important contributions and seminal work on welfare economics in this dissertation, due to space limitations. However, readers that are interested in more background interpretation to Sens' welfare and development economics can read Morris CW (ed) *Amartya Sen* (Cambridge University Press Cambrige 2010).

554 Walker & Unterhalter (eds) Amartya Sen's *Capability Approach and Social Justice* 1.

555 Walker & Unterhalter (eds) Amartya Sen's *Capability Approach and Social Justice* 1.

556 Internet Encyclopedia of Philosophy "Sen's Capability Approach" https://iep.utm.edu/sen-cap/ (Date of use: 30 December 2020); see also Basu & kanbur *Arguments for a Better World* 1-4, for a concise and informative academic background to Amartya Sen.

as the expansion of human capability and the removal of those barriers (Sen calls these barriers "unfreedom"),[557] that prevent the achievement of individual and societal development; what Sen calls, "personal wellness" and "agency goals".[558] Crocker and Robeyn interpret Sens notions of personal well-being as being achievements concerned only with the individuals own "'wellness', 'advantage', or 'personal welfare'."[559] Sen according to Crocker and Robeyns, views capability as a person's ability to develop themselves in a way that adds value to their personal "wellness", so that the individual can achieve a higher level of existence.[560] This according to Sen, is where true freedom rests.[561] Development Sen argues, advances substantive freedom and enables a person to have alternatives to what they are able to do.[562] In this way Sen argues development can be seen as "a process of expanding the real freedoms that people enjoy."[563]

Sen makes the strong argument that social exclusion and the deprivation of capability are the main culprits causing poverty[564] Sen's strong slant towards a capabilities approach is projected to augment human welfare and to extend peoples freedom of choice, by relying on development as an instrument to achieve this.[565] In other words as human capabilities are enhanced people are given greater selection of choices to choose from (from the many choices available to them), to live a better life.[566] According to Sen

> evaluative interest in assessing human advantage, [is] based on two different distinctions. One distinction is between (1.1) the promotion of the person's 'well-being' and (1.2) the pursuit of the person's overall 'agency goals'. The latter encompasses the goals that a person has reasons to adopt, which can 'inter alia' include goals other than the advancement of his or her own well being. The second distinction is between (2.1) 'achievement', and (2.2) the 'freedom to achieve'. This contrast can be applied both to the perspective of well being and to that

557 Sen *Development as freedom* 3.

558 Internet Encyclopedia of Philosophy "Sen's Capability Approach" https://iep.utm.edu/sen-cap/ (Date of use: 30 December 2020); see also Sen *Development as freedom* xii; Crocker & Robeyns *Capability and Agency* 62-63.

559 Crocker & Robeyns *Capability and Agency* 62-63.

560 Crocker & Robeyns *Capability and Agency* 63.

561 Crocker & Robeyns *Capability and Agency* 63.

562 Sen *Development as freedom* 3.

563 Sen *Development as freedom* 3.

564 Sen *Capability and well-being* 30-53.

565 Sen *Capability and well-being* 30-53.

566 Sen *Capability and well-being* 30-53.

> of agency. The two distinctions together yield four different concepts of advantage, related to a person: (1) well-being achievement, (2) agency achievement, (3) well-being freedom, (4) agency freedom.[567]

This means that where individuals are given the opportunity to live different lives (through the instrument of socioeconomic development) this will be found in their enhanced and developed skills capabilities.[568] In other words the more educated and skilled one is the greater the opportunities will be to live a better life. For example, where an individual is deprived of the opportunity to obtain an education such individuals opportunities of choice to improve the quality of their life becomes constrained and is limited. On the other hand, those individuals that can educate themselves and improve their skills set, have abundant opportunity (therefore freedom of choice) to live whatever life they choose within the ambit of what Sen calls their "capability set".[569] Sen posits the important human development notion that suggests socioeconomic development should target enhancing the individual's ability to ensure more freedom of choices.[570] Significantly Sen points out

> the freedom of agency that we individually have is inescapably qualified and constrained by the social, political and economic opportunities available to us. There is a deep complementarity between individual agency and social arrangements. It is important to give simultaneous recognition to the centrality of individual freedom and to the force of social influences on the extent and reach of individual freedom. To counter the problems that we face, we have to see individual freedom as a social commitment.[571]

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567 Sen *Capability and well-being* 30-53; see also Crocker & Robeyns *Capability and Agency* 62-65, for more detailed discussion of these important concepts.

568 Sen *Capability and well-being* 30-53; see also Hawthorne 2016 *SUBB Iurisprudentia* 54-55, for an excellent discussion on this topic and where this author discusses Nussbaum's theory concerning the ten "capabilities of human capabilities". Hawthorne argues that the driving force behind Nussbaum's theory relates to the capabilities of humans referring to what individuals are can do "'and to be – in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being'". Hawthorne relying on Nussbaum points out that social justice in a society can be found in the reality that "ten core 'capabilities', or opportunities to function are available to each and every citizen." Hawthorne relying on Nussbaum argues that each person "has an inalienable right to a basic level of these ten capabilities" because these capabilities are necessary for a "life worthy of human dignity". The ten human capabilities according to Hawthorne are "life; bodily health; bodily integrity; *s*enses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment." Hawthorne draws attention to the fact "that the ten core capabilities have a recognisable call in South Africa" because as she succinctly points out "they are directly or indirectly represented in the Bill of Rights."

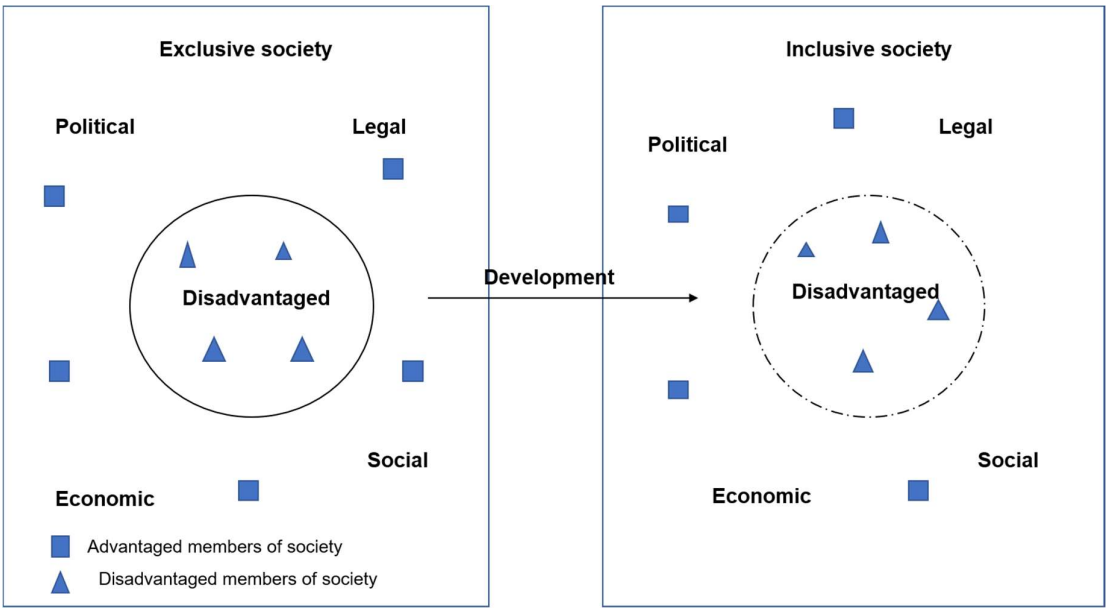
569 Sen *Capability and well-being* 30-53.

570 Sen *Capability and well-being* 30-53.

571 Sen *Development as freedom* xii.

As can be noted from Figure 2, disadvantaged members of a community are surrounded by invisible barriers in the political, economic, social, and legal spheres.

Figure 2: Effects of exclusion on disadvantaged members of society[572]



As observed in Figure 2, these barriers act against disadvantaged members of society by excluding them from fully and meaningfully participating in society.[573] For example, laws in the legal sphere may be enacted to prevent certain members from owning businesses in certain areas, or it may prevent them from accessing education institutions or it may prescribe a set educational curriculum to prepare them for specified limited skills sets or block them from accessing justice.[574] Such barriers preclude disadvantaged members of society from widening their choices to live better lives. Socioeconomic development and economic inclusiveness are therefore important to remove the invisible barriers enclosing disadvantaged members of society, to enable them to secure more choices for a better life. Law then as the key instrument for altering society has an important role to play in

572 Adapted from Sen *Capability and well-being* 30-53.

573 See Philip Mbofholowo & Zwane *Social Economic Inequality* 11-19; for a very good discussion of the impact of inequality and where these authors say, "[i]nequality matters in its own right because of the ways it limits people's access to human rights, to opportunities, and on people's ability to reach their full potential. All of these impact in turn on who is most likely to be poor – and on the types of barriers they face in exiting from poverty" at 12.

574 Such as for example under apartheid.

removing these barriers. This is what the Constitution and vision of the Constitution foresees and aims to achieve.

Relying on Sen's welfare economic ideas, then means that inclusive economic growth should lead to social inclusion and greater capability development; enabling many more people to meaningfully participate in the economy and society. This may lead to greater economic growth, greater opportunities, higher living standards and prosperity for all South Africans.[575] In fact, for as long as the living standards of people in South Africa is not radically improved the realisation of the constitutional vision will remain a pipedream and may be seriously endangered. Inclusive economic growth is a precondition for fulfilling the constitutional dream and both business and government have a very important future role to play in this regard.

3.4 Importance of government in socioeconomic development

Government has a very important role to play in supporting inclusive economic growth and reducing poverty.[576] Government can achieve this through the thoughtful process of redistributing wealth in the economy and in delivering socioeconomic development.[577] Hall suggests that the key driver behind what he calls "public spending and public services" is to realise governments objectives.[578] He correctly points out that government's objectives include:

> ensuring universal education and universal access to healthcare; environmental objectives such as the reduction of greenhouse gas emissions and management of waste; and economic objectives such as full employment. In a wide range of areas, these objectives are most effectively and efficiently achieved through public spending and public services.

In South Africa, governments objectives are set out succinctly in the vision of the Constitution, which is the creation of an equal egalitarian society.[579] Hall strongly suggests that business profits has grown "at the expense of income from wages"

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575 See National Treasury *2017 Budget Review* 1, where the National Treasury state "[t]o realise the vision of the Constitution, South Africa needs transformation that opens a path to inclusive economic growth and development. Growth without transformation would only reinforce the inequitable patterns of wealth inherited from the past. Transformation without economic growth would be narrow and unsustainable."

576 ADFAT *The role of the private sector in promoting economic growth and reducing poverty* 1.

577 Hall *Why we need public spending?* 5-6; see also Gurría *Foreword* 3-4.

578 Hall *Why we need public spending?* 5.

579 For an explanation of the South African constitutional vision and its objectives see section 2.10 of chapter 2.

and goes on to say that "the rise in the incomes of the richest households, have created large and growing inequalities" which has caused "damaging economic and social effects."[580] Hall however, acknowledges the importance of governments role in redistributing wealth by stating that "public spending and public services are the most powerful engines of [achieving] greater equality,"[581] and goes on to say that government "spending redistributes money income through social security benefits, but public services [socioeconomic development] make an even greater contribution to [achieving] equality."[582] Hence in a mixed economy such as ours, government has successfully intervened to rectify the imbalances created by apartheid and the economic system through careful administration of a highly effective and efficient tax collection and administrative system.[583]

Since the end of apartheid, the government has progressively expanded its fiscal programs to help address poverty and inequality while maintaining sound fiscal policy.[584] Inchauste et al points out that the government has widened the tax base and constructed an "efficient tax administration to generate the resources" which is urgently required, "to progressively expand the social safety net for the poor."[585] This tax collection system has been designed to levy higher marginal tax rates on higher income earners and lower taxes on lower earning incomes. In this way the South African economic system is designed to create a redistribution and rebalancing of income inequality by transferring wealth from the wealthy to the poor.[586] If the necessary fiscal rebalancing processes are in place to redistribute wealth and fulfil the objectives of the constitutional vision, why then is this process not taking place at the speed required in South Africa. Is business to blame for this inefficiency? To find the answers to this important question one needs to look at the important challenges that face South Africa and what is undermining the achievement of the key values and rights contained in the Bill of Rights.

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580 Hall *Why we need public spending?* 36.

581 Hall *Why we need public spending?* 5; see also Clements et al (eds) Inequality and Fiscal Policy 3-4.

582 Hall *Why we need public spending?* 36.

583 Inchauste et al 2015 *World Bank Group Policy Research Working Paper* 3.

584 Inchauste et al 2015 *World Bank Group Policy Research Working Paper* 3.

585 Inchauste et al 2015 *World Bank Group Policy Research Working Paper* 3; see also Hundenborn Woolard & Jellema 2019 *International Tax and Public Finance* 1021.

586 Inchauste et al 2015 *World Bank Group Policy Research Working Paper* 3.

3.5 Challenges undermining constitutional rights

The Institute for Accountability in Southern Africa (hereinafter referred to as IFAISA) points out that South Africa faces three critical threats that could undermine our young democracy. These according to IFAISA are: "poverty, inequality and unemployment."[587] IFAISA correctly states that inequality is aggravated by poverty.[588] IFAISA argues that

> **Unemployment today is the result of the current economic order being unable to generate sufficient viable work opportunities for those seeking work, having regard to their standard of education and lack of work experience.** Many remain under-employed or unemployed, because the basic education system is in crisis and does not sufficiently prepare school goers for the demands of the workplace in the economy. Inequality has, according to the gini co-efficient for South Africa, been exacerbated since 1994 when the political liberation of the country took place. Widespread poverty is a legacy of the apartheid past that needs to be addressed constructively if a "better life", as constitutionally contemplated, is to be achieved for all who live in South Africa, whether or not they are at present living in poverty. Left unaddressed the "triple threats" could easily morph into a revolution of highly destructive proportions. **Addressing these triple threats is a major pre-occupation of those responsible for a proper understanding of government's constitutional responsibilities** and for sound policy implementation in the practices in place in government. **The enjoyment of human dignity, the promotion of the achievement of equality and the realisation of the various rights guaranteed to all in the Bill of Rights, are foundational to the new constitutional order in which a non-racial, non-sexist society is meant to be built, united in its diversity and free of unfair discrimination. This is what was envisaged when the people of South Africa embraced multi-party democracy under the rule of law and turned their collective backs on the authoritarian apartheid order of old, in which parliamentary sovereignty held sway and policy making was not constrained by constitutional values and principles** (my emphasis).[589]

Leading economists Dani Rodrik explains that South Africa's democratically elected African National Congress (ANC) government have admirably created "a stable,

587 IFAISA "The effect of corruption on poverty" https://accountabilitynow.org.za/effect-corruption-poverty/ (Date of use: 15 November 2020).

588 IFAISA "The effect of corruption on poverty" https://accountabilitynow.org.za/effect-corruption-poverty/ (Date of use: 15 November 2020).

589 IFAISA "The effect of corruption on poverty" https://accountabilitynow.org.za/effect-corruption-poverty/ (Date of use: 15 November 2020).

peaceful and racially balanced political regime" that sets the record for the achievement of civil liberties and political freedoms.[590] He goes on to say that

> economic policy has been conducted in an equally exemplary manner, with South Africa turning itself into one of the emerging markets with the lowest risk spreads.[591]

However, he argues economic growth between 1994 and 2008 has been lacklustre. According to Rodrik per capita GDP had grown at a measly one-point two percent (1.2%) between 1994 and 2008, which he points out could be compared to

> sub-Saharan Africa (1.1 percent) and Latin America (0.8 percent), and considerably below that of South Asia (3.7 percent) and East Asia (6.2 percent).[592]

Although GDP did grow between 2008 to 2011 to three-point three percent (3.3%) it has since 2011 dropped again to zero-point eight percent (0.8%) at the fourth quarter of 2018. The most disquieting aspect of this unsatisfactory economic performance is unemployment. South Africa's unemployment rate in the fourth quarter of 2020 stood at almost thirty-two-point five percent (32.5%)[593] and in the first quarter of 2021 stood at thirty-two-point six percent (32.6%),[594] as narrowly defined by the expanded definition,[595] according to who is formally unemployed in the South African economy.[596] This is serious and could be amongst one of the highest unemployment rates on the globe. Rodrik postulates two reasons for this (1) he argues that South Africa's wage rates are too high in comparison to real wage rates (2) South Africa's inability to achieve economic growth.[597] Rodrik makes an important and relevant point when he states

590 Rodrik 2008 *Economics of Transition* 770.

591 Rodrik 2008 *Economics of Transition* 770.

592 Rodrik 2008 *Economics of Transition* 770.

593 Omarjee L "SA unemployment rate slightly up, hits new record high" https://www.news24.com/fin24/economy/just-in-sa-unemployment-rate-slightly-up-hits-new-record-high-20210601 (Date of use: 02 June 2021).

594 Omarjee L "SA unemployment rate slightly up, hits new record high" https://www.news24.com/fin24/economy/just-in-sa-unemployment-rate-slightly-up-hits-new-record-high-20210601 (Date of use: 02 June 2021).

595 For an explanation of expanded definition, see Stats SA http://www.statssa.gov.za/?p=13765 (Date of use: 31 December 2020).

596 Stats SA http://www.statssa.gov.za/?page_id=737&id=1 (Date of use: 31 December 2020).

597 Rodrik 2008 *Economics of Transition* 772.

> This poor record on employment represents not only an economic tragedy, it poses a significant threat to the stability and eventual health of the South African democracy.[598]

This solidifies and drives home the notion that if the economy fails to grow; unemployment rises and poverty proliferates in South Africa, the constitutional vision of creating an equal prosperous egalitarian society may fail. Hence, it is clear that the economy, commerce and business enterprises together with government have a very important role to fulfil in eliminating poverty and inequality, creating jobs and restoring substantive human dignity and equality.

3.6 Role of business enterprise in economic progress and socioeconomic development

Jennifer Blanke, Chief Economist at the World Economic Forum (hereinafter referred to as the WEF) argues that many countries globally, suffer from high and rising inequality and where many of their citizens are unable to reap the benefits of economic progress.[599] She goes on to explain that this problem is of serious concern for governments globally.[600] Business has a key role to play in addressing these challenges.[601] Rodrik correctly argues that countries trying to steer away from poverty need to track policies that are tailored to local economic and political realities that include:

> social policies to address inequality and exclusion; continued investments in human capital and skills; and a strengthening of regulatory, legal, and political institutions over time. Countries that do their homework along these dimensions will do better than those that do not.[602]

One thing is certain, economic growth is a key requirement for improving the living standards and "lifetime possibilities" for the "average" citizen of developing nations.[603] The achievement of sustainable higher economic growth is fraught with

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598 Rodrik 2008 *Economics of Transition* 772.

599 Blanke J "*Social Innovation: A Guide to Achieving Corporate and Societal Value*" https://health.oliverwyman.com/2016/03/social_innovationa.html (Date of use 13 November 2020)

600 Blanke J "*Social Innovation: A Guide to Achieving Corporate and Societal Value*" https://health.oliverwyman.com/2016/03/social_innovationa.html (Date of use 13 November 2020)

601 Blanke J "*Social Innovation: A Guide to Achieving Corporate and Societal Value*" https://health.oliverwyman.com/2016/03/social_innovationa.html (Date of use 13 November 2020).

602 Rodrik 2014 *Challenge* 6.

603 Rodrik 2014 *Challenge* 6.

complexity, but one thing is certain and that is that the private sector in the form business enterprise is the "the engine of growth".[604] The private sector is a key role player in economic development by being a foremost contributor to a countries national income and is the main driver for job creation.[605] According to the Australian Department of Foreign Affairs and Trade (hereinafter referred to as ADFAT) business is responsible for the provision of some ninety percent (90%) of both formal and informal employment in the developing world. In addition, business is responsible for the provision of key goods and services in the economy and makes an important and sustainable contribution to the tax revenue base and is also responsible for the "efficient flow of capital."[606]

3.7 The National Development Plan 2030[607]

To realise the vision of the Constitution and to accomplish the objectives as articulated in this vision, the National Planning Commission (hereinafter referred to as the NPC) working together with all South African citizens have established the National Development Plan (hereinafter referred to as the NDP). The NDP is a longer term strategic economic development plan, that sets out the objectives for realising the vision of the Constitution and which aims to create a truly equal and egalitarian society.[608] During the launch of the NDP, former finance minister Trevor Manuel referring to the NDP stated that the NDP

> is a plan for a better future; a future in which no person lives in poverty, where no one goes hungry, where there is work for all, a nation united in the vision of our Constitution.[609]

Minister Manuel went on to say that the NDP imagines a future South Africa where "everyone feels free yet bounded to others" and a place where "opportunity is determined not by birth, but by ability, education and hard work" and where "we

604 ADFAT *The role of the private sector in promoting economic growth and reducing poverty* 12.

605 Avis *Urban Governance* 16.

606 ADFAT *The role of the private sector in promoting economic growth and reducing poverty* 12.

606 Avis *Urban Governance* 16.

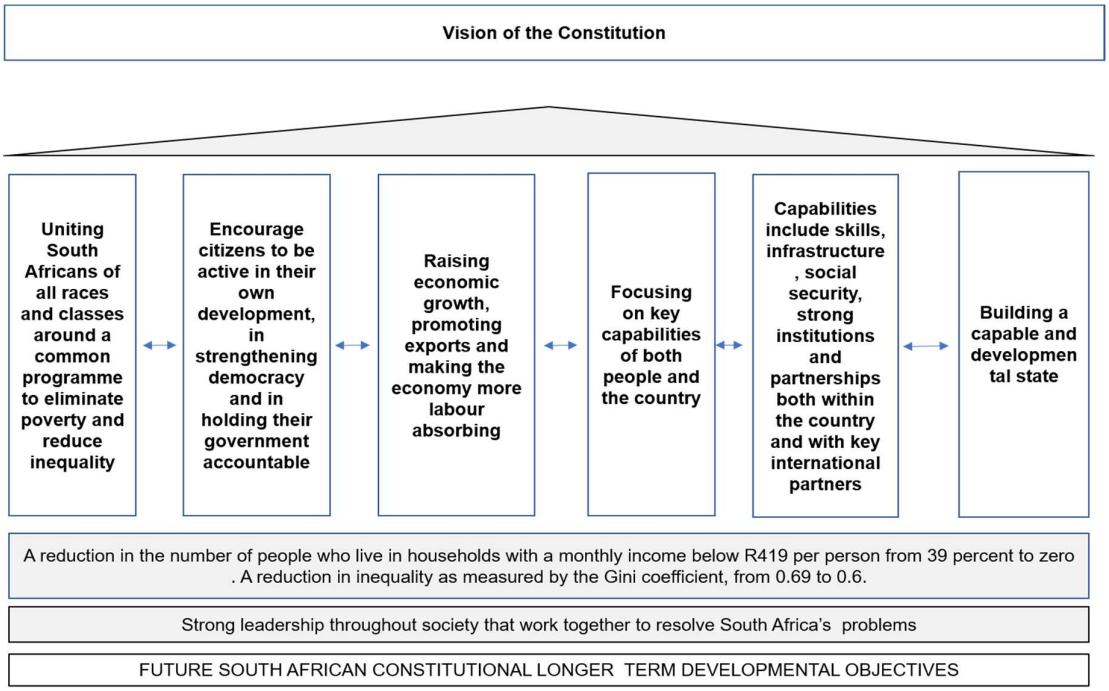
607 National Planning Commission *National Development Plan* 2030.

608 https://www.gov.za/national-development-plan-launch-speech-trevor-manuel-minister-presidency-national-planning (Date of use: 15 November 2020).

609 https://www.gov.za/national-development-plan-launch-speech-trevor-manuel-minister-presidency-national-planning (Date of use: 15 November 2020).

participate fully [in the economy] in efforts to liberate ourselves from the conditions that hinder the flowering of our talents".[610] Manuel argues that to achieve such a social transformation will require a reengineering of the South African economy, which will involve the rebuilding of "capabilities of both the country and the people."[611] Reducing inequality and eliminating poverty requires strong accelerated economic growth that "will benefit all South Africans."[612] Figure 3 illustrates some of the key objectives of the NDP.

Figure 3: Key objectives of the NDP[613]



As shown in Table 1 below, the NDP aims to achieve several critical objectives that are aimed at transforming South Africa into a truly equal and egalitarian society while at the same ensuring that the threats that face our young democracy are neutralised.

610 https://www.gov.za/national-development-plan-launch-speech-trevor-manuel-minister-presidency-national-planning (Date of use: 15 November 2020).

611 Adapted from https://www.gov.za/national-development-plan-launch-speech-trevor-manuel-minister-presidency-national-planning (Date of use: 15 November 2020).

612 https://www.gov.za/national-development-plan-launch-speech-trevor-manuel-minister-presidency-national-planning (Date of use: 15 November 2020).

613 Adapted from National Planning Commission *National Development Plan 2030* at 26.

Table 1: Key objectives of NDP to be achieved by 2030[614]

By 2030
Eliminate income poverty – Reduce the proportion of households with a monthly income below R419 per person (in 2009 prices) from 39 percent to zero.
Reduce inequality – The Gini coefficient should fall from 0.69 to 0.6.
Enabling milestones
• Increase employment from 13 million in 2010 to 24 million in 2030.
• Raise per capita income from R50 000 in 2010 to R120 000 by 2030.
• Increase the share of national income of the bottom 40 percent from 6 percent to 10 percent.
• Establish a competitive base of infrastructure, human resources and regulatory frameworks.
• Ensure that skilled, technical, professional and managerial posts better reflect the country's racial, gender and disability makeup.
• Broaden ownership of assets to historically disadvantaged groups.
• Increase the quality of education so that all children have at least two years of preschool education and all children in grade 3 can read and write.
• Provide affordable access to quality health care while promoting health and wellbeing. Establish effective, safe and affordable public transport.
• Produce sufficient energy to support industry at competitive prices, ensuring access for poor households, while reducing carbon emissions per unit of power by about one-third.
• Ensure that all South Africans have access to clean running water in their homes.
• Make high-speed broadband internet universally available at competitive prices.
• Realise a food trade surplus, with one-third produced by small-scale farmers or households.
• Ensure household food and nutrition security.
• Entrench a social security system covering all working people, with social protection for the poor and other groups in need, such as children and people with disabilities.
• Realise a developmental, capable and ethical state that treats citizens with dignity.
• Ensure that all people live safely, with an independent and fair criminal justice system.
• Broaden social cohesion and unity while redressing the inequities of the past.
• Play a leading role in continental development, economic integration and human rights.
Critical actions
1. A social compact to reduce poverty and inequality, and raise employment and investment.
2. A strategy to address poverty and its impacts by broadening access to employment, strengthening the social wage, improving public transport and raising rural incomes.
3. Steps by the state to professionalise the public service, strengthen accountability, improve coordination and prosecute corruption.
4. Boost private investment in labour-intensive areas, competitiveness, and exports, with adjustments to lower the risk of hiring younger workers.
5. An education accountability chain, with lines of responsibility from state to classroom.
6. Phase in national health insurance, with a focus on upgrading public health facilities, producing more health professionals and reducing the relative cost of private health care.

614 Source: National Planning Commission *National Development Plan 2030* at 34.

7.	Public infrastructure investment at 10 percent of gross domestic product (GDP), financed through tariffs, public-private partnerships, taxes and loans and focused on transport, energy and water.
8.	Interventions to ensure environmental sustainability and resilience to future shocks.
9.	New spatial norms and standards – densifying cities, improving transport, locating jobs where people live, upgrading informal settlements and fixing housing market gaps.
10.	Reduce crime by strengthening criminal justice and improving community environments.

The NDP comprises a set of strategic actions that require completion for the longer-term realisation of the constitutional vision.[615] The NDP proposes that

> South Africa needs an economy that is more inclusive, more dynamic and in which the fruits of growth are shared equitably. In 2030, the economy should be close to full employment, equip people with the skills they need, ensure that ownership of production is more diverse and able to grow rapidly, and provide the resources to pay for investment in human and physical capital.[616]

The aim and objectives of the NDP is to "eliminate poverty and reduce inequality" by setting out a number of objectives and actions plans.[617] The NDP proposes that to achieve these objectives by 2030, the number of people living in households having a monthly income below four hundred and nineteen Rands (R419) per person, must be reduced from thirty nine percent (39%) of the population to zero percent (0%).[618] In addition, the plan also envisages a reduction in the Gini coefficient from the current zero point six nine (0.69) to zero point six (0.6). The Gini index is a statistical measurement that measures "how equitably resource are distributed within a population" and enables one to determine to what extent equity has changed in a given population over a period of time.[619] The Gini coefficient also measures the inequality level of a population.[620] Furthermore, it describes how income is dispersed and gives an indication of the wealth distribution of a population.[621] By aiming to reduce the Gini coefficient, the NDP aims to address the

615 https://www.gov.za/national-development-plan-launch-speech-trevor-manuel-minister-presidency-national-planning (Date of use: 15 November 2020).

616 National Planning Commission *National Development Plan 2030* at 38.

617 National Planning Commission "The National Development Plan" https://nationalplanningcommission.wordpress.com/the-national-development-plan/ (Date of use: 14 November 2020).

618 National Planning Commission "The National Development Plan" https://nationalplanningcommission.wordpress.com/the-national-development-plan/ (Date of use: 14 November 2020).

619 Farris 2010 *The Mathematical Association of America* 851.

620 Farris 2010 *The Mathematical Association of America* 851.

621 https://corporatefinanceinstitute.com/resources/knowledge/economics/gini-coefficient/ (Date of use: 16 November 2020).

primary causes of poverty and inequality.[622] Central to its core objectives, the NDP strives to "ensure the achievement of a 'decent standard of living' for all South Africans by 2030."[623] A "decent standard of living" encompasses a number of factors that include *inter alia* the provision of

- Housing, water, electricity and sanitation;
- safe and reliable public transport;
- Quality education and skills development;
- Safety and security;
- Quality health care;
- Social protection;
- Employment;
- Recreation and leisure
- Clean environment
- Adequate nutrition[624]

The provision of a decent standard of living encompassing all the above for everyone, reinforces the substantive notion of achieving human dignity, equality, and freedom,[625] key values of our Constitution.

3.7.1 Limitation of government obligations and risks to socioeconomic development

The obligations of the government to satisfy its constitutional mandate are clearly spelled out in chapter 2 of the Constitution.[626] The Constitution imposes several obligations on the state in terms of protecting citizens' rights of having access to housing,[627] health care, food, water and social security.[628] Section 27(2) of the Constitution provides the qualification for the extent of governments obligations. Section 27(2) states:

622 National Planning Commission "The National Development Plan" https://nationalplanningcommission.wordpress.com/the-national-development-plan/ (Date of use: 14 November 2020).

623 National Planning Commission "The National Development Plan" https://nationalplanningcommission.wordpress.com/the-national-development-plan/ (Date of use: 14 November 2020).

624 National Planning Commission "The National Development Plan" https://nationalplanningcommission.wordpress.com/the-national-development-plan/ (Date of use: 14 November 2020).

625 See section 3.3.1.

626 Davis 2008 *I•CON* 687; see also Chapter 2 Bill of Rights of the Constitution.

627 Section 26 of the Constitution.

628 Section 27 of the Constitution.

> The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.[629]

The risk attached to this qualifier is that should the "available resources" diminish (such as during poor economic cycles) the governments obligations qualified by the "reasonable measures" will also diminish, thereby endangering the achievement of the constitutional objectives and vision.[630] This means that governments socioeconomic delivery programmes are reliant on strong business, commercial and economic activity to produce sufficient financial resources (in the form of taxes collected from business and individuals) to enable it to deliver on its service delivery mandate.[631] In this regard, a collapse of the economic ecosystems will have very serious consequences for socioeconomic development delivery in South Africa. Other major threats to delivering the objectives set out in the NDP and providing socioeconomic development to South Africans, is the fallout effects of the Corona virus 2019 (hereinafter referred to as Covid-19) and the widespread corruption that is engulfing the country.[632]

3.7.2 Important immediate threats and their impact on socioeconomic development.

In *Glenister v President of the Republic of South Africa and Others*[633] in a majority judgement, the court stated:

> There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the State to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.

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629 Section 27(2) of the Constitution.

630 IFASA "The effect of corruption on poverty" https://accountabilitynow.org.za/effect-corruption-poverty/ (Date of use: 15 November 2020).

631 See section 3.2 for a basic explanation of how government receives income in a simplified mixed economy.

632 IFASA "The effect of corruption on poverty" https://accountabilitynow.org.za/effect-corruption-poverty/ (Date of use: 15 November 2020); see also Mubangizi JC "Corruption in South Africa: The politics, the law and all the shenanigans in between" https://www.news24.com/news24/columnists/guestcolumn/opinion-corruption-in-south-africa-the-politics-the-law-and-all-the-shenanigans-in-between-20201008 (Date of use: 05 November 2020).

633 *Glenister v President of the Republic of South Africa and Others* 2011 7 BCLR 651 (CC) [166].

Corruption has severe consequences for the achievement of the constitutional vision because it can

> render any society unstable and insecure. When corruption becomes endemic, it is destructive of the achievement of the type of society that was envisaged by the founders of the new South Africa. Corruption is a cancer in any society. Left unchecked and unchallenged, corruption leads to failed state status and with that, the further exacerbation of poverty.[634]

Corruption occurs in both the private and public sectors.[635] Corruptive practises in the private sector deprives government of much needed tax revenues to achieve its constitutional mandate.[636] In the public sector, taxes and other payments collected from the private sector that is paid to government is open to abuse by being removed from the economic flow directed towards socioeconomic development, through corruptive processes.[637] This results in the movement of economic resources such as money away from socioeconomic development projects towards the unconscionable enrichment of a few private individuals in the society. Less money spent on socioeconomic delivery means the government can direct less economic resources towards its socioeconomic delivery programmes, thereby endangering the constitutional project.

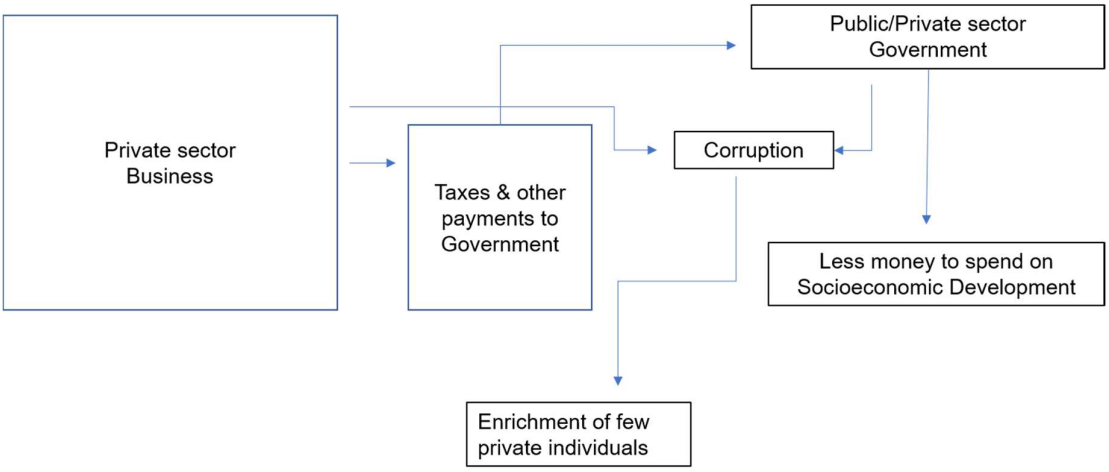
634 IFASA "The effect of corruption on poverty" https://accountabilitynow.org.za/effect-corruption-poverty/ (Date of use: 15 November 2020); see also Silva *Failed and Failing States* 12, where this author points out the characteristics of failed states which "include the failure to provide healthcare, education, food, a legitimate security force and economic sustainability; the possession of significant economic inequalities; a loss of legitimacy; a culture of corruption; a lack of social cohesion; a failure in rule of law, such as in judicial institutions, loss of security and territorial control; and systemic political instability." See also Mubangizi JC "Corruption in South Africa: The politics, the law and all the shenanigans in between" https://www.news24.com/news24/columnists/guestcolumn/opinion-corruption-in-south-africa-the-politics-the-law-and-all-the-shenanigans-in-between-20201008 (Date of use 05 November 2020).

635 Mbuli *Poverty reduction strategies in South Africa* 75-76; see also Mubangizi JC "Corruption in South Africa: The politics, the law and all the shenanigans in between" https://www.news24.com/news24/columnists/guestcolumn/opinion-corruption-in-south-africa-the-politics-the-law-and-all-the-shenanigans-in-between-20201008 (Date of use: 05 November 2020).

636 Mbuli *Poverty reduction strategies in South Africa* 75-76; see also Ngqambela N "Corruption hampers the development of South Africa's youth" https://mg.co.za/opinion/2020-08-05-corruption-hampers-the-development-of-south-africas-youth/ (Date of use: 18 December 2020).

637 Mbuli *Poverty reduction strategies in South Africa* 75-76; Madinda 2014 *International Journal of Education and Research* 181.

Figure 4: Effect of corruption on socioeconomic development



Mbuli (citing Chetwynd et al)[638] points out that corruption impacts poverty through its eroding effects on economic growth.[639] Mbuli goes on to say that this has negative effects on poverty and that both economic theory and the empirical evidence supports the notion that there is an immediate causal link between corruption and economic growth in an economy.[640] Corruption takes place at both the government and private sector levels and it is clear that corruptive practises retards economic growth by impeding

> foreign and domestic investment, taxing and dampening entrepreneurship, lowering the quality of public infrastructure, decreasing tax revenues, diverting public talent into rent-seeking, and distorting the composition of public expenditure.[641]

In addition to limiting economic growth, there is evidence to suggest that corruption also exacerbates income inequality.[642] In his study Mduli (citing Gupta et al)[643] point out that "regression analysis has shown a positive correlation between corruption and income inequality".[644] Relying on Chetwynd et al, Mbuli argues that

638 Chetwynd et al *Corruption and Poverty: A Review of Recent Literature*.

639 Mbuli *Poverty reduction strategies in South Africa* 75-76; see also Madinda 2014 *International Journal of Education and Research* 180.

640 Mbuli *Poverty reduction strategies in South Africa* 75-76.

641 Mbuli *Poverty reduction strategies in South Africa* 75-76; see also also Ngqambela N "Corruption hampers the development of South Africa's youth" https://mg.co.za/opinion/2020-08-05-corruption-hampers-the-development-of-south-africas-youth/ (Date of use: 18 December 2020).

642 See Mbuli *Poverty reduction strategies in South Africa* 75-76; see also Madinda 2014 *International Journal of Education and Research* 180-181; Ünver & Koyuncu 2016 *Journal of Economics Library* 633.

643 Gupta Davoodi and Alonso-Terme 2002 *Economics of Governance* 25-27.

644 Mbuli Poverty reduction strategies in South Africa 75-76; Gupta Davoodi and Alonso-Terme 2002 *Economics of Governance* 25-27.

> explanations for this link are that corruption distorts the economy and the legal and policy frameworks allowing some to benefit more than others; there is unfair distribution of government resources and services; corruption reduces the progressivity of the tax system; corruption increases the inequality of factor ownership; and lower income households (and businesses) pay a higher proportion of their income in bribes than do middle or upper-income households. As it has been demonstrated in the preceding sub-sections, economic growth and income inequality are important because they link corruption to poverty. The absence of economic growth (or negative growth) increases poverty. Inversely, an increase in GDP produces an increase in the income of the poor. However, income distribution is an important mediating factor because economic growth may not always benefit the poor.[645]

Another major threat to South Africa's economic and socioeconomic wellbeing and recovery is the devastating fallout effects of the Corona Virus 2019 (hereinafter referred to as Covid-19). The first case of Covid-19 in South Africa was announced on March 5, 2020.[646] According to the United Nations Development Program, South Africa is one of "the most infected countries in the world.[647] Bhorat et al points out that according to the International Monetary Funds (hereinafter referred to as the IMF) projections for the global economy, global economic growth projections will be greater than "the impact of the global financial crisis" thus making it one of the worst global recessions the world has ever experienced since the Great Depression of 1929.[648] Relying on statistical projections from the IMF, Bhorat et al points out that according to the IMF, the global economy is projected to shrink by three percent (3%) in 2020. Bhorat et al explain

> [t]he magnitude of this predicted downturn dwarfs the annual downturn from the global financial crisis in 2009, where a contraction in global output of 0.1 percent was observed. Acknowledging that these projections may be revised, it is worth noting that the downturn is expected to be more severe in advanced economies relative to emerging markets and developing economies – with a projected contraction in output of 6.1 and 1 percent, respectively, in 2020.[649]

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645 Mbuli *Poverty reduction strategies in South Africa* 75-76.

646 Sekyere E Bohler-Muller N Hongoro C and Makoae M "The Impact of COVID-19 in South Africa" https://reliefweb.int/report/south-africa/impact-covid-19-south-africa (Date of use: 18 November 2020); see also National Treasury *Supplementary Budget Review 2020* at 21-28, where the economic impact of Covid-19 is discussed in detail.

647 UNDP *Socio-Economic Impact of COVID-19 in South Africa* 10.

648 Bhorat et al 2020 *Development Policy Research Unit Working Paper* 7.

649 Bhorat et al 2020 *Development Policy Research Unit Working Paper* 7.

The above-mentioned threats pose an immediate serious obstruction to the realisation of the constitutional vision. The need for economic growth, rule of law and redistribution of income makes the role of both government and business in the economy, even more important and necessary.

3.8 Important role of business in the South African economy

In 2002 Kofi Annan stated, "without the private sector, sustainable development will remain only a distant dream."[650] The important role that business plays in socioeconomic development cannot be overstated.[651] Business is important to creating economic growth and wealth for a country. Business success results in the "economic well-being of a company and its residents" by creating jobs and at the same time improving the "quality of life for the country's citizens."[652] The private sector drives economic productivity, which in turn drives economic growth.[653] The private sector's key role in promoting economic growth in developing countries is well documented in the literature. The private sector is responsible for generating some ninety percent (90%) of the jobs created in the economy.[654] Furthermore, businesses provide the funding for more than sixty percent (60%) of the investment that occurs within developing countries.[655] In addition, businesses are major contributors to government, contributing more that eighty percent (80%) to governments revenues in low and middle income countries.[656] These contributions consist of company taxes, value added taxes, other taxes (such as value added tax,

650 See Wheeler D & McKague K "Role of Business in Development" 2002 Paper presented at York University conference Post-Johannesburg: New Strategies for Sustainable Livelihoods September 27 2002 Toronto Canada 1. https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/2771/role_of_business_in_development.pdf?sequence=1&isAllowed=y (Date of use: 24 December 2020).

651 Smythe D "The Roles of Business Organizations in Economic Development" https://bizfluent.com/info-7745795-roles-business-organizations-economic-development.html (Date of use: 23 December 2020); also see Stan *Studies and Scientific Researches Economics* 165, where this author discusses the importance of small businesses and explains that "small businesses provide catalytic benefits to the economy" and also make a contribution "to national output, and to the society as a whole, beyond the spending and profit they generate."

652 Smythe D "The Roles of Business Organizations in Economic Development" https://bizfluent.com/info-7745795-roles-business-organizations-economic-development.html (Date of use: 23 December 2020); see also Ciani et al *Making It Big Why Developing Countries Need More Large Firms* 33-38, for a comprehensive discussion on the role of Large businesses in the economy and why large business matters. This is an excellent source if one wishes to find out more about the importance the role and importance of Large businesses and their role in improving the quality of life of communities.

653 ADFAT *The role of the private sector in promoting economic growth* 12; see also Ciani et al *Making It Big Why Developing Countries Need More Large Firms* 33-38.

654 ADFAT *The role of the private sector in promoting economic growth* 12.

655 Avis *Urban Governance* 16-17; see also ADFAT *The role of the private sector in promoting economic growth* 12.

656 ADFAT *The role of the private sector in promoting economic growth* 12.

fuel levies and duties, excise duties, etc) and taxes collected on employees renumeration.[657] Furthermore, the private sector make a sustained contribution to the economy by providing a number of essential services such as telecommunications (for example MTN, Vodacom, Cell C), private healthcare (for example Netcare, Life Healthcare) and private education (for example Milpark Business School, Regent, the Ridge School, Pridwin).[658] Businesses are also responsible for driving innovation by inventing, designing and producing many of the products and services that are used by the poor and that drives the economy.[659] Van Kleef and Roome describes innovation as a process that involves discovering and developing "new products, production processes, organizations, technology, and institutional and systemic arrangements".[660] Business is also responsible for producing the necessary goods for exporting out of the economy, thereby earning much needed foreign currency.[661]

The size and scope of business operations have a major effect and influences the way money circulates and is invested in the economy.[662] The private sector makes up some seventy percent (70%) of South Africa's economy.[663] Private investment inflows into an economy due its size has resulted in the private sector exercising "increased influence in how economies are shaped and developed."[664] The central economic policy goals of the South African Government is to speed up inclusive economic growth while simultaneously creating employment.[665] Governments key objectives in this regard "is to ensure sustainable finances by containing the budget deficit and stabilising public debt."[666] The South African government projects future

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657 See section 3.2 above to recap on how government receives funding.

658 ADFAT *The role of the private sector in promoting economic growth* 12.

659 ADFAT *The role of the private sector in promoting economic growth* 12.

660 Van Kleef & Room 2007 *Journal of Cleaner Production* 39.

661 ADFAT *The role of the private sector in promoting economic growth* 12; see also Surugiua & Surugiu 2015 *Procedia Economics and Finance* 132-133, for an explanation of the importance of international trade for business in European countries. The same reasons are important for South African businesses.

662 ADFAT *The role of the private sector in promoting economic growth* 12.

663 Mathebula H "The private sector must come to SA's growth party" https://www.news24.com/citypress/business/the-private-sector-must-come-to-sas-growth-party-20191206#:~:text=The%20private%20sector%20makes%20up,of%20the%20South%20African%20economy.&text=The%20economy%20operates%20in%20the,can%20enable%20faster%20economic%20growth. (Date of use: 18 November 2020).

664 ADFAT *The role of the private sector in promoting economic growth* 12.

665 South African Government "Economy and finance" https://www.gov.za/about-sa/economy (Date of use: 19 November 2020).

666 South African Government "Economy and finance" https://www.gov.za/about-sa/economy (Date of use: 19 November 2020).

economic growth to marginally improve "from 1,5% in 2019 to 2,1% in 2021".[667] The South African government recognises that it needs "higher and more inclusive growth to address unemployment and poverty."[668] To secure the necessary economic growth required government realising the importance of the private sector in economic transformation aims to introduce wide ranging "growth-enhancing reforms" which are aligned to "President Cyril Ramaphosa's Economic Stimulus and Recovery Plan".[669] This plan seeks to inter alia "ignite economic activity, restore investor confidence, prevent further job losses and create much-needed jobs."[670] Although private funding has grown during the last decade, the need for private funding to finance economic growth and socioeconomic development has now increased substantially especially in light of President Ramaphosa's Economic Stimulus and Recovery Plan. Hence, business has a crucially important role to play in contributing to the promotion of the constitutional vision.

3.9 Why legal certainty in the law of contract is important for business

Law (and particularly contract law) is critically important for business operations globally.[671] To ensure the seamless operation of commercial activity, the commune of businesses requires a sound, certain and predictable legal system that

> will give effect to its transaction, which will give legal recognition to trade customs and market prices, which is flexible in order to accommodate new practices and development in business and offers an efficient dispute resolution to deal with its problems.[672]

Hutchison and Pretorius contend that

> If commercial enterprise is to take off on any significant scale, the parties must know that should either of them fail to honour their promise, the other might invoke the assistance of the law to hold them to the agreement. The law must therefore provide mechanisms for the

667 South African Government "Economy and finance" https://www.gov.za/about-sa/economy (Date of use: 19 November 2020).

668 South African Government "Economy and finance" https://www.gov.za/about-sa/economy (Date of use: 19 November 2020).

669 South African Government "Economy and finance" https://www.gov.za/about-sa/economy (Date of use: 19 November 2020).

670 South African Government "Economy and finance" https://www.gov.za/about-sa/economy (Date of use: 19 November 2020).

671 Law Teacher "Commercial Law Is Essential to the Operation of the Business World" https://www.lawteacher.net/free-law-essays/contract-law/commercial-law-essential-operation-of-business-world-law-contract-essay.php (Date of use 17 November 2020).

672 Hutchison & Pretorius (eds) *Law of contract* 22; also see Law Teacher "Commercial Law Is Essential to the Operation of the Business World" https://www.lawteacher.net/free-law-essays/contract-law/commercial-law-essential-operation-of-business-world-law-contract-essay.php (Date of use 17 November 2020); section 2.3.

> enforcement of promises, or for the payment of appropriate compensation when they are broken. At the same time, the State should and will lend its muscle for the enforcement of private bargains only if satisfied that it is fair and reasonable to do so in the circumstances. It must accordingly regulate, to some extent, the conclusion and performance of agreements, to ensure that there is no over-reaching or coercion, and that the parties conduct themselves in an appropriate manner.[673]

Businesses transact daily, secure in the knowledge that where contractual agreements are fair and reasonable our courts will persistently continue to uphold their contracts.[674] Many of these transactions are based on the perceived security for enforcement of contract law, to ensure compliance with the future undertaking of obligations.[675] For example, lease agreements, loan and property bond agreements and sales agreements to name just a few. Were it not for the contract and the rules set down by contract law, none of these transactions would be possible; Banks would not provide loans; lessors would not lease property and sellers would not sell goods on terms; contract law provides the business community with the necessary security they require to ensure for planning and to anticipate liability.[676] In order for business to transact they need to feel secure that "courts will reliably and consistently interpret commercial transactions."[677]

In the past, our courts have in a number of cases swayed between promoting either commercial certainty or constitutional and common law values such as fairness and equity, thereby creating much uncertainty and unpredictability in the common law of contract, for the commercial community.[678] Presently the courts (SCA and CC) have correctly only intervened in those cases where contractual terms have been oppressive and restrictive such as to offend against constitutional values and or

673 Hutchison & Pretorius *Law of contract* 22.

674 Hutchison & Pretorius *Law of contract* 22-23; Law Teacher "Commercial Law Is Essential to the Operation of the Business World" https://www.lawteacher.net/free-law-essays/contract-law/commercial-law-essential-operation-of-business-world-law-contract-essay.php (Date of use: 17 November 2020); see also *Beadica* [81].

675 Hutchison & Pretorius *Law of contract* 22-23.

676 Hutchison & Pretorius *Law of contract* 22-23.

677 Law Teacher "Commercial Law Is Essential to the Operation of the Business World" https://www.lawteacher.net/free-law-essays/contract-law/commercial-law-essential-operation-of-business-world-law-contract-essay.php

678 See for example *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) (hereinafter referred to as *Zuurbekom*); *Bank of Lisbon*; *Sasfin*; *Botha*; *Magna Alloys & Research (SA) (Pty) Ltd. v Ellis* 1984 4 SA 874 (A) (hereinafter referred to as *Magna Alloys*); *Brisley*; *Afrox*; *Barkhuizen*; *Pridwin* (CC).

against the public interest (balanced in terms of fairness and equity[679]). In those cases which conflict with constitutional values, public policy or are unconscionable or unfair our courts have persistently ruled to strike out or invalidate unfair contractual terms that don't satisfactorily meet constitutional or public policy scrutiny. In this way unreasonable contractual disputes are prevented from being disputed before our courts, thereby creating reasonable certainty and predictability in our law of contract. It is important for judicial decisions to be consistent in the common law of contract, judicial consistency in ruling create the necessary legal certainty platform for ensuring commercial certainty in the common law of contract. Certainty in contract law promotes security for commercial actors enabling them to make informed choices and predict legal outcomes.

3.10 Conclusion

To explain the importance of the economy and commerce in socioeconomic development this chapter began with an explanation of the basic circular flow of money model in a simple mixed economy. Then the important relationship between the economy, commerce, socioeconomic development, legal certainty, and substantive equality was discussed. Some key threats hindering the achievement of the constitutional vision also was discussed. Significantly, this chapter explored the importance of the economy and commerce on socioeconomic development, looking in particular at the importance of the economy and commerce and the important role these play in driving and contributing to socioeconomic development and reform and discussed the very important role that economic and commercial developments play in the development of an egalitarian society. The very important role of business and the business need for legal certainty in contractual relations was also critically evaluated and discussed. In the next chapter the important *Beadica* case will be discussed.

679 *Barkhuizen* [51]; [52].

CHAPTER 4: THE *BEADICA* CASE

4.1 Introduction

The *Beadica* case is one of the most important cases for the purposes of this dissertation in that it deals directly with freedom of contract and the constitutional values and principles, such as human dignity, freedom, equality,[680] rule of law[681] and *Ubuntu*[682]*;* the underlying common law of contract value of good faith,[683] as well as abstract notions of fairness, justice, reasonableness and equity. This case can be viewed as the genesis for resolving the SCA's and CC's perceived divergence regarding freedom of contract, the infusion of normative and constitutional values and the establishment of legal certainty, which as pointed out by the CC appears to be a matter of perception rather than what is factual reality.[684] This apparent divergence in approach between the SCA and the CC created much confusion in our judicial system on the rulings over contractual disputes and resulted in HC judges showing a preference towards following the general essence of the CC judgments and then later being overruled by the SCA. To resolve this untenable situation a qualified unambiguous ruling by the CC to end the uncertainty and finalise this matter was required. Such an opportunity arose in the case of *Beadica* which sought to deal with the proper constitutional approach to the judicial enforcement of contractual terms particularly dealing with "the public policy grounds upon which a court may refuse to enforce these terms."[685] *Beadica* aimed to provide specific guidance to determine to what extent our courts were empowered to "refuse to enforce valid contractual terms, on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh", and which has been a highly

680 Section 1(a) of the Constitution.

681 Section 1(c) of the Constitution.

682 Du Plessis *Harmonisation* 97; see also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 3 BCLR 219 (CC) (hereinafter referred to as *Everfresh*) [71]; O'Regan 2011 *Advocate* 32; Liebenberg 2008 *Acta Juridica* 149; Davis 2011 *Stell LR* 845.

683 See Brand 2009 *SALJ* 73 where this author explains that in South African law, good faith has come to mean more than "mere honesty" or an "absence of bad faith". Good faith according to this author, has a "wider" meaning which encompasses an objective content that envelopes "abstract values such as justice, reasonableness, fairness and equity."

684 *Beadica* [80].

685 *Beadica* [1].

contentious issue in our South African law of contract within the "new constitutional era."[686]

Beadica is the latest authority for resolving contractual disputes involving normative values as counterbalanced against freedom of contract and the creation of legal certainty, which were discussed in chapter one of this dissertation. Due to its very striking findings and implications for the common law of contract, this chapter will begin by setting out the background facts of this case and will then go on to discuss the crux of the freedom of contract, normative values and legal certainty debate contained in the judgment, specifically as it relates to the importance of legal certainty in the common law of contract for promoting the constitutional vision.[687] A critical analysis of the judgments and the reasoning of both the majority and minority judgements, will be undertaken to explain the court's *rationale* and, where applicable, to lend support to this reasoning by relying on the findings in previous chapters of this study.

4.2 Background facts of the case

Four black economic empowerment close corporation beneficiaries (applicants) had obtained rights to their franchise businesses from Sale's Hire for a period of five years with an option to renew for another five years, through funding which they had secured from the National Empowerment Fund, a black economic empowerment initiative.[688] The applicants franchised business operations were conducted by the applicants from property that they leased from the first respondent, Trustees for the time being of the Oregon Trust (the "Trust").[689] In accordance with the terms of the franchise agreements, it was a franchisor requirement that the applicants conduct their franchised operations from a location that was to be approved by the franchisor.[690]

686 *Beadica* [1].

687 See *Beadica* [80]-[90] where this is specifically discussed.

688 *Beadica* [2].

689 *Beadica* [2].

690 *Beadica* [4].

The franchised agreements provided for the approved premises to be leased from the Trust. The lease agreements contained an option clause which if exercised required that the applicants renew their lease agreements for a further period of five years, provided that the applicants gave written notification of their intention to renew. This had to be done at least six months prior to the termination of their existing lease.[691] The dispute arose when the applicants failed to exercise their respective renewal options by due date, as was required by the agreement.[692] The franchise agreements also made provision for the respondent to elect to terminate the agreements should the applicants be (1) ejected from the approved locations (2) should the lease agreements be terminated.[693] Due to the applicants failure to renew their lease agreements, the first respondent cancelled the leases and sought to cancel the agreements.[694] The applicants then resorted to bring an urgent application in the WCHC asking for an order to declare that they had validly exercised the renewal options and forbidding the first respondent from evicting them. Davis J relying on the CC findings in *Botha*, granted them the order. Davis J held that the termination of the leases was a disproportionate sanction for the lessee's failure to adhere to the otherwise strict terms of the contract and that such adherence would in future cause the applicants business to fail and result in a failure of the black economic empowerment initiative.[695] On Appeal the SCA overturned the HC decision. The SCA found that our law did not recognise the principle of disproportionality and held that there were no considerations of public policy which rendered the renewal clauses unenforceable. The applicants then appealed to the CC. The CC granted leave to appeal and found in favour of the Trust (lessor). Theron J delivered the majority judgement which spelled out the proper constitutional process and approach to be used for the enforcement of contractual disputes, in particular looking at public policy and *Ubuntu* as valid grounds upon which a court may refuse to enforce a contractual term. The CC decision in this case brings about a much more harmonious approach to legal certainty in contractual law

691 *Beadica* [6].

692 *Beadica* [7].

693 *Beadica* [8]; [9].

694 *Beadica* [6].

695 *Beadica* [10]; [11]; [13].

through the reconciliatory and balanced stance it adopts for the seemingly divergent approaches of the SCA and the CC in respect of such cases.

4.3 Critical analysis of key sections of the CC's findings in the Beadica case[696]

Sections 80 to section 90 of the CC's findings in *Beadica* go to the heart of the freedom of contract versus constitutional and normative value debate, that has been raging and aims to bring about harmony and certainty in the law of contract. It also synthesises the key principles that must be applied when adjudicating contractual disputes. These key principles are directed towards putting an end to the debate by creating legal certainty (as defined in this study) in the common law of contract. These principles are discussed next.

4.3.1 Equity

In its analysis of the principle of equity which includes the common law abstract values of good faith, fairness and reasonableness, the CC pointed out that any perceived digression between the CC and the SCA was in reality simply more imagined than was the case in reality.[697] The CC correctly drew attention to the fact that our law of contract has always to some degree given recognition to equity as a factor when evaluating contractual terms for deciding on enforcing contracts.[698] Reiterating the importance of the role of constitutional values the court explained that under the constitutional order, normative values are important and have a deeply insightful role to play in the law of contract.[699] This means that our courts "may not refuse to enforce contractual terms" simply because a court feels that such enforcement would "in its subjective view, be unfair, unreasonable or unduly harsh."[700] Establishing legal certainty in the common law of contract (as it is used in this dissertation), the court pointed out that although

> abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce

696 See specific paragraphs in *Beadica* [80]-[90].

697 *Beadica* [80].

698 *Beadica* [80]; see also for example *Sasfin,* where the AD adjudicated over this case involving the substantive fairness of a deed of cession and found that that the deed of cession was indisputably unconscionable and incompatible with the public interest.

699 *Beadica* [80].

700 *Beadica* [80].

> contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.[701]

Meaning here, that although abstract values are not legal rules in themselves, their application in the common law of contract is arbitrated through the rules of contract law.[702] This simply means that a party to a contract cannot rely on abstract values to invalidate a contract as such. Importantly however, such party may indeed rely on abstract rules to mitigate the rigid rules of contract law. For example where a party submits an insurance claim for damages suffered by her/him for an insured event, but submits the claim outside the time bar clause of the insurance contract, such party would be able to rely on abstract values that provide mitigating circumstantial and substantive reasons for non-compliance with the contractual term (such as for example that they only became aware of the damage or loss after the occurrence of the event or that she/he was severely ill and hospitalised which precluded her from filing the claim within a reasonable time period).[703] The court clearly articulated that where contractual terms or where a term or its enforcement would be contrary to public policy, a court may not enforce such contractual terms.[704] This is important for contractual certainty, because it makes clear that where a contract goes against the values that society holds most dear, our courts could refuse enforcement of the contract (hence deterring the conclusion of unjust contracts). Therefore, courts may only refuse enforcement of a contractual term in cases where the enforcement of such term would be "so unfair, unreasonable or unjust that it is contrary to public policy"[705] thereby promoting reasonable legal certainty in the common law of contract.

4.3.2 Legal certainty in the law of contract

With regards to the legal certainty principle, Justice Theron delivering the majority judgement, unequivocally stated that "[t]he rule of law requires that the law be clear

701 *Beadica* [80].

702 *Beadica* [80].

703 See *Barkhuizen* [57]-[60]; [84]-86], where this principle is enunciated and discussed.

704 *Beadica* [80].

705 *Beadica* [80].

and ascertainable."[706] This aligns well with the findings in the study.[707] Justice Theron (citing the CC's findings in *Affordable Medicines*)[708] explained that for the law to bring about legal certainty in contractual relations

> The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.' The application of **the common law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain** (my emphasis).[709]

Justice Theron, in line with what Ngcobo J stated in *Affordable Medicines*, draws attention to the importance for our courts to objectively develop the common law in a way that ensures that "rules and doctrines" must be (1) "clear and ascertainable" and (2) "that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties."[710] Theron J, correctly points out that the fulfilment of these two constitutional directives is what the constitutional value "rule of law", as directed by the Constitution requires.[711] This strongly correlates with the findings in the study where it was pointed out that under a system of modern law, the principle legal certainty promotes the idea that law must be sufficiently clear so that it is enables those persons to whom the law applies, to be placed in a position where they are empowered to regulate their own behaviour.[712] In fact this is why Fenwick and Wrbka appear to argue, that the key ideal of legal certainty is that it allows people to regulate their commercial behaviour and this gives commercial law its legitimating value.[713] Wrbka strongly cements the notion

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706 *Beadica* [81].

707 See section 2.3 of Chapter 2 where the legal certainty concept is discussed in greater detail.

708 *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 6 BCLR 529 (CC) (hereinafter referred to as *Affordable Medicines*) [108].

709 *Beadica* [81]; see also section 2.3.1 in Chapter 2 regarding legal certainty where Lord Mansfield said that "in all mercantile transactions the great object should be certainty. And therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon" in *Vallejo* at 50.

710 *Beadica* [81]; These pronouncements align well with the findings in the literature see section 2.3 of Chapter 2.

711 *Beadica* [81]; see also section 2.3 in chapter 2; Hawthorne 2014 *THRHR* 409.

712 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1; see also Brown *Legal certainty and competition law* 1; Raitio 2006 *Rechtstheorie* 397; *Beadica* [81].

713 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1; see also section 2.3.5 of chapter 2 where I discussed certainty in law as being an important constitutional principle in most domestic constitutions, including South Africa. In *Mighty Solutions* [27], the court stated that "legal certainty is essential for the rule of law – a constitutional value." It was further pointed out that legal certainty also functions as a fundamental principle in many global organizations such as the EU as well as ECHR who both accept legal certainty as a key legal principle that is a necessary requirement for the proper functioning of the rule of law.

that legal certainty is irrefutably one of the indispensable legal principles included in all modern day legal systems.[714] Fenwick and Wrbka also submit that legal certainty plays an important role in promoting and securing the "space of individual freedom",[715] while Waldon on the other hand seems to suggest that the different notions of the rule of law emphasise "legal certainty, predictability, and settlement" for determining those standards that are supported by society, as well as the reliable administration by the state,[716] strongly drawing attention to the fact that law needs to be certain and predictable for it to be maintained and accepted by society.

The CC made another pertinent point regarding the judicial enforcement of contractual terms. The CC stated that judicial enforcement of contractual terms does "not depend on an individual judge's sense of what fairness, reasonableness and justice require" because as the court correctly observes

> to make the enforcement of contractual terms dependent on the 'idiosyncratic inferences of a few judicial minds' …**would introduce an unacceptable degree of uncertainty into our law of contract**. The resultant **uncertainty would be inimical to the rule of law** (my emphasis).[717]

The general consensus of opinion seems to be that this appears to be the correct approach to adopt, because the subjective enforcement of contractual terms related to fairness and equity, may impact negatively on legal certainty in contract law, as it could make room for contradictory subjective interpretations of the rules governing contract law.[718] This may then result in

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714 Wrbka *Comments on Legal Certainty* 10.

715 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1.

716 Fenwick & Wrbka (eds) *The Shifting Meaning of Legal Certainty* 1-3.

717 *Beadica* [81].

718 In *Beadica* [81], Theron J correctly stated that the "rule of law requires that the law be clear and ascertainable." Citing the CC in *Affordable Medicines*, she goes on to say that the law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly." Theron J explains that applying the common law of contract rules "should result in reasonably predictable outcomes", that will allow individuals to contract with "the belief that they will be able to approach a court to enforce their bargain." With regard to the development of the law of contract she points out that it is important for courts to "develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties." Theron J correctly emphasises that this is a requirement of the constitutional value "rule of law". She makes the important point that "enforcement" of "contractual terms" are not reliant on "an individual judge's sense of what fairness, reasonableness and justice require." Here she seems to be suggesting that judges each have their own ideas of what fairness and equity entails and therefore the judicial outcomes of each case could be different, thereby creating legal uncertainty. She correctly argues that by subjecting the enforcement of contractual terms to the idiosyncratic "inferences" of a "few judicial minds" will bring about an "unacceptable degree of uncertainty into our law of contract" and this may bring about legal "uncertainty" which would be contrary to the rule of law"; see also sections 2.3.2-2.3.3 of Chapter 2, on the effects of different court adjudication outcomes and the negative impact on legal certainty.

multiple interpretations of the rules and doctrines and substantive appreciations of the law of contract, with multiple judicial outcomes. Thereby creating much uncertainty in the law of contract. Where the degree of uncertainty for judicial outcomes is high and exceeds the unpredictability level as explained by Coelho, this may result in much legal uncertainty and will result in negative economic consequences.[719] Hence, possibly resulting in lower economic growth and lower investment in business which in turn may result in less government income and lower socioeconomic development investment.[720] Lower government spending on public goods and services could well mean less inflows of money into the economy and lower spending on public goods and services, which may cause a lowering of standards of living and quality of life for citizens, placing the constitutional vision of achieving an egalitarian society at risk.[721]

4.3.3 Key principles governing judicial control of contracts

The notion that the differences in legal opinion regarding the judicial enforcement of contract law disputes dealing with the contested enforcement of a valid contract on the basis of public policy and issues such as when the Constitution, fairness and reasonableness, good faith, and *Ubuntu* are at issue, between the CC and SCA, appear to be more perceived than real. The CC (citing the case of *AB and another*

719 See Coelho 2017 *International Journal of Insolvency Law* 1, where this author explains that the legal certainty concept is related to ideas of the judicial predictability of legal decisions. He uses an interesting and simplistic, equation to define legal certainty. According to him the more predictable judicial decisions are the greater the legal certainty and the more unpredictable judicial decisions are the more legal uncertainty will result. Coelho points out that there is no reliable means for predetermining a judicial decision in each and every case. However, he argues it is possible to reasonably foresee what the most possible outcome of a court decision will be in most cases (such as currently is the case in the South African law of contract – where a term of a contract is contrary to public policy or constitutional values it will fail the judicial scrutiny test). In a very small number of cases he argues, the judicial outcome of a case will unavoidably emerge as a surprise or be unpredictable. Coelho calls this "predictable unpredictability", which according to him refers to the very small number of cases where the courts will not apply the law in accordance with reasonable expected outcomes. Accordingly, Coelho correctly argues for as long as the level of unpredictable decisions remains within the "predictable unpredictability" margin, it does not affect legal certainty; see also section 2.3 of chapter 2 where the legal certainty idea is discussed in more detail.

720 See section 3.3 of chapter 3, where I discussed the impact of legal certainty and legal uncertainty on economic investments. It was pointed out that those countries having higher levels of uncertainty may fail to attract strong investment flows into their domestic economies resulting in lower investment in the local economy, less taxes for government and a decline in socioeconomic services. This will have serious negative consequences for the constitutional vision of creating an egalitarian society. On the other hand, it was pointed out that countries having high levels of legal certainty tend to attract greater foreign and local domestic investment into their economies, enabling them to make greater investment in socioeconomic development thereby uplifting the disadvantaged communities of their society.

721 For an explanation of the definition of "average" citizen see Rodrik 2014 *Challenge* 9-10, where he describes the "average person" as "the person in the middle of the global income distribution—that is, the individual who receives the median level of income in the global economy".

v Pridwin)[722] highlights the "general uniformity of principles between the two courts."[723] The CC explains that in the *AB and another v Pridwin*[724] case, the SCA had unequivocally pronounced the fundamental legal principles and views it held regarding the exercise of "judicial control" over contracts in respect of public policy. Ending any controversy regarding any divergence between the CC and the SCA, the CC reiterated the legal principles that must be applied to contractual law disputes. The CC cited with approval the following formulation of the SCA in *Pridwin*

> (i) Public policy demands that contracts freely and consciously entered into must be honoured;
>
> (ii) A court will declare invalid a contract that is *prima facie* inimical to a constitutional value or principle, or otherwise contrary to public policy;
>
> (iii) Where a contract is not *prima facie* contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
>
> (iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
>
> (v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
>
> (vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.[725]

In doing so, the CC in essence seems to have favoured a clear and systematic set of contractual principles governing the judicial control of contracts through the instrument of public policy for our courts to follow, when adjudicating over contractual disputes. Thereby, possibly promoting legal certainty in contract law. The CC went on to explain that these contractual principles have been established from a number of cases in our historical jurisprudence and that these principles are

722 *AB and another v Pridwin* (SCA).

723 *Beadica* [82].

724 *AB and another v Pridwin* (SCA).

725 *Beadica* [82].

supported by past decisions of the CC,[726] thereby putting an end to any notions that the SCA and the CC were not aligned in their thinking, regarding following the judicial application of the same contractual principles relating to contractual fairness and the judicial discretion to not enforce a contract on the grounds of public policy. Conceivably this may end further debate of any divergence in legal opinion between the SCA and the CC and may bring about much needed certainty regarding the principles that must apply in adjudicating contract law disputes dealing with the contested enforcement of a valid contract on the basis of public policy and issues such as when the Constitution, fairness and reasonableness, good faith, and *Ubuntu* come into focus.

A possible weakness that cannot be ignored in the CC's approach however, is that while this court provides a number of plausible principles for adjudicating over contractual disputes relating to fairness and equity, it fails to provide pragmatic solutions for implementing these principles. It would seem that the implementation of these principles has been left hanging and is still subject to the subjective interpretations of the "idiosyncratic inferences of a few judicial minds", meaning here that judges will still have to subjectively decide (within the ambit set by the CC adjudicatory principles), what is fair, just and equitable in the individual circumstances of each case.[727] This may still bring about legal uncertainty in the common law of contract, due to the multiple interpretations that may arise from individual judges notions of what is fair, equitable and just and the differing judicial outcomes that could arise in future.

726 *Beadica* [82]; see for example *Barkhuizen*; *Mohameds Leisure Holdings*; *AB and another v Pridwin* (SCA).

727 See *Beadica* [106]; [107], where Froneman J in a minority judgement states "the regulation of unfairness in contract law is never simply a 'legal' one that can be deduced from supposedly neutral legal principles in a self executing way. This kind of regulation inevitably involves making an underlying moral or value choice. The first judgment makes clear that these choices must be made within the objective value system of the Constitution. It does not, however, consider it necessary to develop or give further guidance as to how these objective values are to be translated into practical application…and goes on to say "I accept that our purpose must be to delineate reasonably certain, practical and objective legal principles and rules to guide prospective contracting parties. In so doing the caricature of rogue judges imposing their own subjective and arbitrary opinions of what is fair and reasonable upon unsuspecting litigants must be dispelled." In this regard, Froneman J's argument is sound as it appears to mean that although the CC has seemingly provided a clear set of principled guidelines for our courts to follow when adjudicating over contractual disputes related to fairness and equity, the lack of clear practical rules means that judges will still have to make moral decisions on what is fair and just according to their own individual frame of reference. This may result in many different legal outcomes thereby creating much unpredictability, instability and legal uncertainty.

In *AB and another v Pridwin*[728] the SCA explained that the "relationship" that exists between "private contracts" and the way that judicial control over these contracts is exercised "through the instrument of public policy" is now "underpinned by the Constitution". It is important to bear in mind that in this case the SCA was not dealing with all or any contractual disputes; the specific judicial focus here and the key issues involved mainly related to contractual fairness and the discretionary powers that the judiciary is empowered to have, for not enforcing a contract on public policy grounds. Therefore, a significantly argumentative point in the more recent case law,[729] is whether or not there is a free-floating or independent principle which determines that a court can strike down or refuse to enforce a contract purely on the basis of fairness. The resolution of this legal issue, required a ruling from the CC that would set the precedent for future contractual disputes of this nature and provide clarity on this issue, which has now seemingly been provided in the *Beadica* case.

The reaffirmation of these specific principles in *Beadica*, is important for legal certainty because they appear to create an almost codified set of principled guidelines (albeit lacking practical solutions), that courts must follow when adjudicating contractual disputes of this nature.[730] However, in an effort to develop and align these contractual principles further and to bring about greater legal certainty in the law of contract, the CC provided further clarification on two important principles that the SCA listed in the *AB and another v Pridwin*[731] case. These two principles involve the important role of public policy in the judicial enforcement of contracts and the importance of contractual relations in economic and socioeconomic development.[732]

728 *AB and another v Pridwin* (SCA) [27].

729 Boonzaier 2020 *SALJ* 1, for example states that the outcome of the decision in *Botha* drew much legal criticism for the CC's "apparent willingness to subject all exercises of contractual rights to an overarching test of 'fairness'".

730 See the minority decision of Froneman J in *Beadica* [106].

731 *Beadica* [82]; see also *AB and another v Pridwin* (SCA) [27].

732 *Beadica* [82].

4.3.4 The role of public policy in judicial enforcement of contracts

The CC reinforced the principle that contracts "freely and consciously entered into" had to be "honoured".[733] The court emphasised that the honouring of contractual obligations where contracts had been freely and consciously entered into, was a public policy requirement.[734] This is important because it seemingly reinforces legal certainty in the law of contract by maintaining that where a contract has been freely and voluntarily concluded and complies with constitutional and public policy requirements as informed by good faith, fairness and equity, public policy demands that the obligations imposed by such contract must be satisfied. Regarding the important *pacta sunt servanda* principle the court had to decide whether a court is empowered to disregard this principle on the basis of contractual fairness. The court stated that this principle gives life to a parties freedom and dignity, which in essence are central constitutional values.[735] To end any possible uncertainty that the common law principle *pacta sunt servanda* belongs to the tradition of our preconstitutional common law, and therefore is no longer applicable, the court emphasised the contrary, and went on to explain the important role that this principle plays in the judicial control of contracts through the instrument of public policy.[736] The CC emphasised that the principle *pacta sunt servanda* "gives expression to central constitutional values" such as human dignity, equality and freedom.[737] The court quoting from *Wells*[738] also emphatically stated

> '[i]f there is one thing, which more than another, public policy requires, it is that [individuals] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts.'[739]

But added further clarity regarding its stance, by stating that in the constitutional era, the preconstitutional "privileging" of the *pacta sunt servanda* principle is inappropriate for the "judicial control of enforcement of contracts."[740] Balancing

733 *Beadica* [82].
734 *Beadica* [83].
735 *Beadica* [83].
736 *Beadica* [83].
737 *Beadica* [83].
738 *Wells* at 73.
739 *Beadica* [86].
740 *Beadica* [86].

freedom of contract with constitutional and other normative values, the CC stated that under the Constitution, the *pacta sunt servanda* principle is neither the "only" nor is it "the most important principle informing the judicial control of contracts."[741] The court pointed out that public policy is "informed by a wide range of constitutional values" (such as human dignity, equality, freedom and *Ubuntu*) and that there were no grounds for placing *pacta sunt servanda* ahead of "other constitutional rights and values."[742] In those cases that implicate constitutional rights and values the court stated that our courts need to employ a vigilant "balancing exercise" to establish if contractual enforcement would conflict with public policy (as directed by the constitutional values of human dignity, equality and freedom and as informed by the common law abstract values of fairness, equity, reasonableness and good faith), given the particular circumstances of each case.[743]

In underscoring the equal treatment of the *pacta sunt servanda principle* and other constitutional rights and values, the CC highlights the importance that public policy places on both freedom of contract and constitutional rights coupled to abstract values (such as fairness, equity, reasonableness and good faith). The CC's approach to harmonising constitutional and abstract values with the principle of freedom of contract, underscores an indisputable fair and just judicial approach to dealing with contractual disputes. In this way the fulfilment of obligations where contracts are freely and voluntarily entered into, and do not conflict with constitutional and public policy imperatives (as informed by abstract common law values of fairness, equity, good faith and reasonableness), appears to support the infusion of a degree of trust (for all parties) into contractual relations thereby promoting certainty (reasonable predictability and stability).[744]This balanced approach aligns well with the approach to legal certainty (which is to create reasonable predictability and stability in the law of contract) identified in the

741 *Beadica* [87].

742 *Beadica* [87].

743 *Beadica* [87].

744 See section 2.3 of Chapter 2 where the legal certainty concept is explained in detail.

literature, which is that for the law to be certain judicial adjudication outcomes must be consistent, reasonable and predictable.[745]

4.3.5 Importance of contractual certainty in economic and socioeconomic development

Recognising the very important role that legal certainty must play in the law of contract, the CC draws attention to the important role of contractual relations in economic and socioeconomic development and its important role in promoting the constitutional vision.[746] Theron J acting for the majority succinctly pointed out that

> contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.[747]

Justice Theron, making reference to the Preamble of the Constitution and the Bill of Rights, went on to say that many of "the rights promises made by our Constitution" are dependent on a stable economy including the "continued economic development of our country."[748] She pointed out the important fact (which has been a salient theme throughout this study) that "[c]ertainty in contractual relations fosters a fertile environment for the advancement of constitutional rights."[749] Acknowledging the importance of protecting the "sanctity of contracts", Justice Theron correctly pointed out that this principle is key for fulfilling the constitutional vision of our society and went on to state that "our constitutional project" (meaning transformation of our society in accordance with constitutional imperatives) will be endangered if our courts strip away the *pacta sunt servanda* principle.[750] This notion is supported in *Barkhuizen* where Ngcobo J stated that *pacta sunt servanda* is an overpowering

745 See section 2.3 of Chapter 2 where the legal certainty concept is explained in detail.

746 *Beadica* [84]; for the importance of economic and socioeconomic development for promoting the constitutional vision see Chapter 2 and Chapter 3.

747 *Beadica* [84].

748 *Beadica* [85]; see also section 2.10 of chapter 2 where the vision of the Constitution is discussed in detail and section 3.3 of chapter 3, where the importance of the economy for socioeconomic development and the realisation of the constitutional vision is discussed at length.

749 *Beadica* [85].

750 *Beadica* [85].

principle of morality and that a society's existence, is dependent on its application.[751] However, as Ngcobo J also fervently pointed out, *pacta sunt servanda* is "universally recognised" as an important legal principle and that this contractual principle generally required that "agreements must be honoured", but at the same time added that it must not and should never apply to agreements that are illegal.[752] Such agreements (illegal agreements) Ngcobo J said, are a violation of public policy.[753] As a matter of fact our courts have in the past recognised this common law principle, and now it is re-enforced by the Constitution.[754]

In this regard, it is important to be reminded that contractual relations involve two or more persons, and that if notions of freedom of contract and *pacta sunt servanda* were to be strictly adhered to in judicial adjudication, including their application to illegal agreements (by ignoring constitutional and common law values), then the party that benefits from such an unfair ruling would feel glorified and continue to have faith in the law, but the other losing parties would feel disparaged and lose faith in the law, thereby bringing about much contractual uncertainty.[755] While it is important for our courts to promote ideas of freedom of contract and *pacta sunt servanda* in the interest of creating contractual certainty, they cannot be applied to illegal agreements.[756] This notion has played an important role in the development

751 *Barkhuizen* [87].

752 *Barkhuizen* [87]; note that the term "illegal agreement" is used here because an agreement may not be enforceable (for being in conflict with public policy), whilst a contract is per definition an agreement that is valid in all respects and therefore enforceable.

753 *Barkhuizen* [87]; Interestingly, the principle (*pacta sunt servanda*) is indirectly enforced where the party's have performed in terms of an illegal agreement, but the court refuses an enrichment remedy (the *condictio ob turpem vel iniustam causam*) to the party who wants to reclaim his or her performance, because of that party's moral turpitude. So, in effect, the agreement is invalid and unenforceable, but somewhat ironically has been honoured (i.e., *pacta sunt servanda* has been complied with) and cannot be undone.

754 *Beadica* [89].

755 In this regard see section 2.3.7 and the importance of having faith in the law; also see Hutchison & Pretorius (eds) *Law of Contract* 23, where these authors state "While parties might enjoy considerable freedom in determining the contents of their contracts, they cannot legitimately expect the courts to enforce provisions that are offensive to law, morals, public policy, or to broad community notions of what is fair and reasonable. The law of contract should accordingly import open-ended standards like good faith and reasonableness in order to give judges sufficient flexibility to ensure justice in each particular case."

756 *Barkhuizen* [87]; it is also important to remember that *pacta sunt servanda* and freedom of contract are limited by the public interest (or public policy). Courts will not enforce an agreement which is in conflict with public policy (*Sasfin* sets out the position at common law quite well) because such an agreement is illegal *ab initio* and does not amount to an enforceable contract. Such an agreement is already invalid or void, so any issues of enforceability (*pacta sunt servanda*) do not really arise conceptually. In practice, however, a party seeking to enforce an invalid agreement will be prevented from doing so once the court finds that the agreement is illegal (and hence not an enforceable contract).

of the Roman law of contract throughout the centuries and helped "breathe an equitable spirit into the body of civil law."[757]

4.3.6 Principle of perceptive restraint

Another very important principle that the CC expanded on is the "perceptive restraint" principle, which has often been championed in the past by the SCA.[758] This principle provides that when a court is faced with exercising its judicial authority to invalidate or refuse enforcement of a contractual term, such authority must be exercised with the utmost caution.[759] The CC (citing *Pridwin, Mohammed's Leisure Holdings, Afrox*, *Brisley* and *Sasfin*) explains that this principle has been used by the SCA in the past to cast light on the notion that when adjudicating over a contractual dispute the "court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases".[760] In full support of this ideal espoused by the SCA (tending to eliminate perceived divergence between the two courts), the CC draws attention to and again reinforces the ideal that "contracts, freely and voluntarily entered" must be honoured.[761] The CC goes on to say that it has recognised as sound the approach adopted (regarding the perceptive restraint principle) by the SCA and recognises that "the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases" thereby reinforcing contractual certainty in the law of contract.[762]

4.3.7 Role of the courts in applying law of contract

In the performance of their judicial duties, the CC cautioned our courts not to depend on the perceptive restraint principle, as an excuse for failing to perform their "constitutional duty to infuse public policy with constitutional values."[763] Nor for that matter, should our courts rely on the perceptive restraint principle to fleece public policy from the "complex value system" that was created by our Constitution.[764]

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757 Hutchison & Pretorius (eds) *Law of Contract* 26.

758 *Beadica* [88].

759 *Beadica* [88].

760 *Beadica* [88].

761 *Beadica* [89].

762 *Beadica* [90].

763 *Beadica* [90].

764 *Beadica* [90].

Recognising the very important role that public policy plays in the judicial enforcement of contracts, the CC makes it clear that when applying the requirements of public policy, courts must ensure that its application is done in such shear a way which attaches "proper weight to the overarching mandate of the Constitution."[765] This means that when applying the perceptive restraint principle to a contractual dispute involving fairness and equity, a court must apply this principle in a manner that balances constitutional values and rights.[766] Meaning here that the "perceptive restraint" principle must not be used by the courts to protect contracts that seek to "undermine" the important objectives that our Constitution was engineered to realise (including, transformative justice).[767] Moreover, the notion that there must be substantial and incontestable "harm to the public" before a court may decline to enforce a contract on public policy grounds, the CC stated is unknown to our law of contract.[768] In *Sasfin*[769], for example harm to the public was described as that which is "inimical to the interests of the community", "opposed to the interest of the state", "contrary to law or morality", or which "run[s] counter to social or economic expedience". In this case, the AD had given recognition to the significance of public policy as a key principle for benchmarking, adjudicating and judging fairness and reasonableness in our law of contract. It was also in *Sasfin*, that Smalberger JA held that "[n]o court should ... shrink from the duty of declaring a contract contrary to public policy when the occasion so demands".[770] The converse is also true; namely that where an agreement is clearly "inimical to the public interest" as informed by the Constitution, a court should not shrink from its duty to strike it down. Or where the enforcement of a contract would offend the public interest in the circumstances, a court should decline to enforce it. What is significant however is that to create legal certainty in the South Africa law of contract a balanced approach is needed.

765 *Beadica* [90].

766 *Beadica* [90].

767 *Beadica* [90].

768 *Beadica* [90].

769 See *Sasfin* at 350.

770 *Sasfin* at 351.

4.4 Analysis of minority decisions in Beadica

This study would be incomplete without a discussion of some of the central ideas that were raised in the two important minority judgments in the *Beadica* case. Therefore, to ensure completeness of this study the most important principles embodied in these judgements will be discussed. Interestingly, both minority judgments would have found in favour of the applicants (franchisees). In this section I provide an analysis of the main arguments embodied in the separate minority judgements of Froneman J and Victor AJ. Froneman J's judgement apparently conceptualises a test for when not to enforce an otherwise acceptable contract on public policy grounds, while Victor AJ on the other hand casts light on the important role that the indigenous legal value *Ubuntu* has to play for promoting fairness in the common law of contract, and specifically related to contracts involving the participation of black economic empowerment parties in franchise agreements.

4.4.1 Froneman J (dissenting)

Although Froneman J agreed that the majority judgement establishes "the regulation of fairness in our contract law squarely and unambiguously" within the realm of our "constitutional value system", he still found it necessary to add to the majority judgement.[771] He explicates three main reasons for writing separately. Firstly, Froneman J argues that the purpose of his separate judgement is to shed light on the divergent approaches between the SCA and the CC.[772] He goes on to explain that regulating "unfairness in contract law" is not merely a "legal"' matter that can be interpreted "from supposedly neutral legal principles in a self-executing way,"[773] because he argues the regulation of unfair contracts inevitably "involves making an underlying moral or value choice".[774]

He suggests that although the majority judgement clearly establishes the fact that "these choices must be made within the objective value system of the Constitution,"[775] he makes a very important point, by arguing that it fails to provide

771 *Beadica* [105].
772 *Beadica* [106].
773 *Beadica* [106].
774 *Beadica* [106].
775 *Beadica* [106].

practical guidance on how to "develop or give further guidance" as to how "these objective values" are to be practically applied, in contractual disputes of this nature.[776]`This is an important point, because as the SCA and CC has time and time again pointed out, to ensure certainty in contractual relations, judicial interpretation concerning constitutional and common law abstract values cannot be subjected to the "individual idiosyncratic inferences of a few judicial minds",[777] because this would lead to different legal interpretations and judicial outcomes and bring about much uncertainty in the law of contract. The lack of practical strategies for implementing the guideline contractual principles espoused by the CC in the majority judgement, may in future become challenging, especially so, in cases where it will need to be practically implemented. This is especially true, because as Froneman J points out, the role of the judiciary is "to delineate reasonably certain, practical and objective legal principles and rules to guide prospective contracting parties."[778] The purpose of which Froneman J argues, is to avoid

> the caricature of rogue judges imposing their own subjective and arbitrary opinions of what is fair and reasonable upon unsuspecting litigants [which] must be dispelled.[779]

This appears to suggest that the guideline contractual principles established by the majority judgement in *Beadica*, for adjudicating contractual disputes (involving fairness and equity) are merely guidelines as such, and do not provide practical measures for judges to implement in their judgements. This may result in individual judges making different rulings (in contract law disputes relating to fairness and equity due to their own frame of references as to what fairness and justice entails), which may in future bring about much legal uncertainty because contractual law may well become unpredictable and unstable.[780] To avoid judges "imposing their own subjective and arbitrary opinions of what is fair and reasonable" Froneman J suggests that the approach of the majority judgement is "that the individualism of our law of contract" has always made room to account for "the reasonable

776 *Beadica* [106]; "disputes" here refers to contractual disputes involving fairness and equity that revolve around the Constitution, constitutional values and common law abstract values.

777 *Beadica* [81].

778 *Beadica* [107].

779 *Beadica* [107]; [108].

780 See section 2.3 of Chapter 2.

expectations" of contractants, including "those of the wider community."[781] These "reasonable expectations" he seems to suggest can be used to fairly regulate contracts "in a manner that ensures objectivity, reasonable practicality and certainty."[782]

4.4.1.1 The derivative nature of morality in the common law of contract

Froneman J (citing Brownsword),[783] explains that the "social, political and economic history" of a country influences and shapes the way a country conceives and "chooses to forge its fundamental values" into establishing its system of contractual law.[784] He makes it clear that there are "discernible differences in perspective and emphasis" in our system of law before the Constitution.[785] These two "sources of our mixed legal system" were the "civilian tradition and the English common law tradition"[786], to which we have now added "the Constitution" incorporating an all-embracing "objective value system"[787], which must now

> inform not only our views on our mixed common law and civilian heritage, but must embrace also the neglected 'third grace' of our legal heritage, namely African customary law and tradition.[788]

Froneman J opines, despite the different approaches adopted by the "civil law and common law systems" it has generally been recognised that "both" these legal systems "grapple with the same problem" which is the regulation of "fairness" in the law of contract law.[789] Both the civil and common law legal systems appear to be having difficulty with adjudicating over contractual disputes involving fairness and

781 *Beadica* [108].

782 *Beadica* [108].

783 See Brownsword *Contract Law*: *Themes for the Twenty First Century* 165, where this author provides insight into a number of important themes in contract law as it makes its debut the twenty-first century. This author provides critical and positive responses on a multitude of issues which he discusses and which include an array of discussions on the influences of the classical and modern on the present law of contract.

784 *Beadica* [110].

785 *Beadica* [110].

786 *Beadica* [110].

787 *Beadica* [110].

788 *Beadica* [110].

789 *Beadica* [111].

equity in the law of contract, quoting what Bingham LJ said in *Interfoto*[790], Froneman J points out:

> In many civil law systems, and perhaps in most legal systems outside the common law world, **the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith**. This does not mean simply that they should not deceive each other… [I]ts effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's own cards face upwards on the table'. It is in essence a principle of fair and open dealing…English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of fairness (my emphasis).[791]

Recognising that fairness is "universally recognised" as essential to any legal system of contractual law, Froneman J asks how this contentious legal issue, having different conceptions, should be approached. He questions whether it should be dealt with in a piecemeal or general principled fashion (like the majority decision in *Beadica* has done).[792] Giving proper meaning to "fairness" Froneman J explains, involves "a moral choice or value judgment."[793] According to him both in the civilian and common law traditions of law, the way fairness is conceived in the law of contract "has changed"[794], and therefore he argues "it is instructive to understand this evolving process" of the way "fairness in contract" was conceived in the past

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790 See *Interfoto Picture Library Ltd v Stiletto Visual Programmes* Ltd 1989 1 QB 433 (hereinafter referred to as *Interfoto*), where in this case, Stiletto Visual Programmes (SVP) had placed an order for forty-seven (47) photographic transparencies from Interfoto Picture Library (IPL). The delivery note contained a clause which stated that the transparencies had to be returned to IPL within 14 days of date of delivery. Should the transparencies not be returned within this timeframe then IPL reserved the right to charge a holding fee of £5 per transparency for each day the transparencies were not received. SVP only returned the transparencies four (4) weeks later. It then received an invoice for more than three thousand seven hundred Pounds (£3,700). Subsequently, SVP refused to make payment to IPL for this amount and was issued with a court judgement for payment. In response, SVP appealed the judgement. In their response SVP, contended they had never dealt with IPL before and that they were not aware of IPL's standard terms and conditions and further that they had not been sent a copy of IPL's conditions prior to their having returned the transparencies. In addition, SVP contended that even if they had been sent a copy of the terms, IPL had failed to make them aware of the onerous terms which included that the fees charged amounted to more than ten times higher than other lending libraries. SVP argued strongly that a contract had come about when they requested the transparencies and that IPL agreed to send them and that the terms of the contract were therefore binding. In response to these claims, IPL argued that the delivery note had been included when the transparencies were delivered and that it was both clear and unambiguous. They argued further that for these reasons they were entitled to rely on the clause and claim the penalty money that was due to them. The court held that the clause had not been successfully incorporated into the contract. The court went on to state that in cases where a clause is onerous such as in this case, and where unreasonable fees were charged in comparison to other photographic libraries a party who wishes to rely on the existence of a penalty clause would need to adduce evidence that it has taken reasonable steps to draw the clause to the attention of the other party. The court found that IPL had failed to do this, and therefore they were only entitled to recover fees assessed on a *quantum meruit* basis.

791 *Interfoto* at 439.

792 *Beadica* [112].

793 *Beadica* [112].

794 *Beadica* [113].

and how fairness is now viewed.[795] This is important because as Froneman J has pointed out fairness involves a moral "choice or value judgement".[796] It is this "moral choice or value judgement" of fairness that is contentious because it is dependent on from who's view it is being seen. This is similar to an accident. All the persons involved in the accident will view the accident and decide on who is wrong from different angles, depending on the angle from which they are viewing the accident, and their particular frame of reference of who is at fault. Froneman J, makes the vivid point that our conceptions of fairness have been formed by the "traditions" …of our mixed legal heritage" (meaning Roman-Dutch and English law) and also that "we might unwittingly and uncritically cling to a particular conception" (formed by the tradition of our common law heritage) of what fairness means "that may have outlived its usefulness" (under the Constitution which instils a new set of abstract public values).[797] In this respect, Froneman J points out, we are now duty bound "to ensure that our own conception of fairness in contract" aligns with the value system of our Constitution.[798] This according to him can only be understood if we are able to determine from where and how our prevailing ideas of fairness have been formed.[799]

4.4.1.2 Froneman J's derivative conceptions of fairness in contract[800]

To explain how our conceptions of fairness has been formed, Froneman J identifies and articulates four notions from which our understanding of fairness has been shaped. These notions of our derived frame of reference for fairness, according to him, has taken place in four main phases (1) "equality of exchange" in the contractual bargaining process[801] (2) "unfettered freedom" of contract law and its

795 *Beadica* [113].

796 *Beadica* [113].

797 *Beadica* [113].

798 *Beadica* [113]; see also Farmbry 2014 *Public Administration Quarterly* 526-527, where this author discusses the "notions of rational choice, the original position, and reflective equilibrium" as Rawls proposed. According to this author, "the issue of the rational choice to engage in a society where the conversation on notions of moral order shaped by conceptualizations of the right versus the good is an area where there has been a degree of tension. For many people who were at the margins during the apartheid years, the good is framed by questions of how to move towards a societal model based on notions of inclusion. Recognition of the prioritization of the right over the good means that a number of balancing factors need to be considered as the nation moves to its ideal situation. Central in which is a conceptualization of how to balance limited societal resources with broader goals of societal change."

799 *Beadica* [113].

800 *Beadica* [113]; [114].

801 *Beadica* [115]; [116].

rise[802] (3) the "decline and transformation of freedom of contract" and (4) the advent of constitutionalism.[803]

Under the equality of exchange idea, Froneman draws in the important fairness idea that value and burden must be equal.[804] Citing Gordley[805], Froneman J argues that in "ancient" times when an exchange of value occurred, it was accepted that the "value of what each party gives should be equal to the value of what he receives."[806] He states that under the once "idealised Roman law tradition…academic jurists regarded this idea as a basic principle of the law of contracts."[807] Roman jurists in Gordley's view according to Froneman, did not have expectations that contract law should "remedy every unequal exchange, for to do so might be unsettling for commerce."[808] However, as Froneman (citing Gordley)[809] points out, Roman jurists did regard "an unequal exchange as unjust in principle and thought that the law should provide a remedy where practical."[810] Froneman seems to draw in the important notion of fairness in contract, which is that for a contract to be fair, there must be a more or less equitable exchange of value and that this value exchange, should impose the same contractual burden on each of the parties.[811] Froneman J seems to suggest that it was this "rich moral content of the intellectual tradition" which gave the law of contract its purpose, for ensuring the proportionally equal value of exchange.[812] Froneman J (citing Gordley)[813] argues, that this equal value of

802 *Beadica* [113]; [114].

803 *Beadica* [119]; [120].

804 *Beadica* [114].

805 See Gordley 1981 *California Law review* 1587, where this author points out that the equality of exchange idea means that in contract, the value that a party gives should be equal to the value that the other party receives. This is the basic idea encompassing value of exchange which Froneman seems to be pushing to be adopted. Gordley argues that this is the ideal that was adopted under the Roman Jurists and has fallen into disuse through the passage of time either because some believed that this concept was "meaningless" or that "judicial remedies were an unwarranted interference" in the judicial process. *Beadica* [114]; see also Gordley 1981 *California Law review* 1587; Murphy 2002 *he American Journal of Jurisprudence* 85, where this author points out that Gordley is a strong supporter and defender of "a set of views about equality in exchange drawn from the Scholastic jurists in the Aristotelian tradition". Citing Gordley, he goes on to say that "Gordley has repeatedly asserted that, in the Scholastic tradition justice in voluntary exchange requires that a party's performance that is exchanged must be of equal value.

806 *Beadica* [114].

807 *Beadica* [114].

808 Gordley 1981 *California law Review* 1587.

809 See Gordley 1981 *California Law review* 1587.

810 *Beadica* [114].

811 *Beadica* [114].

812 *Beadica* [116].

813 See Gordley 1981 *California Law review* 1587.

exchange tradition "was abandoned" by the "classical law of contract", that was formed during the "nineteenth century",[814] period in our history.

Interestingly, Froneman (citing Gordley)[815] uses the word "abandoned"[816] which is defined as "to leave behind or run away from someone or something, or to give up something".[817] In my view, Gordley's argument fails to consider that it was, as Watson argues

> the Roman jurists rather than the conditions in the society at large that determined the origins and nature of the individual Roman contracts, and that the jurists were largely unaffected by society's realities. Of course, social, economic, political and religious factors, did have an impact but to an extent that was very much less than their general importance in society.[818]

This seems to suggest, if I understand it correctly, that the Roman law was bent to the will of the Roman jurists and not so much so to the changes taking place in Roman society, brought about by changes occurring in the social, political, economic and technological spheres at the time.

Under legal modernity it can be argued that in

> a civil society, …[law] is required to maintain order and to establish what personal behavior and business practices are right or wrong based on a society's values and circumstances [at a given point in time][819]

The rapid pace of social, economic, political and legal change resulting from an unsophisticated agrarian society to a much more highly specialised industrialised society, created the need for the law, to adapt to these changing circumstances.[820] It has been clearly established that "society does not remain static so the legal system and the laws it produces need to be relevant (to the time) in order to be

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814 *Beadica* [116]; see also Gordley 1981 *California law Review* 1587.

815 See Gordley 1981 *California Law review* 1587.

816 Gordley 1981 *California law Review* 1587.

817 Cambridge Dictionary "Abandon" https://dictionary.cambridge.org/dictionary/english/abandon (Date of use: 12 February 2021).

818 See Watson 1987 *Law and History Review* 537.

819 Lumen learning "Introduction to Business" https://courses.lumenlearning.com/wmopen-introductiontobusiness/chapter/meaning-and-purpose-of-law/ (Date of use: 12 February 2021).

820 See Encyclopedia Britannica "The Industrial Revolution Economic effects" https://www.britannica.com/topic/history-of-Europe/The-Industrial-Revolution#ref643971 (Date of use: 02 March 2021); see also National Geographic "Industrialization, Labor, and Life" https://www.nationalgeographic.org/article/industrialization-labor-and-life/6th-grade/ (Date of use: 02 March 2021).

effective."[821] Laws that order society and enable human progress, has to "respond to social, economic, technological, moral and political change by evolving as those changes emerge",[822] (such as with changes brought about by democracy and the rise of constitutionalism for example).

Froneman J (citing Gordley)[823] posits the notion that the Roman law of contract was replaced by "'a thin collection of organising principles'" focused on supposedly "'voluntary choices by individuals'…[t]his analytical framework, preserving as cardinal the principle of respecting and enforcing voluntary choices" and resulted in the establishment of "a closed system of thought that excluded inconsistent rules and doctrines."[824] This "closed system of thought" obviously meaning classical positivist "black letter" law of contract, aligned to *laissez faire* and free market choices. Froneman J quoting Atiyah states

> '[T]he contents of the contract, the terms and the price and the subject matter are entirely for the parties to settle. It is assumed that the parties know their own minds … that they will calculate the risks and future contingencies that are relevant, and that all these enter into the bargain. It follows that the unfairness of the bargain gross inadequacy or excess of price is irrelevant, and once made the contract is binding.'[825]

In Froneman J's opinion, it was these free-market ideas which influenced the law of contract to be what he calls "a closed and self-executing system in terms of its internal logic".[826] Froneman (citing Brownsword)[827] argues that it was the "foundational ideas" of classical law embracing "ideas of freedom of contract and sanctity of contract" which served "autonomy by adopting the principle of freedom of contract" and that it was "contract [that] underpins rational planning by adopting

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821 Open Learn "Why law changes" https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=69031&section=1 (Date of use: 12 February 2021).

822 Lumen learning "Introduction to Business" https://courses.lumenlearning.com/wmopen-introductiontobusiness/chapter/meaning-and-purpose-of-law/ (Date of use: 12 February 2021).

823 See Gordley 1981 *California law Review* 1587, for an in dept discussion of the exchange of value ideal. This author points out that during ancient times when value was exchanged the value of what each party gives was to be equivalent to the value of what the other party received. This idea formed the basis of contract law and that jurist adopted this idea as the basic foundational principle upon which the law of contract was governed. However, Gordley also acknowledges that these Jurists did not expect that contract law should "remedy" every unequal exchange of value because to do that, according to him would be "unsettling for commerce" meaning that it would lead to legal uncertainty in the law of contract.

824 *Beadica* [116].

825 *Beadica* [117]; see also Atiyah *The Rise and Fall of Freedom of Contract* 403.

826 *Beadica* [118].

827 Brownsword *Contract Law: Themes for the Twenty First Century* 69.

the principle of sanctity of contract."[828] It is important to note as Froneman J points out

> It should not be overlooked that the classical 19th century interpretation of freedom of contract and the market order also laid claim to fairness. The **normative justification for this notion of freedom of contract lies in its claim to promote and sustain liberty, equality and fairness in exchange. Its protection of individual liberty and freedom lies in the extensive freedom it gives to individuals to decide who to contract with, on what terms to contract and in the protection of the sanctity of contract. Its protection of equality lies at a formal level of equality of opportunity: every person has the same set of rights to enter contracts and own property no distinctions of rank and privilege apply**. Lastly, fairness finds expression in the reciprocity of exchange: both parties to a contract give up something of value in return for something that was desired. Interference to ensure equivalence in value thus becomes unnecessary (my emphasis).[829]

Froneman sheds light on Atiyah[830], whom he says recorded the decay of "the rigid conception of the freedom of contact" which according to Atiyah was watered down by "government regulation" which substituted freedom of contract with protectiveness and "paternalism" and still continues today "in different forms."[831] According to Froneman, the classical form that the market took under *laissez faire*, as well as the "content of its legal regulation has altered dramatically."[832] Modern day markets he argues "cannot be described as a system based on individual freedom of contract." Referring to Europe he argues that two of the most significant developments taking place there are the protection of the "mass consumer market"

828 *Beadica* [118]; see also Atiyah *The Rise and Fall of Freedom of Contract* 403-404

829 *Beadica* [119].

830 Atiyah 1985 *The University of Toronto Law Journal* 3.

831 *Beadica* [119]; see also Atiyah 1985 *The University of Toronto Law Journal* 3, where Atiyah states that "The second set of rules or principles concerning adequacy of considera- tion was exclusively equitable in origin, and many of them have a long history. The usury laws limiting rates of interest have existed in some shape or form since the Reformation,though there was half a between 1854 and 1900 when all statutory restraints disappeared; the law of mortgages has for centuries limited the power of the mortgagee to demand more than a fair return on his loan; the law of penalties has at least since the seventeenth century protected contracting parties from liability freely entered into quite irrespective of the promisor's under- standing of the nature of the terms; and the law relating to the sale of reversions or the purchase of annuities has also provided relief in certain circumstances to the victims of harsh and unconscionable bargains. These equitable doctrines, unlike the broader defences of fraud, misrep- resentation, and duress, were mostly limited to particular types of transac- tion or particular types of promise; but on the other hand they could not be treated as merely concerned with the reality of consent or procedural fairness. It is clear that these were doctrines concerned with the substan- tive fairness of transactions or exchanges. Probably for that very reason they came to seem anomalous during the nineteenth century, and many of them were gradually whittled down. Only in very recent times have they shown renewed signs of life, but even today they are not usually regarded as qualifications to the doctrine that adequacy of consideration is immaterial."

832 *Beadica* [121].

by the "legislative protective regime" coupled to increasing awareness and appreciation that "relational commercial dealing" requires its own set of regulatory rules;[833] a major concern being "the inequality in power relations created and maintained by a narrow and rigid conception of freedom of contact."[834]

The idea that freedom articulates itself "in only one voice" he argues "has been debunked" because he postulates, "[c]ontract law cannot protect freedom in the abstract" and freedom of contract can "never be absolute", mainly because it would not be possible "to determine the kind of freedom that needs to be protected."[835] Quoting Kennedy, Froneman correctly emphasises that judicial "rules" needs to be fairly balanced.[836] Too many rules favouring freedom of contract, will result in a form of "legalised theft" or alternatively as he puts it "cutting back the rules far enough" will result in too much leniency in the application of the freedom of contract principle.[837] This will "jeopardise" and undermine contractual law and we will then have "departed" from the true freedom of contract meaning.[838]

Kennedy puts forward the important notion that a "decision maker" should "indeed enforce agreements" but at the same time also needs to "refuse to enforce agreements under the principle of freedom of contract."[839] In Kennedy's view, contractual law contains "gaps, conflicts, and ambiguities"[840], and he suggests that judges cannot rely on the freedom of contract principle because this principle fails to provide them with all that is needed to make decisions about which contracts to enforce.[841] Kennedy, argues that to make decisions within the freedom of contract "doctrine" judges will rely on stereotypical and predictable policy arguments grounded in "altruism" and "individualism" for deciding "individual cases", and which according to him will put into question both the settled and unsettled parts of the doctrine.[842]

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833 *Beadica* [121].

834 *Beadica* [121].

835 *Beadica* [121]; [122].

836 *Beadica* [122]; see also Kennedy 1982 *Maryland Law Review* 582

837 *Beadica* [122]; see also Kennedy 1982 *Maryland Law Review* 582

838 *Beadica* [122]; see also Kennedy 1982 *Maryland Law Review* 582

839 Kennedy 1982 *Maryland Law Review* 569.

840 Kennedy 1982 *Maryland Law Review* 586.

841 Kennedy 1982 *Maryland Law Review* 581.

842 Kennedy 1982 *Maryland Law Review* 581-582.

Kennedy maintains that "eliminating inequality of bargaining power", as conceived by "liberals" is not associated with factual elimination of inequalities.[843] According to him it fails to be directly relevant "to the actual division of social product among the warring groups of civil society"[844] and that all it does is "resembles efficiency: it transposes deadly fights of social groups to a plane where the issue is merely formal".[845] For Kennedy,

> the doctrine of unequal bargaining power represents a partial acceptance of distributive motives into the domain of contract law, but an acceptance that is rhetorical rather than real—intended to disarm. It would fail of its own purpose if the application of the doctrine led to a substantial change in the actual distribution of the good things in life.[846].

It is also important to remember that in South Africa, Kennedy's arguments ring hollow. The so called "liberals" which Kennedy refers to, have since 1994 contributed to the government's tax base in an effort to contribute to socioeconomic development and wealth distribution by means of various taxation regimes, in an effort to curb poverty and to redistribute wealth. It is apt to point out, as a minority group it is in their interest to contribute to the development of our democracy and the overall wellbeing of South Africa. It has factually been proven that rampant corruption and the abuse of this tax pool of revenue, has resulted in a failure of the state to achieve the constitutional objectives and vision.[847] It is generally well known that rampant outrighted corruption by rogue elements, has robbed the people of South Africa of a better life. This has serious implications for South Africa and for the realisation of the constitutional vision. For as long as corruption continues and is not checked, the security of our young democracy will be placed in peril and the so called "liberals" will unfairly bear the brunt of the blame, for transformative failure.[848]

To deal with incorporating fairness into contractual disputes, Froneman J proposes a two-pronged strategy that involve fairness and equity. Froneman J proposes two

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843 Kennedy 1982 *Maryland Law Review* 621.

844 Kennedy 1982 *Maryland Law Review* 621.

845 Kennedy 1982 *Maryland Law Review* 621-622.

846 Kennedy 1982 *Maryland Law Review* 621-622.

847 See section 3.7.2 of Chapter 3 where the impact of corruption is discussed.

848 See section 3.7.2 of Chapter 3.

pragmatic “possibilities” that could be used to resolve this issue. Firstly, he posits the notion that fair dealing standards which are recognised by “the community of which the contractors are part” should be incorporated and secondly fair dealing and cooperation standards “in terms of the best moral theory” should also be adopted.[849] This is significant because the incorporation of a society’s notions of fairness, fair dealing and cooperation standards from within the community generally enforces and serves to strengthen the law of contract. In this way certainty (predictability and stability) in the law is created and reinforced.

Contract law according to Froneman J “prefers practicality” rather than theoretical foundations because according to him, “the best standard appears to be one that reflects the expectations associated with good commercial practice.”[850] He argues that any decision involving concepts such as fairness inevitably entails a subjective evaluation of the facts despite there being also an objective rule. Froneman J’s argument centers on the fact that irrespective, when adjudicating over such disputes, a decision on how and whether to implement it must still be subjectively made.[851] He then questions if it is possible to objectively adjudicate over contractual disputes, involving fairness and equity. To answer this question, he reverts back to Gordley[852] whom Froneman suggests argued that “it always comes back to the ancient idea of equality in exchange”. Froneman J quoting from Gordley[853] states:

> It seems hard to maintain that a ‘disproportion’ in the values exchanged is of itself neither unfair nor an evil to be remedied, but one that exploits another's precarious situation and causes such a disproportion is acting against good morals. A situation can only be described as ‘precarious’ by reference to some harmful consequences that might occur. Conduct can only be described as ‘exploitive’ if some unfair advantage is taken. Yet here, the only harm that attends the ‘precarious situation’ of the one party, and the only advantage taken of him by the other, seems to be the disproportionality in the values exchanged. If the disproportion were not viewed as an evil in itself, it is hard to see why one would care about either the situation or the conduct.[854]

849 *Beadica* [125].

850 *Beadica* [124]; [125].

851 *Beadica* [126].

852 *Beadica* [125], see also Gordley 1981 *California Law review* 1632.

853 *Beadica* [125], see also Gordley 1981 *California Law review* 1632.

854 Gordley 1981 *California Law review* 1632.

Gordley, Froneman J says, believes that it is not impossible "to determine the disproportion objectively" and pragmatically.[855] Froneman J relying on Gordley[856] argues that where the harm is more certain of being realised, the less will be the ability of one "to protect against it", and therefore the more willing the court should be to provide a remedy. The reason for this is that, it is the "disproportion in the [exchange]" itself that provides sufficient "reason" for providing the relief.[857] However, as Gordley acknowledges, this "does not mean" that relief should be provided "whenever an exchange is disproportionate" because as Gordley points out that if our courts are not to "cause more inequalities than they cure" our courts must direct relief only to those cases "where the [exchange] is clearly disproportionate" and limited to those cases where the disadvantaged party suffers severe injury and is "less able to protect" themselves.[858]

Froneman J argues that our common law of contract has experienced similar developments.[859] For him the doctrine of *laesio enormis*[860] had survived for longer in our non-codified Roman Dutch law than in Europe, until it was finally abolished by the AD's decision in *Tjollo.*[861] He then refers to back to the *exceptio doli* which was according to him "not explicitly linked to equality in exchange". However he argues it "remained as a general legal device" that could thwart a party from relying on a legal right where such party failed to live up to the general "standard of good faith."[862] However, he points out "that equitable instrument" was excised from our contract law by the AD in *Bank of Lisbon*[863]and goes on to say that the AD's "decision remains doubtful", because determining when a party may be prevented from

855 *Beadica* [126].

856 *Beadica* [125]; see also Gordley 1981 *California Law review* 1632.

857 *Beadica* [126]; see also Gordley 1981 *California Law review* 1621.

858 *Beadica* [126], see also Gordley 1981 *California Law review* 1621.

859 *Beadica* [127].

860 A doctrine of Roman law that is included in some European legal systems but not in English law. It states that the price given in a contract by way of consideration must be fair and reasonable or the contract may be rescinded.

861 *Beadica* [127]; see also *Tjollo Ateljees* (*Eins*) *Bpk v Small* 1949 1 SA 856 (A).

862 *Beadica* [129]; see *Bank of Lisbon* where the court stated that the *exceptio* had never become part of our law. The *exceptio doli generalis* provided relief *to a party* that challenged another party's conduct (who had acted in bad faith). In this case the *exceptio* was considered unnecessary because it was felt that consensual contracts were all rooted in good faith.

863 *Beadica* [129].

exercising a contractual right is now one of the most pressing problems in modern contract law.[864]

Froneman J argues that freedom of contract was "a closed and self executing system" that aligned well with the Pandectist ideals that the law was "a formalistic science, the rules and methods of which were derived from the system itself."[865] This system according to him also had a strong influence over authors such as JC De Wet, whom he argues had a strong influence of South African contract law.[866] Froneman J argues that the consequential effect of adapting a Pandectist scientific approach to contract law, had a limiting influence on normative principles. For example, he explains that De Wet "derived" from the Pandectists

> a methodology that seeks to give the whole of private law a coherent conceptual structure that at the same time provides the general principles from which the application of rules to individual cases follow and from which new related concepts could be constructed to cover new situations. The conceptual framework has an ethic and logic of its own and, provided this is used properly, no further normative work needs to be done in adjudication. The underlying normative premise is that the personal autonomy and individual responsibility contract law provides is sufficient guarantee for ethically acceptable results. Judicial interference is thus unnecessary.[867]

Froneman J is of the conviction, that the "closed and selfexecuting nature of the [capitalist] system in terms of its internal logic" may explain why the "system" was seen as an obvious truth which required no further elucidation.[868] For Froneman J (finding support from Cockrell[869]), the privileged position in our law of contract, has been "occupied by a substantive individualism couched in a rules based form"[870], which included among others the "sanctity of individual promises, the minimal role for the courts in matters of contractual agreement", and he accordingly goes on to say (quoting Cockrell[871]) that "'it is what

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864 *Beadica* [129].

865 *Beadica* [129].

866 *Beadica* [129].

867 *Beadica* [130].

868 *Beadica* [129].

869 Cockrell 1992 *SALJ* 48.

870 *Beadica* [132].

871 Cockrell 1992 *SALJ* 48.

established the need for certainty in the law'",[872] and that it was these factors that echoed throughout the law.[873] He goes on to elaborate that the privileging favoured "individualism" and that the rules form "is an axiomatic truth rather than a controversial premise in an ongoing argument."[874]

Citing a number of examples from our common law of contract, Froneman J explains that any person that is conversant with the contract law of South Africa, will know that the law of contract, on both a "descriptive" as well as "normative level" fails to explain the inflexible "conception of freedom of contract".[875] Here, Froneman J argues that with the contractual defence of mistake for example, our law of contract (much like other legal systems) generally accepts that the demand for personal autonomy in the shape of individual consent, must prevail in contractual liability and that it must "be qualified in some form by the reasonable expectation of the other party."[876] This according to Froneman J, is where the contractual principle of "autonomy" merges with the principle of contractual reliance. Thus, Froneman J says this is where the process involving contractual liability is located; "outside the subjective consent of the contracting parties" and this is "when the content of contractual obligations is determined."[877] Froneman J gives the example of the tacit terms in a contract,[878] which he points out, are inferred by a judge into the contract. He explains that this form of "hypothetical consent" is

> justified by a finding by a judge that the parties would have agreed to that term if they had been made aware of its possible inclusion at the time of concluding the contract. But they did not. The practical upshot is that the judge makes that part of their contract for the parties. [879]

Froneman J points out that our highest courts have in the past persistently given recognition to the concept of good faith, which he strongly argues underscores our

872 *Beadica* [132].

873 *Beadica* [132].

874 *Beadica* [132].

875 *Beadica* [133].

876 *Beadica* [132].

877 *Beadica* [135].

878 *Beadica* [135]. Tacit terms refer to the unspoken contractual terms that parties would have had in mind and taken into account when contracting and that although not specifically documented, are implied in the contract. See *Beadica* [135] where Froneman citing Corbett JA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) provides a very succinct explanation of the distinction between implied terms and tacit terms.

879 *Beadica* [132].

law of contract. He points out that good faith (as an informing value for the development of our law of contract) has been used by the higher courts to interfere in freedom of contract by developing legal remedies for repudiation, cession, auction bids, as well to modify notice terms by conduct, and for allowing for a relaxation of the principle of reciprocity and the award of a reduced contract price.[880]

In addition, he argues defences for "misrepresentation, duress and undue influence are often explained on the basis that they illustrate defects in the promisor's volition."[881] Significantly, he hammers home the point that a more palpable explanation for such defences are that they arise out of promisee's conduct by highlighting the bad faith conduct of the promisee, "from which the law will not allow the promisee to benefit".[882] In respect of public policy, Froneman J draws our attention to the fact that our courts have refused to enforce contractual agreements because they were contrary to public policy and which we now know, is part of our constitutional value system. In *Sasfin* for example, he argues the AD adjudicated over this case which involved determining the substantive fairness of a deed of cession, and came to the conclusion that the contract was "clearly unconscionable and incompatible with the public interest.[883] Furthermore as Froneman J highlights our common law of contract has now established that "covenants in restraint of trade" cannot be enforced in cases where it is established that such enforcement would go against public policy[884] and much more especially so, in those cases which fail to provide a legitimate reason to restrain a party from participating in trade.[885]

Froneman J opines that by interfering in contractual relationships through either their terms or alternatively through contractual enforcement, "our courts second guess, or 'make' and 'unmake' contracts for parties", outside the independent consent of "the contracting parties."[886] Other jurisdictions, Froneman J argues have intervened in contractual relations by supplanting or alternatively displacing "freedom of

880 *Beadica* [136].

881 *Beadica* [136].

882 *Beadica* [137].

883 *Beadica* [138].

884 *Beadica* [138]; A contract in restraint of trade refers to one whereby a party (the convenantor) agrees with the other party (the convenantee) to restrict his freedom to pursue trade with other persons.

885 *Beadica* [138].

886 *Beadica* [139].

contract for reasons of equity."[887] Hence the key point that Froneman J drives home, is that our courts are already interfering with contractual relationships outside of their individual consensus, and therefore he correctly suggests that there is no such thing as absolute freedom of contract. Froneman J (citing Cockrell)[888] asks "while the strains of commitment pull relentlessly in both directions" why is it that our law of contract, "cannot mediate between self-interest and sociality" in a self-conscious manner "that does not blindly value legal doctrine as an end unto itself."[889] Thus, Froneman J seems to be suggesting that notions of good faith and fairness should be given formal recognition as a contractual rule, and must be dealt with the same legal force, as other legal remedies (such as for example, misrepresentation, repudiation, fraud and duress) in the common law of contract.

Froneman J goes on to say that in pre-constitutional South Africa, for the majority of South Africans, the "moral justification for freedom of contract was virtually non-existent".[890] The reasons for this he points out, was that "there was no freedom to contract with anyone they chose on the terms they wished", mainly because it was unlawful at the time.[891] In addition, he points out there was no "equality of opportunity, because rank and privilege applied" and furthermore, "[t]here was no proper reciprocity in exchange", this was mainly because he asserts, "the disadvantaged lacked the means to decide freely what they valued in that exchange."[892] Froneman J correctly points out, that the law of contract is a regulating mechanism which "regulates both productive and distributive relations", and therefore "functions as a key mechanism in the distribution of wealth."[893] For Froneman J, "the undeniable inequality in the distribution of wealth over centuries in our country" is a major stumbling block against the argument "that the playing field is now level and hence that the moral justification" that the principle "freedom of contract can simply be applied."[894]

887 *Beadica* [139]-[141].

888 Cockrell 1992 *SALJ* 62.

889 *Beadica* [140]; see also Cockrell 1992 *SALJ* 62.

890 *Beadica* [140].

891 *Beadica* [142].

892 *Beadica* [140].

893 *Beadica* [140].

894 *Beadica* [140].

4.4.1.3 Froneman J's pragmatic adjudicatory application over unfair contracts

Froneman J supports the majority decision that the jurisprudence followed by the SCA and the CC, is the same. He opines that the CC's "analysis" converges with SCA's approach, in terms of the contractual principles involved when adjudicating over unfair contracts and public policy.[895] In agreement with the majority decision in *Beadica*, he suggests that the "apparent differences" of the approaches of these courts is "more apparent than real."[896] Citing the majority judgement where the court stated:

> These abstract values have not been accorded autonomous, selfstanding status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.[897]

Froneman J expresses concern with the SCA's repetitive statement that the so called "abstract" values of fairness, justice and equity, and reasonableness have no autonomous, self-standing status because as he points out "it may be read to underplay what *Barkhuizen* actually decided."[898] He argues that statements that claim abstract values are "mediated by the common law rule that a court may not enforce contractual terms contrary to public policy", creatively seek to connect the division that exists "between the criticism of the application of abstract values as distinct from legal rules."[899] Froneman J argues that

> privileging freedom of contract and certainty in an absolutist manner is no fit redress for the valid complaint that this Court's approach lacks discernible objective criteria to give content to good faith and its close relatives, fairness and reasonableness. Rigidity negates any possibility for these notions to play a role in contract law, even indirectly. So the quest must be for reasonably practical, objective and clear requirements informed by these concepts. That is not an impossible task.[900]

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895 *Beadica* [144].

896 *Beadica* [144].

897 *Beadica* [80].

898 *Beadica* [144].

899 *Beadica* [145].

900 *Beadica* [180].

Froneman J believes that the most contentious criticism for adjudication over contractual disputes concerning fairness and equity has been the question of subjectivity.[901] To overcome this subjectivity argument, he proposes a three-point test, which details how legal decision makers may arrive at a decision to refuse enforcement of a contract based on public policy grounds.[902] Froneman J correctly points out that *Barkhuizen* is,

> authoritative and binding precedent that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done directly in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy.[903]

Froneman J borrowing from Ngcobo J in *Barkhuizen*[904], proposes that refusal to enforce a contract on the basis of public policy grounds should evaluate (1) if there exists a clear disproportion of exchange between the parties which would include providing substantive reasons for failing to comply; (2) The disadvantaged party must suffer or have suffered serious prejudice; (3) The party occupying a weak position should have been placed in a position where they are less able to protect themselves than the other stronger contracting party.[905]

German law he says "makes a distinction between invalidation on public policy grounds and the general operation of good faith".[906] Referring to articles 134 and 138 of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB), he argues that Article 134 provides that any legal transaction that "violates a statutory prohibition is void, unless the statute leads to a different conclusion", while Article 138(1) of the BGB provides he says, that "a legal transaction that is contrary to public policy is void."[907] With regards to Article 138(2) he highlights that

> a particular, a legal transaction is void by which a person, **by exploiting the predicament, inexperience, lack of sound judgment or considerable weakness of will of another, causes himself or a third**

901 *Beadica* [107].
902 *Beadica* [187].
903 *Beadica* [146].
904 Beadica [146].
905 *Beadica* [187]; [188]; see also *Barkhuizen*.
906 *Beadica* [181]-[182].
907 *Beadica* [181]-[182].

> **party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance** (my emphasis).[908]

Froneman J points out that, our common law of contract already recognises that a contract, or contractual term that is contrary or conflicts with legislation is void.[909] Importantly, Froneman J explains that Article 138(1) of the BGB, contains equivalent abstractness and also lacks the certainty that our South African common law suffers from, in declaring contracts contrary to public policy.[910] Froneman J believes that this is where "articulating individual fundamental rights in the Constitution", can be of great assistance.[911] He believes any "infringement of a fundamental individual right" in a contractual context, may then present a tangible example of being in conflict with public policy.[912] This he points out, had already been recognised in *Barkhuizen*.[913]

Accordingly, he explains it is here where "an infringement of a fundamental right" occurs (which is not clear in the first stage of the Barkhuizen test for fairness), that certain features of article 138(2) of the BGB, can be used to provide a deeper insight and understanding into the manner in which "specific and ascertainable rules may be of assistance" to us.[914] This he argues can be used when we are dealing with the particular enquiry during the second stage of the *Barkhuizen* analysis, involving determining or establishing, whether a contractual clause is valid, and whether it should be enforced.[915] Froneman J opines that *Barkhuizen*, may be just the prelude in South African contract law, which objectively determines that a "certain rule" during the second enquiry stage, requires that parties seeking to dispel the consequences of "their own breach of contract on the basis of public policy" will be required to sufficiently provide a proper explanation, for failing to comply with the clause. This requirement according to him, may fit in with first of the three requirements that underscore Article 138(2) of the BGB and the suggestion by

908 *Beadica* [183].
909 *Beadica* [184].
910 *Beadica* [185].
911 *Beadica* [185].
912 *Beadica* [185].
913 *Beadica* [185]; see also *Barkhuizen*.
914 *Beadica* [186].
915 *Beadica* [186].

Gordley, that more is required.[916] The disadvantaged contractual party will then need to prove that:

> (a) the exchange is clearly disproportionate (which would include providing a reason for noncompliance) ; (b) the disadvantaged party is badly prejudiced; and (c) that the disadvantaged party is less able to protect itself than the other contracting party. The greater and more certain the harm and the less the ability to protect against it, the more willing the court should then be to provide a remedy.[917]

In this regard proving a disproportionate exchange only becomes possible in cases, where there exists tangible evidence as to what constitutes a normal otherwise proportionate exchange in commercial practice.[918] This Froneman J says may be

> a difficult evidentiary burden but the lack of proof will then serve as the first filter for ensuring that invalidation is done 'sparingly' and in only the 'clearest' of cases.[919] The next filter will be proof of the prejudice that the complaining party will have to endure because of the disproportionality. This again goes to **a cautionary approach to exclude undeserving** cases. And lastly that party **will have to show that it was less able to protect the contracting party than the other contracting party, which would incorporate current notions of inequality in bargaining power** (my emphasis).[920]

Regarding the common law value of good faith, Froneman J explains that when establishing "unreasonableness and fairness" under the public policy test "for invalidity" good faith "overlaps" with these values, because as he highlights, good faith includes reasonableness and unfairness.[921] He draws specific attention to the fact that the CC "has not confined good faith to public policy invalidation. and has recognised its application in other fields as well."[922] In support of his argument he reverts back to the *Botha* case, which he says may provide an example of a case where,

> good faith considerations justified the development of the common law rule that the rigorous application of reciprocity in bilateral contracts, in the

916 *Beadica* [187].
917 *Beadica* [187].
918 *Beadica* [188].
919 *Beadica* [188].
920 *Beadica* [188]-[189].
921 *Beadica* [188].
922 *Beadica* [188].

> form of the use of the *exceptio non adimpleti contractus*, may be relaxed where fairness and justice dictates it.[923]

That rule he argues, was developed and applied by the Appellate Division in *BK Tooling*[924] and the rule allowed for a relaxation of "the principle of reciprocity" and provided for an award to be made by reducing the "contract price in circumstances where equity demands it."[925] Froneman J explains that

> [t]he difference in the application of good faith in the context of developing the common law, in contrast to public policy application, lies in its purpose."[926] Its purpose is that of development and modification of a legal rule, while public policy aims at something different, namely the invalidation of a contractual term or its enforcement. The effect of the order in *Botha* was not to invalidate the cancellation clause in the contract, but to postpone it in order for Ms Botha to have a further opportunity to cure her default and other arrears.[927]

This he then explains "still leaves the problem of giving objectively ascertainable content in a particular case to the dictates of good faith."[928] Quoting du Plessis[929], he states that when applying Article 242 of the BGB:

> 'good faith' does not simply mean fairness or reasonableness. It bears a more specific meaning, which sometimes is explained by a closer examination of the German term, *Treu und Glauben*, of which 'good faith' is a rather vague translation. **The term essentially requires that a party takes into account the protectable interests of another party (that is, display *Treu*) and the other party in turn must rely on this** (that is, must display *Glauben*). **The protection of this reliance lies at the heart of the whole construct of good faith. When used in this sense, the concept is defined 'objectively' as a standard of behaviour, as opposed to the 'subjective' sense of having the state of mind of being 'in good faith', typically through not knowing something.** German law then uses a different term, *gutter Glaube*, to describe 'subjective' good faith (my emphasis).[930]

This Froneman J points out is "not too far off" from what was said in what he refers to as "the much-maligned *Botha*" case. In *Botha*, it was said that:

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923 *Beadica* [189].

924 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 3 All SA 166 (AD).

925 *Beadica* [190].

926 *Beadica* [191].

927 *Beadica* [191]; see also Du Plessis 2018 *Stell LR* 381.

928 *Beadica* [192].

929 Du Plessis 2018 *Stell LR* 381.

930 *Beadica* [192]; see also Du Plessis 2018 *Stell LR* 381.

> Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each other to benefit both. **Honouring that contract cannot therefore be a matter of each side pursuing his or her own self interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way** (my emphasis).[931]

For Froneman J, "[t]esting the respective trust and reliance of the parties, in and towards each other, is by disproportionality working both ways" as he says was "illustrated" in the earlier *Botha* statement.[932] Froneman J believes that by relying on the example from the *Botha* case, a practical "'substantive rule'" may be derived that could be applicable to future cases, involving disputes concerning fairness and equity. This he explains can be done in the following way:

> The narrower formulation would be that: (a) the facts of the matter must disclose a relationship of reciprocal trust and reliance, inherent in the application of good faith, between the parties; in (b) a situation where the defence of the *exceptio non adimpleti contractus* is raised in litigation; and (c) it is possible to **provide relief in the form of a proportionate adjustment to the respective exchanges agreed to by the parties in the contract. The wider formulation would extend the second requirement to the relaxation of the strictness of the contractual principle of reciprocity in general, and not only to situations where the *exceptio* is raised as a defence** (my emphasis).[933]

Froneman J seems to suggest that from this, we are able to observe the convergence between the way the rules are applied in the second stage of *Barkhuizen* analysis. Meaning under public policy unconscionableness, and those of good faith that are applicable to the "operation of contracts."[934] This "overlap", he explains may lie in the requirement of proportionality for good faith and unconscionableness.[935] However, as he points out, the proportionality enquiry differs. He argues that good faith's purpose in contract, "is to ascertain whether a proportionate adjustment to the agreed exchanges is possible."[936] He goes on to say that if it is not, then

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931 See *Botha* [46].

932 *Beadica* [194]; see also *Botha* [194].

933 *Beadica* [194].

934 *Beadica* [195].

935 *Beadica* [195].

936 *Beadica* [195].

> that particularised rule deriving from good faith will not avail a claimant, because the aim of developing the common law to cater for some adjustment to the agreed reciprocal obligations cannot be achieved. But the purpose of public policy invalidation is plainly invalidation, not adjustment of exchange. It is a more drastic remedy because invalidating the enforcement of an obligation is permanent, and not a mere temporary adjustment to an obligation that can remain, or be revived, for further enforcement.[937]

It is for this reason that, while disproportionality is a necessary requirement to invalidate a contract on public policy grounds, it is insufficient. More is required to invalidate a contract in the "form of individual collateral prejudice and lastly, a less powerful ability to protect himself than his adversary."[938]

4.4.1.4 Practical application of Froneman J's conceptions to the *Beadica* case

It is clear that the majority judgment found that the applicants failed to provide a good reason/s for not complying with the notice clause of the agreement. Froneman J, disagrees with this finding, because he believes that the applicants had sufficiently explained their position as "unsophisticated" "businessman" who were not adequately prepared in the "niceties of the law".[939] Furthermore the applicants arguments, were not challenged or "contradicted" by any other evidence.[940] In addition, further circumstantial evidence was adduced to support their contentions.[941] Froneman J argues that the applicants position became clear because as they stated "they were not businessmen in their own right" and they had been previously employed by the respondent. They had secured their businesses through a black economic empowerment scheme whose object was to facilitate the empowerment of historically disadvantaged individuals.[942] Froneman J argues that "[i]t is closing one's eyes to reality to deny the obviously unequal relationship" that exists between franchisees and franchisor and that this relationship "was no different."[943] Froneman J says that the Franchisor (Mr Sale) exercised "the power of

937 *Beadica* [195].
938 *Beadica* [195]-[196].
939 *Beadica* [196].
940 *Beadica* [196].
941 *Beadica* [196].
942 *Beadica* [197].
943 *Beadica* [197].

life and death over their franchises."[944] Hence highlighting the disproportion that existed in the bargaining power relationship, where the franchisor was in a position of power over the franchisees. Froneman J believes that the franchisees lacked "sophistication" which is evidenced by "the content of the renewal notices"[945] which had not been "written by lawyers."[946] In fact, according to him the first letter was "'a formal request to propose a renewal on our already existing lease agreement with the option to purchase'".[947] The second letter also made an "offer to purchase" and provided for an interim measure to renew the lease. The third letter, Froneman J argues, was written by "an accountant, in informal terms" acknowledging that the lease contained a termination clause and that the termination "date is 31 July 2016."[948] The third letter also asked how "'[h]ow soon can you draw up a new lease agreement for Gavin'" and further requested "'a draft copy for discussion purposes.'"[949]

Froneman J then explains that this was followed by a reply from one of the respondent's employees "dated 15 March 2016", wherein she stated that the respondent (Mr sale) "was out of town" and that "she would only be able to revert "'once your offer has been discussed with him.'"[950] Froneman J draws attention to the fact that this "express acquiescence in the consideration of the offer" was "followed by four months of further acquiescence by silence". Thereafter he says, the "first and third applicants were told to vacate the premises by 31 July 2016 by an attorneys' letter", while the

> second and fourth applicants were advised on 29 July 2016 that the first respondent was amenable to concluding new agreements with them and was willing to let the premises to them on a monthly basis until new agreements could be concluded. They were warned that if they did not respond by 31 July 2016, they would be required to vacate the premises on that day.[951]

944 *Beadica* [197].
945 *Beadica* [198].
946 *Beadica* [198].
947 *Beadica* [198].
948 *Beadica* [198].
949 *Beadica* [197]- [198].
950 *Beadica* [199].
951 *Beadica* [199].

Froneman J draws a number of inferences from the respondent's actions. Firstly, he finds that the applicants were "novices in how to play a hard business game."[952] He argues that the applicants were ignorant in "'niceties of law'" because as he puts it

> they are lulled into a sense of security, first expressly and then by silence, that their offers and expectation of renewal of the leases will be considered; and then, four months later, just as 31 July approaches, they are hit by attorney' letters that give effect to their franchisor's power of death over the future of their franchises.[953]

Froneman draws a comparison of the applicants with Mr Bredenkamp in the *Bredenkamp*[954] case. He argues that the applicants had approached the CC "on the basis that the fundamental constitutional values of dignity and equality are implicated", when establishing "whether enforcement of the notice clause is against public policy."[955] He highlights that in cases of this nature, *Barkhuizen* requires that the application of public policy for determining the unconscionableness of contractual terms and their enforcement, has to be carried out in a way that accords "with notions of fairness, justice and equity, and reasonableness", which he rightfully stresses cannot be cut back from public policy.[956] He spells out the fact that public policy considers the important notion of "necessity to do simple justice between individuals and is informed by the concept of *ubuntu*."[957]

Falling back on this notion, Froneman J argues, "that the applicants' assertion of relative lack of sophistication is clearly apparent" when it is compared to "the conduct of the third respondent."[958] He opines that the explanation given by the applicants of why they failed to comply "rings true."[959] Froneman J strongly believes that the "disproportionate unfairness between their conduct and that of the first respondent is equally clear."[960] The "prejudice" that the applicants suffer due to

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952 *Beadica* [200].

953 *Beadica* [200].

954 *Beadica* [201]; see also *Bredenkamp*. In this case Mr Bredenkamp was a sophisticated businessman who had a number of companies under his control which were involved with international commodity trading. They held accounts with Standard Bank. Standard Bank informed Bredenkamp and his companies that they were "international commodities traders" and that they were going to withdraw their overdraft facilities. Bredenkamp was informed that he should move his banking business elsewhere as the bank was going to close all his accounts.

955 *Beadica* [201].

956 *Beadica* [201].

957 *Beadica* [201].

958 *Beadica* [202].

959 *Beadica* [202].

960 *Beadica* [202].

losing “their businesses is obvious against that the first respondent” whom Froneman J says “loses nothing.”[961] This he points out is where “the inequality in bargaining power between the applicants as franchisees and their franchisor” is openly displayed.[962] For these reasons Froneman J finds that he “would uphold the appeal.[963]

4.4.1.5 Critical analysis of Froneman J’s notions of fairness

Froneman J views fairness in contract as being achieved when there is some form of equal balance in terms of the value exchange.[964] This view appears to be the crux of his ideas around disproportionality. Citing Gordley[965] he argues that in exchanges of value, both performance and the burden imposed upon the parties should be more or less equivalent.[966] In addition, he argues there should also be evidence available (contextual factors) which casts light on what a normal or proportionate exchange of value resembles.[967] This will according to him, empower a court to fittingly screen cases that are inappropriate. This in his view, would be extremely helpful in aiding a court to decide under circumstances, where there is no clear indication of what would be proportional in the circumstances of a particular case.[968] Thus, disproportionality seems to refer to an exchange which is unusually one-sided and distinct from other similar contractual relationships. In order to determine a party’s lesser ability to protect itself, evidence of an inequality of bargaining power in the contractual relationship would have to be taken into consideration here.[969] Any major form of inequality of bargaining power between the respective party’s will serve to reinforce the notion of disproportionality in the exchange of performances.[970]

Froneman J’s notions for achieving fairness in the law of contract seem to stem from Aristotle and some ancient Roman ideas, on the achievement of contractual

961 *Beadica* [202].
962 *Beadica* [202].
963 *Beadica* [203].
964 See *Beadica* [115].
965 See Gordley 1981 *California law Review* 1587.
966 *Beadica* [115].
967 *Beadica* [188].
968 *Beadica* [123]; [124]; [125]; [126].
969 *Beadica* [125]; [126].
970 *Beadica* [123]; [124]; [125]; [126].

fairness. In typical Aristotlean form, Froneman J's ideas appear to be suggestive of Aristotle's ideas on commutative justice, which as Gordley points out follows an arithmetic proportion which concerns itself not with the "sharing [of] resources, but with preserving each citizen's share.[971] This appears to mean that a party who has lost resources to another, has a claim against the other party for the amount necessary to restore his original position.[972] As Gordley puts it, "[i]t is the mathematics of addition and subtraction, of balancing accounts."[973]

Froneman J's ideas are to be commended. Froneman J seems to suggest that our law of contract needs to formalise the acceptance of fairness and good faith as constitutional values in the law of contract. Meaning here that fairness, equity and good faith need to be incorporated into our law of contract as self-standing legal principles. This is especially important in South Africa where the history of our past has resulted in many persons lacking the required business skills that are so important to achieve economic transformation. Opperman believes that our courts should veer away from too narrowly conceptualising our contract law and viewing it as completely separated from values which underscore the society in which they operate.[974] In this respect, our courts need to be especially thoughtful especially of the fact that due to South Africa's socio- economic and historical past, contracts generally are often between parties of unequal bargaining power.[975] Such contracts are generally made up of parties consisting of economically powerful organisations on one hand, and weak and vulnerable companies on the other.[976] For this reason, as Opperman argues, it may be necessary for good faith to be formally recognised as a contractual rule.[977] Froneman J also seems to suggest that the formal recognition and inclusion of good faith into our law of contract, will temper the sometimes-harsh consequences of the *pacta sunt servanda* principle, by taking into consideration a party's historical and background circumstances when determining fair outcomes. This suggestion aligns well with the African customary concept of

971 Gordley 1981 *California law Review* 1589.
972 Gordley 1981 *California law Review* 1589.
973 Gordley 1981 *California law Review* 1589.
974 Opperman 2007 *Without Prejudice* 12.
975 Opperman 2007 *Without Prejudice* 12.
976 Opperman 2007 *Without Prejudice* 12.
977 Opperman 2007 *Without Prejudice* 12.

Ubuntu.[978] This is what *Barkhuizen* seemed to propose but stopped short of completing. Froneman J's conceptual ideas around proportionality has much application in franchise agreements which as he correctly points out, almost always favour the franchisor who is in a stronger bargaining position than the franchisees.

Froneman J's conception of fairness in the South African sense is sound, because it makes room for correcting the disproportionate relationships that exist for disadvantaged persons in franchise businesses, and which is so important for economic inclusivity and realising the constitutional vision.[979] The majority decision stops short of developing the common law of contract by formalising good faith and fairness as independent substantive rules in the law of contract, although it does consider and where necessary gives effect to these abstract common law values, when determining whether or not to enforce unfair contractual agreements. In many ways the majority judgement aligns with Froneman J's conceptions of building fairness into the law of contract, albeit not formally giving recognition to good faith and fairness as independent stand-alone rules that can be used to invalidate unfair contracts. Perhaps this is because as the majority stated:

> Indeed, this Court has recognised the necessity of infusing our law of contract with constitutional values. **This requires courts to exercise both resourcefulness and restraint. In line with this Court's repeated warnings against overzealous judicial reform, the power held by the courts to develop the common law must be exercised in an incremental fashion as the facts of each case require. The development of new doctrines must also be capable of finding certain, generalised application beyond the particular factual matrix of the case in which a court is called upon to develop the common law.** While abstract values provide a normative basis for the development of new doctrines, **prudent and disciplined reasoning is required to ensure certainty of the law** (my emphasis).[980]

While Froneman J provides commendable conceptual arguments for formally developing the common law of contract by incorporating good faith, fairness and equity, into franchise agreements, it is important to consider whether these notions can be incorporated (on a concrete level) into all contractual agreements. Here it is

978 See section 2.6 of Chapter 2 where the concept *Ubuntu* is discussed in more detail.

979 See section 3.3.1 of Chapter 3 in this regard.

980 *Beadica* [76].

important to bear in mind that although the Romans were the most advanced nation at the time, the ancient Roman period was a completely different era economically, technologically and socially, compared to present day. In addition, the economic form of the market was also very different. During Roman times, despite "all of the glory and grandeur of Ancient Rome" the economy of the Romans was more simple and less complex than the modern-day economies we have today.[981]

The economy of ancient Rome was predominantly "agrarian and slave based" and was largely concerned with feeding its citizens and legionaries who lived in the Mediterranean region.[982] Principally, the Roman economy was dominated by agriculture, trade and small-scale industrial production.[983] On a more concrete level, Foneman J's equal value of exchange idea may have worked during Roman times and would be more applicable to unsophisticated transactions such as physical asset transfer which fair value price may be determined. Today, a large proportion of contractual transactions involve virtual assets such as for example currency trading, equities and mobile data whose pricing (value) may not be so easy to determine, due to the rapidly fluctuating nature of their value. These prices are determined according to their intrinsic worth and the value the purchaser and seller attaches to them at any given point in time. They are also determined according to extraneous variables prevalent at the time of transacting.[984] The Merriam Webster dictionary defines value as:

> 1: the monetary worth of something…
> 2: a fair return or equivalent in goods, services, or money for something exchanged…
> 3: relative worth, utility, or importance….
> 4: something (such as a principle or quality) intrinsically valuable or desirable sought …material *values* instead of human *values…*
> 5: a numerical quantity that is assigned or is determined by calculation or measurement[985]

981 UNRV https://www.unrv.com/economy.php (Date of use 26 March 2021).

982 UNRV https://www.unrv.com/economy.php (Date of use 26 March 2021).

983 UNRV https://www.unrv.com/economy.php (Date of use 26 March 2021).

984 Principles of Marketing "Factors affecting pricing" https://open.lib.umn.edu/principlesmarketing/chapter/15-2-factors-that-affect-pricing-decisions/ (Date of use:08 April 2021).

985 Merriam Webster Dictionary https://www.merriam-webster.com/dictionary/value (Date of use: 26 March 2021).

Lapidus points out that in order for us to fully understand what the worth (value) of something is in "financial terms", a useful distinction would be to determine and compare the valuation and pricing of the asset.[986] Accordingly, Lapidus correctly points out that an assets value can only be determined by the future cash flows generated by the asset, and then determining what the present value of these future cash flows will be.[987] For example, company valuations, projects, property and financial debt instruments.[988] However, it is important to bear in mind that even these are subject to change, depending on the fluctuating nature of the highly sophisticated market economy. In a healthy economic environment, prices and cash flows generated from some assets generally tend to increase while during an economic downturn the pricing of assets generally tend to lose value. This is due to the "invisible hand" of the market.[989] This is the natural way a free market operates. Thus, intrinsic value can be calculated based on a set of rules (determined by factors prevalent at any given point in time), while pricing on the other hand is contingent on other references.[990] It is clear that the determination of pricing as Lapidus puts it is "best answered by the economist's refrain: An asset is worth whatever the market will bear."[991] It is generally well known that

986 Lapidus B "What's the Difference Between Valuation and Pricing of Assets? FP&A Should Know." https://www.afponline.org/ideas-inspiration/topics/articles/Details/what's-the-difference-between-valuation-and-pricing-of-assets-fp-a-should-know (Date of use: 26 March 2021).

987 Lapidus B "What's the Difference Between Valuation and Pricing of Assets? FP&A Should Know." https://www.afponline.org/ideas-inspiration/topics/articles/Details/what's-the-difference-between-valuation-and-pricing-of-assets-fp-a-should-know (Date of use: 26 March 2021).

988 Lapidus B "What's the Difference Between Valuation and Pricing of Assets? FP&A Should Know." https://www.afponline.org/ideas-inspiration/topics/articles/Details/what's-the-difference-between-valuation-and-pricing-of-assets-fp-a-should-know (Date of use: 26 March 2021).

989 See The Economic Times "Definition of 'Invisible Hand' https://economictimes.indiatimes.com/definition/invisible-hand which describes this economic concept as "the unobservable market force that helps the demand and supply of goods in a free market to reach equilibrium automatically". Adam Smith introduced this phrase in his book "The Wealth of Nations". Smith believed that the economy could function well under the free market system with no external interference and where everyone could work towards securing their own welfare. Smith believed that the economy functions well if the government did not interfere in trade. He argued that that if the market was left to itself, Traders in the market would compete between themselves and that this would lead to a reduction in prices and the most economic outcome with "positive output" assisted by the force of the "invisible hand." It is important to note that the free-market system is free of regulations and/or restrictions imposed by the government. Where a good or service is offered in the market customers will be free to choose from whom they want to buy; this will lead to competition between suppliers and ultimately efficiency and lower prices.

990 Lapidus B "What's the Difference Between Valuation and Pricing of Assets? FP&A Should Know." https://www.afponline.org/ideas-inspiration/topics/articles/Details/what's-the-difference-between-valuation-and-pricing-of-assets-fp-a-should-know (Date of use: 26 March 2021).

991 Lapidus B "What's the Difference Between Valuation and Pricing of Assets? FP&A Should Know." https://www.afponline.org/ideas-inspiration/topics/articles/Details/what's-the-difference-between-valuation-and-pricing-of-assets-fp-a-should-know (Date of use: 26 March 2021).

> Bitcoin and other currencies [and other commodities] cannot be valued, instead their pricing is determined by the price set by the market.[992] They are created by an issuing entity's decree, usually a government and called fiat currency. Its value is then free to change against other stores of value **based on the perception of how it will be managed by the government, and how it will perform relative to other currencies**. The purpose is a store of value to enable trades of other goods and services. To a **lesser degree, it is a source of speculation and bets on for currency** traders (my emphasis).[993]

The same applies to leasehold; the value of a lease or franchise for that matter is determined at any given point by the political, economic, social, technological, regulatory and environmental factors prevailing at a given point in time, of which the seller or buyer of the asset has no control. It is clear that an assets value is determined by the value the market attaches to the asset as well as what the owner of the asset believes it is worth. For a court to determine the value of an asset when adjudicating and deciding fairness in contractual disputes, is tantamount to the court making the contract for the parties. This is contrary to the role of the court.

In comparison to the sound contractual principles provided in Justice Theron's majority judgement, Froneman J's conception of equality of exchange will be difficult for contracting parties to swallow. This is because if one follows Froneman J's notions of fairness they will not be able to determine what constitutes fair equal value. This may possibly lead to much uncertainty in the law of contract. Take for example the case where a buyer buys a house that is valued at a million rand (R1000 000) for one hundred thousand rand (R100 000), due to the prevailing poor economic and political conditions at the time of the sale. One year later, if the country's political and economic conditions improve and the house is sold for one million rand (R1000 000), relying on Froneman J's conception of achieving fairness, meaning the equitable exchange of value, it would mean that the first seller would have a claim against the buyer because there is clearly an inequitable exchange of

992 Lapidus B "What's the Difference Between Valuation and Pricing of Assets? FP&A Should Know." https://www.afponline.org/ideas-inspiration/topics/articles/Details/what's-the-difference-between-valuation-and-pricing-of-assets-fp-a-should-know (Date of use: 26 March 2021).

993 Lapidus B "What's the Difference Between Valuation and Pricing of Assets? FP&A Should Know." https://www.afponline.org/ideas-inspiration/topics/articles/Details/what's-the-difference-between-valuation-and-pricing-of-assets-fp-a-should-know (Date of use: 26 March 2021).

value that occurred in the first sale. This is nonsensical and would be a very clear deterrent to trade and commerce, much to the detriment of socioeconomic development and achieving the constitutional vision.

In my view, the *Beadica* case was not about a disproportion of value but cantered more on whether it was fair to terminate a franchise and lease agreement where the previously disadvantaged lessees, had failed to adhere to the strict terms of the agreement; which was to provide the lessor with timeous notification of their intention to renew the lease, and whether a court was sufficiently empowered to not enforce an agreement which it found to be unfair on public policy grounds. This case was not about inequality in value of the franchise or lease for that matter. It was more about the inequality that existed between the franchisees and the franchisor in terms of their respective bargaining power. It is evident that the franchisee/lessee fight to take this matter up to the CC, is sufficient evidence to show that the lease and franchise possessed much value to warrant their decision. If it had not, then there is a slim chance that the franchisees would have opted to incur great expense in trying to get the cancellation overturned. That said, the inquiry must turn on whether Froneman J's equality in value exchange suggestions, are viable.

It is clearly evident that lease values are determined by a multiple internal and extraneous factor. It would be rather difficult if not impossible to peg a value on a lease agreement, because such values are determined by a number of factors such as the land value and position, population in area, state of the economy, politics, social factors, etc., to name but a few, and involve a subjective value judgement from the side of each of the contracting party's. What value the lessee sees in securing the lease, depends on their subjective point of reference they hold of these factors, at any particular point in time. This same psychology holds for other assets including virtual assets, such as currency, equities and mobile data. Therefore, if Froneman J's approach was to be used to adjudicate over contractual disputes relating to fairness, it would encroach on an individual's freedom to contract, and a

court that decides the value of an asset for the parties would essentially be making the agreement for them which falls outside the role of the court.[994]

It will also undermine the freedom of contract principle which is highly valued in commercial dealings. Courts serve to resolve disputes; it is not the function of the courts to make agreements on behalf of contractants. If such was to happen as would be the case with Froneman J's approach, then this would lead to much legal uncertainty in the common law of contract. It may even result in the demise of contracts, which could have severe consequences for achieving the objectives of the constitutional vision. Another important consideration that requires serious attention is whether Froneman J's ideals of using equality of exchange can be reconciled with the majority judgement guidelines in *Beadica*. As far as disproportionate bargaining power relationships are concerned, Froneman J's ideals of proportionality aligns well with the majority judgement because as the majority stated where a party that alleges an unfair contract and such party is able to prove that the contract is unfair, our courts will refuse enforcement of the contractual term or contract.[995] On the other hand, Froneman J's notions of equality of exchange on a concrete level fails to align to the findings of the majority decision. As the majority citing the SCA in *Pridwin* pointed out, "[p]ublic policy demands" that in cases where contracts have been "freely and consciously entered into" such contracts "must be honoured", and in cases where a contract is contrary to constitutional values and principles, or are contrary to public policy such contract will be declared invalid.[996] Importantly, the court also stated that in cases where a contract is not on the face of it contrary to public policy, but where its enforcement is, our courts will refuse its enforcement. The court also acknowledged that the "party who attacks the contract or its enforcement" will have the responsibility to "establish the facts.[997] In this way the majority decision takes good faith into

994 See *Mansell v Mansell* 1953 (3) SA 716 (N) at 721, where the full bench of the court stated "We have frequently pointed out that the court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute." This aligns to the generally accepted principle that courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.

995 *Beadica* [82].

996 *Beadica* [82].

997 *Beadica* [82].

consideration without developing the common law of contract thereby maintaining contractual certainty.

4.4.2 Victor AJ: (Dissenting)

The crux of Victor AJ's arguments in her minority judgement, is based on achieving a harmonious balance between "constitutionalism and contractual autonomy" in the law of contract, which she believes is "best viewed through the prism of a transformative constitutional framework."[998] For Victor AJ, "the adjudication of this case" revolves around the resolution of "a dispute that originates from a franchise and lease agreement" which is staged "within a black economic empowerment context."[999] Victor AJ correctly argues that the purpose of the Broad Based Black Economic Empowerment Act (B-BBEE Act),[1000] is an attempt by the legislature to "level the playing fields skewed by the apartheid system."[1001] She contends that now is the fitting time "in our evolving jurisprudence" for adjudication in our common law of contract, to give recognition not only to the common law values of "good faith, reasonableness and fairness" but also to the constitutional value of "*ubuntu*" *as well* as the promotion of inclusive "economic participation" which she believes must take its rightful place "alongside these values, as one of the integral considerations of public policy."[1002] She opines that *Ubuntu* reverberates in our "contextual" understanding and "interpretation" of the B-BBEE Act.[1003] Here it is important to be reminded that all post-apartheid legislation is aimed at undoing past injustices and have the primary objective of realising the constitutional vision.

4.4.2.1 Victor AJ's notions of the application of *Ubuntu* in contract

Citing Madala J, Victor AJ argues that *Ubuntu* perforates throughout "the Constitution generally, and more particularly the Bill of Rights".[1004] She points out quoting Madala J, that the *Ubuntu* concept "'carries in it the ideas of humaneness, social justice and fairness,'" and argues *Ubuntu* is not a free floating "constitutional

998 *Beadica* [221].
999 *Beadica* [221].
1000 Broad-based Black Economic Empowerment Act 53 of 2003.
1001 *Beadica* [221].
1002 *Beadica* [220].
1003 *Beadica* [221].
1004 *Beadica* [210].

value" that should "hover on the marginal boundaries of our jurisprudence, with its place debated."[1005] According to Victor AJ *Ubuntu*

> is an important part of our constitutional jurisprudence which is already embedded as a substantive value in the core values of our Constitution. *Ubuntu* together with the other underlying values such as fairness and justice, is one of the central values of our jurisprudence generally when adjudicating fairness in contract.[1006]

Victor AJ's minority judgement incorporates the important African value of *Ubuntu* and the important role that this value plays in realising the constitutional vision, through transforming the South African economic landscape. Citing Moseneke DCJ in *Everfresh*, Victor AJ argues that infusing the law of contract with the constitutional value of *Ubuntu* "is highly desirable and in fact necessary".[1007] Victor AJ believes that *Ubuntu* is significant because it "stands alongside values such as good faith, fairness, justice, equity, and reasonableness,"[1008] which she believes "go a long way in addressing fairness in the law of contract".[1009] She argues that being a "constitutional value…*ubuntu* adds a value of substance."[1010] *Ubuntu* in her interpretation, is a self-standing value in the law of contract and is wider than 'fairness' because it incorporates…"compassion"…"group solidarity"… "humaneness" and "social justice".[1011] According to her, "*Ubuntu* together with the other constitutional and common law values, form a transformative basis" in adjudication when making decisions and "deciding whether to set aside an unfair contractual term or its unfair enforcement.[1012] Victor AJ firmly believes that the characterisation of *Ubuntu* as a substantive constitutional value in the law of contract, leads to a more contextually sensitive approach in adjudication and facilitates a constitutionally transformative result. She authoritatively argues that

> The recognition of *ubuntu*, in interpreting contracts will not undermine the traditionally highly prized jurisprudential concept of certainty and contractual autonomy. When adjudicating the law of contract, certainty

1005 *Beadica* [210].
1006 *Beadica* [210].
1007 *Beadica* [205].
1008 *Beadica* [205].
1009 *Beadica* [205].
1010 *Beadica* [205].
1011 *Beadica* [206]; [207]; [210].
1012 *Beadica* [206].

> and the principle of *pactum sunt servanda* will continue to be consonant with what the second judgment refers to as a consideration in the '*underlying moral or value choice'*. Based on this tonal palette, the recognition of the value of *ubuntu* in the interpretive process will not detract from the principles of certainty in contract, instead it will contribute to the achievement of the transformative goals required by the Constitution. Certainty is not erased when adjudicating contracts '*in a manner that ensures objective*, *reasonable practicality and certainty*'. This approach is objectively verifiable and does not spiral into a subjective vortex of uncertainty where it collides with commercialism.[1013]

While *Ubuntu* has gained strong recognition and is now accepted as a constitutional value,[1014] Victor AJ brings in a new transformative angle with this value, by stating that *Ubuntu* has the ability to transform contractual law by allowing a contextually sensitive examination of the facts in each particular case.[1015] Victor AJ referring to the first and second judgements points out that "the law of contract has moved away from formalism towards substantive fairness."[1016] She goes on to "emphasise the value of *ubuntu* in adjudicating contractual fairness" because as she points out "it has a greater and context sensitive reach" more especially in those cases where there is inequality in the bargaining power between the party's. A possible peril of adopting such an approach according to Victor AJ, is clustering fairness and *Ubuntu* as meaning the same thing.[1017] Victor AJ argues that it is clear that these two concepts are not the same, because *Ubuntu* has a much broader meaning than fairness.[1018] This position is according to her is succinctly summed up in *Everfresh*:

> [*ubuntu*] emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'.[1019]

In agreement with Froneman J, Victor AJ believes that the franchisees appeal should have been upheld.[1020] Relying on the African *Ubuntu* value concept, as a contextual basis for achieving substantive fairness, Victor AJ draws attention to the

1013 *Beadica* [220].
1014 *Beadica* [206].
1015 *Beadica* [206].
1016 *Beadica* [207].
1017 *Beadica* [206].
1018 *Beadica* [207].
1019 *Beadica* [207].
1020 *Beadica* [232].

franchisees whom she noted belonged to an empowerment scheme, which was intended to extend substantive freedom by economically uplifting previously disadvantaged individuals[1021] She goes on to argue that "adjudicating fairness in contract" cannot be accomplished through what she terms a "neutral set of principles", because in her correct view transformation is the objective.[1022] This is important for legal certainty in the common law of contract, because on the one hand due to the legacy of South Africa's past,[1023] wealth has been concentrated and accumulated in the hands of a minority population, while the vast majority of the population have been economically excluded.

On the other hand, those liberal groups holding economic wealth as Kennedy explains, appear not to be in favour of "eliminating inequality of bargaining power", because they seem not to be concerned with the factual elimination of inequality in society.[1024] According to Kennedy this is because it fails to be directly relevant "to the actual division of social product among the warring groups of civil society"[1025] It is against this background that Victor AJ seems to suggest that when adjudicating contractual disputes the contract must be analysed against the objectives associated with broad based black economic empowerment (B-BBEE), which resonates well with the value of *Ubuntu.*[1026] In Victor AJ's opinion the facts "in this case support unity of purpose" this is mainly because according to her "the facts" contextually exist in the B-BBEE Act.[1027] For Victor AJ the Broad-based Black Economic Empowerment Act[1028] seeks to redress the economic wrongs of

1021 *Beadica* [208].

1022 *Beadica* [214].

1023 See Ramoroka M "Legacies of apartheid: South African austerity perpetuates the inequalities of decades past" https://www.cesr.org/legacies-apartheid-south-african-austerity-perpetuates-inequalities-decades-past (Date of use: 24 February 2021), where this author writes " Post-apartheid South Africa is a captivating case study of the ways in which economic inequality can be reproduced and preserved within a country's social fabric, allowing it to continue to permeate its economy and power structures. The ever-worsening challenges of inequality and economic and social rights deprivations in South Africa are evidence of the persistent legacy of apartheid—the legally mandated system of racialized segregation and discrimination that ended twenty-five years ago."

1024 Kennedy 1982 *Maryland Law Review* 621.

1025 Kennedy 1982 *Maryland Law Review* 621.

1026 *Beadica* [221].

1027 *Beadica* [223].

1028 Broad-based Black Economic Empowerment Act 53 of 2003.

> the legacy of *apartheid* and promote the economic participation of previously disadvantaged people in the South African economy.[1029]

This view is strongly aligned to the vision of the Constitution which is to create a truly egalitarian and equal society which includes inclusive economic equality.[1030] This is also confirmed by the preamble of the Broad-based Black Economic Empowerment Act[1031] which gives recognition to the right of all South Africans to participate in the economy.

4.4.2.2 Broad based black economic empowerment

Citing the HC case, Victor AJ explains that the HC had referred to this contract as a "'vitally important initiative'" whose purpose was the encouragement "of ownership of business" by persons previously disadvantaged and which strike "a fatal blow" to the "applicants". [1032] Victor AJ (quoting Davis J in the HC case) points out that in Davis J's view, granting the eviction order was tantamount to being the same as administering "capital punishment" on the franchisees.[1033] The reason for this Victor AJ seems to argue, is that if the franchisees failed in their application to overturn the cancellation of the leases and be evicted, then this would be detrimental to achieving the objectives of B-BBEE.[1034] This would be so because according to Victor AJ

> The applicants were contractually bound to rent the respondent's premises. It was a term in the agreement. The High Court judgment explained the effect of implementing the eviction of the applicants from the premises. It held that '[i]t would be a devastating blow to these objectives if these businesses were to collapse and be taken away from the applicants when they had diligently paid off their loans to the NEF and were finally in a position to enjoy the 'full economic benefit of their businesses unencumbered by these loan obligations'.[1035]

1029 *Beadica* [223]; see also Andrews 2008 *Harvard Faculty Research Working Paper Series 3*, who observes that "Black Economic Empowerment (BEE and its more recent Broad-Based version) is a policy intervention driven from the economic and industrial complex in government. Aimed directly at addressing the economy's skewed racial profile, BEE calls the private sector to restructure itself and create opportunities for previously disadvantaged individuals (PDIs)." He goes on to say "Organizational theory argues that these kinds of intra and inter-firm relational structures and the networks they establish influence who participates in economies and how these people benefit. This argument supports the contention that BEE's focal changes are necessary to open the economy and adjust its racial composition."

1030 See section 3.3.1 of Chapter 3 where this idea is discussed in detail.

1031 Broad-based Black Economic Empowerment Act 53 of 2003.

1032 *Beadica* [223]; see also *Beadica 231 CC and others v Trustees for the Time Being of The Oregon Trust and others* 2018 JOL 39639 (WCC) (hereinafter referred to as *Beadica* (WCC) to differentiate it from the CC case) [39].

1033 *Beadica* [223], see also *Beadica* (WCC) [39].

1034 *Beadica* [223], [228].

1035 *Beadica* [227]-[228]; see also *Beadica* (WCC) [29].

In this sense then, this could be seen as failing to achieve substantive inclusive economic justice for historically disadvantaged persons and could possibly run against the grain of creating a just, equal and economically empowered and equal society. This would also be contrary to the very purpose for which the National Empowerment Fund as well as the National Empowerment Act were created and whose main objective "is to facilitate the redressing of economic inequality" caused by "the past unfair discrimination against historically disadvantaged persons".[1036] It is important to note that it was the National Empowerment Fund which provided the finance to the franchisees to acquire the franchise businesses in the first instance, to promote economic participation of previously disadvantaged individuals and to promote the longer term achievement of the constitutional vision.

Reverting back to the case, Victor AJ vehemently believes that Mr Sale as the Franchisor had a moral duty to ensure that transformation took place by taking an active interest in the welfare of the franchisees.[1037] Instead, according to Victor AJ, Mr Sale failed to secure the welfare interest of the franchisees by approaching the court for an eviction order.[1038] Victor AJ suggests that the CC's granting of this order nullifies the overall purpose of the contract, which was the achievement of substantive economic equality through the empowerment of historically disadvantaged individuals.[1039]

A possible interpretation of Victor AJ's minority judgement is that this judgment appears to fuse *Ubuntu* with economic empowerment as a component of transformative constitutionalism. Victor AJ seems to suggest that when adjudicating over cases involving fairness in the common law of contract, fairness should involve paying special attention to those cases involving historically disadvantaged individuals. Her rationale for this would appear to be that in order to achieve the objectives of achieving an equal egalitarian society (whose achievement for previously disadvantaged black persons was trammelled by apartheid), special

1036 Section 3(a) National Empowerment Act 105 of 1998.

1037 *Beadica* [226].

1038 *Beadica* [226].

1039 *Beadica* [226].

consideration should be given to B-BBEE parties, that would be disadvantaged if the *pacta sunt servanda* principle was strictly applied. Victor AJ seems to suggest that the very purpose of this contract, was to empower the franchisees who belonged to the historically disadvantage groups, and if economic inclusiveness and the creation of a just, equitable and prosperous egalitarian society is to be created, contractual disputes involving previously disadvantaged individuals should favour the empowerment purpose of the contract, over the historically advantaged franchisor.

Here it is important to consider that although Victor AJ's intentions appear to be noble, it must be noted that her arguments for relying on *Ubuntu* (to tone down the seemingly harsh consequences of *pacta sunt servanda*, by taking into consideration constitutional transformation and B-BBEE in the common law of contract), radically differ from the views expressed by Theron J writing for the majority. Theron J had correctly argued that the preferential treatment of previously disadvantaged persons who conclude B-BBEE contracts, will discourage non-B-BBEE commercial parties from concluding contracts with empowerment parties.[1040] Furthermore, it must be noted that the ideal of promoting empowerment at the expense of business sustainability and profitability by both local and international companies is alien. If contractual agreements of this nature were to be adjudicated unfairly favouring B-BBEE participants, this will lead to much uncertainty in the common law of contract. Non-B-BBEE commercial parties who perceive that they are being treated unfairly may fail to invest not only in franchise businesses, but also in other commercial ventures and areas of the local economy. In addition, providing special privilege to B-BBEE contractants, may spill over into other areas of contractual law such as for example sale agreements. Here, it could be perceived that if B-BBEE participants fail to meet their monthly instalment payments and the law was to unfairly favour B-BBEE participants in favour of constitutional transformation, this may have serious negative repercussions for sale contracts. Another example of an area of contractual law that may be affected is construction contracts. Does it for example mean that if a construction project given to a B-BBEE company that provides inferior

1040 *Beadica* [101].

workmanship and is poorly executed, and results in the death of many, giving rise to claims arising for damages and poor workmanship, that then in the name of transformative constitutionalism, the breaching of obligations that arise from the contract must be forgiven and overlooked. I would think not.

While Victor AJ's ideas must be applauded, in the real world of commerce it is highly unlikely that her ideas will succeed in creating certainty, instead my view is that it will lead to much commercial uncertainty. This may then have very serious negative consequences for achieving the constitutional vision objectives.

4.4.3 Concluding comments

While Victor AJ's racially based notions on *Ubuntu* and the promotion of transformative constitutionalism, do offer a new way of thinking around how the value of *Ubuntu* can be applied in the common law of contract, in my view it will fail to create certainty (as defined in this study) in the law of contract. Although I am not in favour of Froneman J's ideas on proportionality in value exchange, because I believe it is not practical and will lead to much legal uncertainty in the law of contract, I believe that Froneman J's new offering of ideas founded on an inquiry into the level of disproportionality, which is to be determined from the contextual factors of the matter, is much more plausible than a specifically race-based inquiry in a country that is already racially deeply divided. Froneman J's notions of proportionality, in my opinion, will resonate more fittingly with the creation of legal certainty than the ideas of Victor AJ. Although the development of a jurisprudence around the meaning of what *Ubuntu* in the law of contract means is to be welcomed, it should be applied more within the context of concrete and commercial factors.

4.5 Conclusion

This chapter discussed some of the most important principles and implications applicable to the judicial enforcement of contracts under the South African contract law. It began by setting out the background facts of the landmark *Beadica* case and then went on to discuss the legal certainty normative values debate which are

contained in specific sections of the judgment.[1041] The discussion centred on the importance of legal certainty in the common law contract, for promoting the constitutional vision. A number of uniform legal principles relating to contractual law as adopted by the CC were identified and discussed. It became clear that the views of the CC and the SCA regarding the judicial enforcement of contracts (with a few minor exceptions which conceivably have now been remedied) is essentially the same. Although the CC firmly entrenched the ideal of freedom of contract by reinforcing those contracts "freely and consciously entered into" must be honoured, it also made its position clear that immoral or otherwise illegal agreements will not be tolerated by the courts.

The importance of this judgement is that it ends much speculation about the perceived divergence between the CC and the SCA (in respect of the principles that apply to adjudicating contractual disputes mainly concerned with fairness and equity and the power afforded to the judiciary in terms of their judicial discretion, to not enforce a contract on public policy grounds) in that it highlights the similarities in judicial thinking between these two courts.[1042] In addition, it also confirms and synthesises a number of just and equitable principles that must be applied to contractual disputes thereby conceivably ending continued uncertainty and brings about much greater clarity in the adjudication of contractual disputes related to fairness and the judicial discretion a court is empowered with, in not enforcing a contract on the grounds of public policy. Moreover, this case highlights the importance attaching to all values, which must be accorded equal weight and balanced, when reaching a decision regarding the fair judicial enforcement of contracts. The courts, relying on public policy to scale fairness, must attach the same weight to all values, including freedom of contract and *pacta sunt servanda* and balance them to arrive at a fair and just conclusion. In the future, as our courts follow the legal principles developed by the SCA and the CC in the *Beadica*

1041 See *Beadica* [80]-[90].

1042 Before the ruling of the CC in *Beadica*, a contentious point in recent case law has been whether or not there is a free-floating or independent principle which determines that a court can strike down or refuse to enforce a contract purely on the basis of fairness. Essentially the CC in *Beadica* (as per the majority) reasoned that fairness cannot be used as a free-floating or independent ground to refuse enforcement of a contract. See *Beadica* [80], where according to the majority, it is only when the enforcement of a contract is "so unfair, unreasonable or unjust that it is contrary to public policy" that a court may intervene and justifiably refuse enforcement.

judgement, it is left to be seen if this may bring about much contractual certainty and possibly pave the way for the realisation of the constitutional vision.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter concludes the study by summarising the key findings and resulting conclusions. This is followed by providing an overview of the contribution that this study seeks to make to the existing body of knowledge and recommendations for future research on this important subject.

5.2 Summary of main findings and the resulting conclusions

This study addressed the importance of legal certainty in the common law of contract for promoting the constitutional vision. South African courts have long since understood and realised the importance of having legal certainty in the common law of contract. Our courts, particularly the SCA and CC appear to have clearly understood the notion that there is a direct link between certainty in contract and socioeconomic development, while at the same time also realising the importance of constitutional and common law abstract values for achieving the constitutional vision. For this reason these courts have in the past struggled to balance competing constitutional values (such as human dignity, equality, freedom and *Ubuntu*) and common law values (encompassing fairness, reasonableness and good faith) with the contractual common law principle sanctity of contract (*pacta sunt servanda*) and grappled with how to bring about a just, fair and balanced settlement in contractual disputes concerning fairness and equity.[1043] As a result, South African courts have long been faced with much contentious debate and legal arguments on how to strike the correct balance between these competing values, and the degree to which they (the courts) should intrude in contractual relationships, without upsetting legal certainty.[1044] Moreover, our courts have had much difficulty contending with notions of when and how to invalidate a contract when relying on constitutional values and/or common law principles against the notion of sanctity of contract. This has led to many controversial debates in the South African law of contract pertaining to the

1043 See Aleinikoff 1987 *The Yale Law Journal* 945; Where this author describes "balancing" as a "metaphor" that refers "to theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests"; see also section 1.2 of Chapter 1.

1044 See section 1.2 of Chapter1.

degree our courts are empowered to strike down or refuse enforcement of a contract or term, which in the court's opinion was found to be unreasonable, excessively harsh or unfair.[1045]

Throughout our jurisprudential history, in the interest of preserving legal certainty in contract law, there have been loud calls for the common law value sanctity of contract (in cases where contracts between parties had been entered into freely and voluntarily) to be privileged over values such as fairness and equity, and to be rigidly enforced. This call to enforce contracts that privileged *pacta sunt servanda* over constitutional values (such as human dignity, equality, freedom and *Ubuntu*) and common law values (such as good faith, which encompasses the ideals of justice, fairness and reasonableness) became challenging in the South African common law of contract in the era of constitutionalism, resulting in much legal uncertainty.[1046]

It is common cause that the privileging of the *pacta sunt servanda* principle over constitutional and common law values mentioned directly above appears to have been misunderstood. This is mainly because the privileging of sanctity of contract and freedom of contract appeared to be superficially seen by some of the judiciary as preserving legal certainty in the common law of contract, at the expense of normative values and rights. This approach however, was highly antagonistic under a constitutional dispensation, mainly because sanctity of contract and freedom of contract, unfairly aided a party with superior bargaining power, to manipulate the weaker party into concluding an unfair contract.[1047] Such a situation was untenable and could not be left unchecked, as it resulted in unfair contracts that lacked any regard for constitutional and common law values, which encompassed important substantive notions of human dignity, equality, freedom, fairness, justice and equity.

The lack of a uniform and principled approach to judicial adjudication in contractual disputes involving unfairness,[1048] appears to have resulted in opposing subjective

1045 See section 1.3 of Chapter 1.

1046 See sections 1.2-1.4 of Chapter 1.

1047 See section 1.15 of Chapter 1.

1048 *AB and another v Pridwin* (SCA) [27]; see also *Sasfin* at 347, where Smallberger JA referring to the public policy doctrine and quoting Lord Atkin in *Fender v St John Mildmay* 1938 AC 1 at 12 states "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds". It is apt to note that the CC in *Beadica* [90] indicates that such a stance is alien to our law of contract.

judicial outcomes thereby causing much legal uncertainty in the law of contract. The oscillation of judicial opinion between the SCA and the CC regarding freedom of contract and the common law principle *pacta sunt servanda* against normative abstract values, added to the uncertainty created in the law of contract.[1049] To overcome this undesirable situation, this study attempted to explain and highlight the meaning and importance of both legal certainty and substantive equality in the common law of contract for promoting the constitutional vision. Its aims were to show how each complimented each other and to show how the CC in the recent landmark *Beadica* case, sought to harmonise the legal principles for interpreting contracts (between the SCA and the CC) under the new South African constitutional dispensation. The study simultaneously also acknowledges and highlights the important need to balance both freedom of contract and the constitutional and common law abstract values, in a way that creates legal certainty in the South African common law of contract, for promoting the realisation of the constitutional vision.[1050]

5.2.1 Study findings

It is irrefutably clear from the study findings that there are great inequalities in wealth distribution and quality of life in South Africa, and millions of South Africans continue to live in unacceptable conditions and extreme poverty.[1051] This situation is profoundly exacerbated by high unemployment levels, poor education and skills levels, and insufficient social security.[1052] At the time when the Constitution was adopted, a promise had been made by the founding fathers to attend to these serious injustices and to transform South African society into one that is imbued with substantive human dignity, freedom and equality.[1053] These key values are deeply ingrained in our Constitution.[1054] This study attempts to make it clear that for as long as these intolerable conditions continue to prevail, any aspirations for having a truly egalitarian society will be meaningless and any gains we have made under our

1049 See section 1.2 of Chapter 1.

1050 See section Chapter 4, where the main contractual principles applicable to this case is discussed in detail.

1051 See section 2.4.1 of Chapter 2.

1052 See section 2.10 of Chapter 2.

1053 See section 2.10 of Chapter 2.

1054 See section 1(a) of the Constitution.

newly found democracy, may be seriously threatened. To overcome the socioeconomic crisis that haunts South African society and in order for us to realise the objectives of the constitutional vision, there must be a major concerted effort directed towards socioeconomic development and achieving substantive equality by providing housing, healthcare, employment, sanitation, skills development and importantly education.[1055] Significantly, this study found that the provision of each of these socioeconomic services (and therefore realising the constitutional vision) depends on a vibrant and pulsating economy coupled with robust commercial activity, which seems to be highly dependent on contractual legal certainty, in the South African law of contract.[1056]

Legal certainty it was discovered, on the face of it appears to be both complex and deceptively explicit. The available evidence demonstrates that legal certainty in contractual relations plays a vital role in building stable commercial societies.[1057] It would seem that it is able to achieve this through the creation of a set of precise norms that aids persons in a society to commercially interact with one another, safe in the knowledge that if there is failure in performance by either party, the law will uphold their bargain.[1058] This study also suggests that within the context of modern law, legal certainty strongly promotes the idea that the law must be clear, sufficiently stable, predictable and substantively fair and just, to enable persons to regulate their behaviour and to protect themselves against the abuses of arbitrary power.[1059]

A significant discovery of this study is that legal certainty in the law of contract appears not to mean absolute certainty, because as the evidence suggests absolute certainty in contractual law is neither possible or achievable.[1060] The available evidence points to legal certainty as relating to the degree of judicial predictability of all legal decisions, meaning that when courts apply and interpret the rules of contract law to a case, the judicial outcome must be the same or at least very similar.[1061]

1055 See section 2.10 of Chapter 2.

1056 See section 2.10 of Chapter 2.

1057 See section 2.3 of Chapter 2.

1058 See section 2.3 of Chapter 2.

1059 See section 4.2.2 of Chapter 4; see also *Beadica* [216] where Victor AJ in a dissenting opinion stated that "the concept of absolute certainty in contract is illusory … Absolute preordained certainty in the outcome of legal disputes can hardly be attained."

1060 See section 2.3.2 of Chapter 2.

1061 See section 2.3.2 of Chapter 2.

Therefore, we may conclude that the more judicial pronouncements produce the same outcomes, the more predictable and stable the law of contract will be. Accordingly, the research also suggests that legal certainty expresses the degree to which judicial decisions can be reasonably predicted. In this regard, the more predictable judicial outcomes are in contractual disputes, the greater will be the legal certainty in the law of contract.[1062] On the other hand, it was uncovered greater unpredictability of judicial outcomes results in more legal uncertainty. It would therefore seem that to achieve legal certainty in the law of contract, the same judicial outcomes arising in all contractual disputes coming before the courts should be high and predictable.[1063]

The study also peeled away and disclosed the underlying important direct relationship between legal certainty and economic investment.[1064] An important finding in this regard was that at both global and national levels, investment decisions in business and the economy, appear to be driven by the level of investment opportunities available to business, coupled to the degree of legal stability in a country.[1065] Moreover, these findings suggest that those countries having higher levels of legal certainty, attract much more foreign and local investment into their domestic economies, than those countries having higher degrees of legal uncertainty.[1066] The available evidence also indicates that the realisation of the longer term constitutional vision depends on much needed socioeconomic development for the upliftment of South African society, in order to create a truly egalitarian society.[1067] As such, it would appear that this will require strong investment growth in the local economy to facilitate socioeconomic development and the upliftment of the indigent, and to equalise the socioeconomic playing field for all citizens, through the provision of substantive human dignity, equality and freedom; key values of our Constitution.[1068] Further strong evidence in this study supports the notion that a failure to achieve this socioeconomic upliftment,

1062 See section 2.3.2 of Chapter 2.

1063 See Coelho 2017 *International Journal of Insolvency Law* 1.

1064 See Chapter 3.

1065 See Chapter 3.

1066 See section 2.3.4 of Chapter 2.

1067 See sections 2.6; 2.10 of Chapter 2; also see Chapter 3.

1068 See section 3.3 of Chapter 3.

may trammel the realisation of the constitutional vision and may threaten our young democracy in future.[1069]

Another significant finding of this study, was that the evidence strongly suggests that predictability and stability does not infer that contractual terms that are manifestly unfair, unjust and unconscionable must be upheld in the interest of maintaining contractual certainty.[1070] It is apparent from the research that contracts that are unfair, contrary to constitutional values or for that matter are objectively unconscionable, will persistently fail to survive judicial scrutiny and could promptly be struck down by the courts for being contrary to public policy, which is now firmly rooted in the Constitution.[1071] Thus, seemingly creating much needed legal certainty in the law of contract by enforcing the notion that unfair contracts will not be tolerated. Additionally, this study also pointed out that in those cases where a party to a contract fails to persuade a court that the contract or contractual terms of a contract are unconscionable, unconstitutional or fails to provide acceptable substantive reasons for failing to comply with their contractual obligations, our courts may well refuse not to enforce the contract.[1072] Therefore, this apparently sound new approach,[1073] to adjudicating contractual disputes, that should be adopted by our courts in future, appears to be balanced, fair, reasonable and uniform and may in future create a much higher degree of reasonable predictability and stability than before, possibly creating legal certainty, in the South African common law of contract.

The study also addressed the importance of legal certainty for promoting the constitutional vision in the future. The strong inferences that can be drawn from the research findings are that should high levels of legal uncertainty emerge in South African contractual jurisprudence in the future, it could result in lower levels of investment into local business initiatives, which may then result in a movement of investment capital away from South Africa, to lower legal risk destinations.[1074] Here

1069 See *Beadica* [80].

1070 See section 3.9 of Chapter 3.

1071 See section 3.9 of Chapter 3.

1072 See section 3.9 of Chapter 3.

1073 See *Beadica* [82]-[90], for a list of guiding principles that our courts must now follow when adjudicating over unfair contracts.

1074 See section 2.3.2 of Chapter 2.

it is important to mention that legal uncertainty might arise when the courts interpret and apply the rules of contract law differently. This may result in unpredictable judicial outcomes for different cases. In addition, the study also cast light on the potential risks of lower investment flows into the South African economy and uncovered the possibility that less investment inflows may bring about lower economic growth leading to fewer jobs, lower savings, less taxes for the state and decreasing or no investment in basic infrastructure, education and general public goods.[1075] This is an important finding not addressed before, because as evidenced by the study, this may well have serious negative effects on the broader economy and socioeconomic development. In sum, the study uncovered this may jeopardise the realisation of the constitutional vision and may imperil our young democracy.

Chapter 3 of this study evaluated certainty, the importance of economy, commerce and socioeconomic development and substantive equality for promoting the constitutional vision. The study found that the South African economy is structured along the lines of a mixed economic system which encompasses components of both capitalism and socialism.[1076] It is ostensibly clear from the study that a vibrant, robust and growing inclusive economy, is needed to provide citizens with the required goods and services they need, while simultaneously also providing the government with the necessary financial resources it requires to deliver on much needed socioeconomic development,[1077] to create a truly egalitarian South African society. This in turn it was found, could satisfy the objectives for realising the constitutional vision. Many of these requirements it was emphasised, is contained in the NDP which sets out the strategic objectives and action plans that government must achieve, to realise the constitutional vision.[1078] It becomes increasingly evident from the literature that the economy, commerce, business enterprise and governments role in supporting inclusive economic growth and reducing poverty may be key if the constitutional vision is to become a reality.[1079] The study findings reveal that a healthy inclusive economy and business might be both necessary and

1075 See section 2.3.2 of Chapter 2.

1076 For a discussion of the South African economic structure and how the economy works see section 3.2 of Chapter 3.

1077 See section 3.2 of Chapter 3 which discusses how government obtains financial resources for socioeconomic development in the economy.

1078 See section 3.7 of Chapter 3.

1079 See Chapter 3 for a discussion of governments role in the South African economy.

important for South Africa's future wellbeing, and to enable government to achieve its public policy objectives. Moreover, the research findings appear to give the strong impression that business is the engine that drives economic growth and is the major contributor to government finances and that contractual legal certainty is a key requirement for business success.[1080]

In addition, evidence from the study suggests that business in South Africa is a major player for job creation and remains the primary producer of goods and services.[1081] The available evidence strongly indicates that government is able to secure the necessary finances and resources it needs through a process of levying taxes on individual wages and business profits, and that the imposition of higher taxes on high income earners rebalances the distribution of wealth from higher income earners to lower income earners. In this way government stands able to achieve inclusive economic growth and secure the longer-term formation of a more equally balanced and just society.[1082] Further evidence from the study suggests that government is able to achieve this social rebalancing by delivering much needed socioeconomic development to less fortunate underdeveloped communities. The necessary inclusive economic growth strategy and rebalancing of wealth distribution in the South African socioeconomic landscape, as highlighted by the study, aims to create a harmonious, substantively equal, and just egalitarian society, capable of taking its rightful place amongst the nations of the world.

Two immediate threats that may obstruct and threaten the realisation of the constitutional vision were also identified.[1083] The first threat identified the aftereffects of the Covid-19 epidemic, that has created economic and social tensions and seems to have brought the global economy to its knees. The evidence from the study indicates that the Covid-19 epidemic has importantly highlighted the significance of global economic growth and development and has exposed the deep inequalities that fester in South African society. The resultant aftermath of Covid-19 appears to

1080 See section 3.6 of Chapter 3 for a discussion of the important role of business in the South African economy.

1081 See section 3.8 of Chapter 3 for a discussion of the important role of business in the economy; see also section 3.3.1 of Chapter 3.

1082 See Chapter 3.

1083 See section 3.7.2 of Chapter 3 for a more detailed discussion of these threats and the possible effects they may have on realising the constitutional vision.

be still unclear and has resulted in sharp drops in global economic growth worldwide, including South Africa. The study strongly suggests that lower economic growth results in less income for government and therefore lower socioeconomic development for the less fortunate, which may result in much higher levels of dissatisfaction amongst communities and could in future imperil the realisation of the constitutional vision.[1084] The second serious threat undermining the realisation of the constitutional vision in South Africa is corruption. The research findings suggest that corruption occurs in both the private and public sectors and that corruption has the effect of dispossessing the government of the much-needed finances and resources it desperately requires to deliver on its constitutional mandate. Left unattended, corruption threatens to transform South Africa into failed state.[1085]

The study findings strongly indicate that the law of contract has a crucially important role to play in facilitating and encouraging business development and growth. It could be argued that all business enterprises rely on sound commercial practises and the businesses community strongly depends on a stable, certain, and predictable legal system of contract law. The study findings seem to indicate that contract law provides the business community with the necessary security it requires to ensure for future planning and to anticipate liability, and that in order for business to transact successfully it needs to feel secure that the courts will interpret contractual rules fairly, reliably and consistently.[1086] Evidence from the study suggests that if business growth is to occur on any scale, contracting parties may need the law to assist them when called upon to do so, to ensure the fulfilment of contractual obligations.[1087] In this respect, it was found that present contractual law provides a sound mechanism to ensure that contractual undertakings are met, and in cases where there is a failure to meet contractual obligations the law will come to the assistance of the innocent party to restore the balance. However, as this study

1084 See section 2.7.2.1 of Chapter 2.

1085 For a discussion of these immediate threats to realising the constitutional vision see section 3.7.2 of Chapter 3.

1086 See section 3.9 of Chapter 3.

1087 See section 3.9 of Chapter 3.

indicates, the law may only do so when it is satisfied that it is fair, reasonable, and just to do so under the circumstances of the individual case.

Finally, the study discussed some of the key findings in the recent landmark *Beadica* case, which attempted to harmonise and synthesise the legal principles for interpreting contracts under the new South African constitutional dispensation.[1088] *Beadica* appears to acknowledge the importance of both freedom of contract and the constitutional and common law abstract values in reaching a fair, balanced and just judicial outcome. The *Beadica* case seems to clarify any misconception of any possible digression between the SCA and the CC, regarding the legal principles applicable to the South African law of contract, thereby ostensibly creating predictability and stability in the law of contract. Evidence from this case indicates that the past legal positions adopted between the CC and the SCA appear to be more perceived than real. In addition, evidence arising from the *Beadica* case appear to show that the CC has now made its position clear that the contractual principles followed by the SCA may now be endorsed by the CC, thereby appearing to create a set of almost codified principles for the adjudication of contractual disputes. Should such be the case, it will bring about much more lucidity and certainty in the South African law of contract.

Adding to these contractual principles the study evidence shows that the CC may have further explicated its position regarding the principles of *pacta sunt servanda* and perceptive restraint. The CC it was found, lucidly pronounced that under a constitutional construct, our common law of contract can no longer privilege *pacta sunt servanda* over other constitutional and common law principles. The CC appears to have adopted the position that all values should be afforded equal weight and that in the event of a contractual dispute, these values should be carefully balanced using public policy as a scale to balance and secure a just and equitable outcome for all parties. This seemingly sound and contractually just approach may strengthen certainty in the law of contract because on the one hand those to whom the law applies may know that unfair contracts that are unconstitutional or unfair (as measured by public policy requirements) may no longer be tolerated, while on the

1088 See Chapter 4 in this regard.

other hand where contracts have been freely and voluntarily entered into and that comply with constitutional and public policy imperatives, may fail not to be upheld by the courts.

In respect of the important perceptive restraint principal evidence from the *Beadica* case indicates that courts may only rely on this principle sparingly and then too, only in the clearest of cases. Courts may in future not rely on this principle for failing to carry out their constitutional duties of infusing contracts with constitutional values. Furthermore, the notion that contracts, freely and voluntarily entered must be honoured provided they pass constitutional and public policy scrutiny, appears to have been strongly recognised. It is also evident from the study that courts could in future only exercise their power to invalidate, or refuse to enforce, contractual terms only in the clearest of cases thus reinforcing contractual certainty in the law of contract and paving the way for the realisation of the constitutional vision.

5.3 Overview of the important contributions of the study

Coming full circle, this dissertation has endeavoured to make a contribution to the body of knowledge by shedding light on the importance of legal certainty in the common law of contract for promoting the constitutional vision. The Preamble of the Constitution envisions a future egalitarian South African society imbued with substantive human dignity, equality and freedom, which are core values of our Constitution. It appears to be clear from this study that the achievement of the constitutional vision is highly reliant on a robust and thriving inclusive economy and business environment while simultaneously also recognising human rights as embodied in substantive normative values. An important point of this study is that skilfully striking a perfect balance between these important principles and values in a fair, just and equitable manner, restores faith in the law of contract and it is what creates contractual legal certainty.

This study strongly demonstrates that South Africa's democratic future depends on the realisation of the constitutional vision, and the satisfaction of the objectives set for achieving the constitutional vision, requires legal certainty. However, as this study has revealed, time and time again, legal certainty does not endorse the privileging of the *pacta sunt servanda* principle over constitutional and common law

values, nor does legal certainty regard any value as more important than any other value. Under a constitutional dispensation all values must be apportioned equal weight. Legal certainty in the law of contract entails creating reasonable predictability and stability. This can only be achieved by carefully balancing these principles and values fairly, justly, and equitably (when approaching the adjudication of contractual disputes) so as to bring about fair, just and equitable outcomes, as viewed through the eyes of public policy imperatives. In this way it can be argued, the application of legal certainty legitimises and gives recognition to the common law of contract, but also may be closely aligned with constitutional imperatives. Such legitimacy it may further be argued, is important to create certainty in contractual relations and to create a stable, predictable commercial environment which in turn promotes the realisation of the important constitutional vision.

5.4 Recommendations for further research

There are several gaps in knowledge that follow from the study findings, and which would benefit from further research:

i. While this study has discussed the importance of legal certainty in the common law of contract for promoting the constitutional vision and has attempted to show how contractual legal certainty has been possibly created in the *Beadica* judgement, due to this case being very recent, it is still very early to determine how successful the CC's synthesising and formulation of a uniform set of contractual principles has been. In future, further research will be required to determine how successfully these principles are being applied to contractual disputes that may arise.
ii. Whereas the reduction of privileging the common law of contract *pacta sunt servanda* principle over normative values is also important, further research must determine how this reduction will impact on future commercial agreements (such as franchise agreements), contractual law and socioeconomic development.
iii. A study to examine how the current contractual principles affirmed by the CC in *Beadica* influences future contractual drafting will also be valuable. Here, it would be interesting to draw a comparison between contracts pre-*Beadica* with

contracts post-*Beadica* to determine how the contractual rules established by *Beadica* have been incorporated into contracts under the new system of contractual rules. Franchise agreements would be a good case in point here.

iv. Although this study briefly identified and discussed Covid-19 and corruption as major immediate threats to realising the constitutional vision, further detailed studies will be needed to determine the impact each of these will have on the economy, commerce and the realisation of the constitutional vision.

5.5 Conclusion

This chapter concludes the study by summarising the key findings and resulting conclusions. This was followed by providing an overview of the attempted contributions that this study makes to the existing body of knowledge on this important subject while also making several recommendations for future research. Perhaps the best way to close this study is with reference to the thought provoking words of Amartya Sen

> Development requires the removal of major sources of unfree-dom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states. Despite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers-perhaps even the majority of people. Sometimes the lack of substantive freedoms relates directly to economic poverty, which robs people of the freedom to satisfy hunger, or to achieve sufficient nutrition, or to obtain remedies for treatable illnesses, or the opportunity to be adequately clothed or sheltered, or to enjoy clean water or sanitary facilities. In other cases, the unfreedom links closely to the lack of public facilities and social care, such as the absence of epidemiological programs, or of organized arrangements for health care or educational facilities, or of effective institutions for the maintenance of local peace and order. In still other cases, the violation of freedom results directly from a denial of political and civil liberties by authoritarian regimes and from imposed restrictions on the freedom to participate in the social, political and economic life of the community.[1089]

1089 Sen *Development as freedom* 3-4.

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LIST OF ABBREVIATIONS

AJR	*African Journal of Rhetoric*
CCR	*Constitutional Court Review*
DPRU	*Development Policy Research Unit*
ECGI	*European Corporate Governance Institute*
FIIB Business Review	*Fortune Institute of International Business Business Review*
GA. J. INT'L & COMP. L	*Georgia Journal of International and Comparative Law*
HRB	*Human Rights Brief*

JARLE	*Journal of Advanced Research in Law and Economics*
LDD	*Law, Democracy & Development*
PELJ	*Potchefstroom Electronic Law Journal*
S Afr J Sci	*South African Journal of Science*
SA Merc LJ	*South African Mercantile Law Journal*
SALJ	*South African Law Journal*
SAJHR	*South African Journal on Human Rights*
SAPL	*SA Public Law*
Stell LR	*Stellenbosch Law Review*
SUBB Jurisprudentia	*Studia Universitatis Babes Bolyai Jurisprudentia*
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollands Reg*
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*
Tulane J. of Int & Comp Law	*Tulane Journal of International & Competition Law*