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Human Dignity in the Common Law of Contract: Making Sense of the *Barkhuizen*, *Bredenkamp* and *Botha* Trilogy

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ABSTRACT: This article considers the role of human dignity in the South African common law of contract. Firstly, I critically investigate how human dignity is understood in contract law. This investigation consists of a discussion of Beyleveld and Brownsword's dualistic approach to human dignity based on their individualistic interpretation of Kantian dignity. As an alternative to this individualistic reading of Kant, I then discuss Cornell and Wood's communitarian interpretation of Kantian dignity. Thereafter, I rely on Cornell's criticisms of Kantian dignity to highlight and compare the notion of ubuntu with the Kantian interpretations of dignity. I rely on the work of Cornell (together with Muvangua) to investigate human dignity through ubuntu in order to show how Kantian dignity and ubuntu can be harmonised. In the second part of the article, I discuss the Court's approach to human dignity as developed in the constitutional jurisprudence outside the field of contract law over the last two decades. The Court's approach reflects a similar harmonisation between Kantian dignity and ubuntu. I then use the Court's evolving understanding of the constitutional value of human dignity to critically engage with the apparent tension between the Court's approach to contractual fairness in *Barkhuizen v Napier* and *Botha r v Rich NO* , with that of the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa Ltd* . I conclude by arguing that the decision in *Botha* can be interpreted as creating an equitable discretion to declare unfair contract terms or the unfair enforcement of contract terms invalid and that the Court is in the process of developing an equitable discretion in the common law of contract.

KEYWORDS: contractual fairness, human dignity as empowerment, human dignity as constraint, Kantian dignity, ubuntu

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I INTRODUCTION

The role of fairness[1] in the South African common law of contract has been a contentious issue for centuries.[2] After the introduction of the Constitution of the Republic of South Africa, 1996 (Constitution), this debate came to the fore with the apparent tension between the Court's decision in *Barkhuizen*[3] and that of the Supreme Court of Appeal in *Bredenkamp*.[4] The *Barkhuizen* Court expressly rejected the contention that a contractual term that is unfair cannot lead to the conclusion that the term is contrary to constitutional values and principles.[5] In contrast, the *Bredenkamp* court held that fairness becomes relevant only when a specific constitutional value or right is implicated and it must be determined whether the clause or its enforcement is contrary to public policy.[6] Accordingly, it rejected the idea that fairness is an overarching requirement in the common law of contract.[7]

Legal practitioners and academics awaited the Court's response to *Bredenkamp*, especially after the *Everfresh* Court's *obiter dictum* that ubuntu may require the development of good faith to ensure more contractual justice.[8] However, the Court's subsequent decision in *Botha* was met with disappointment.[9] The Court held that the enforcement of a cancellation clause which would also entail the forfeiture of more than half of the purchase price already paid by the purchaser 'would be a disproportionate penalty for the breach' of the contract.[10] Some legal scholars argued that the Court's reasoning led to the impression that it impliedly held that the enforcement of the cancellation clause would be unfair and therefore unconstitutional.[11] Sharrock argued that if this is the case, the Court's decision is in conflict with that in *Bredenkamp,* which held that fairness is not an overarching requirement for the enforcement

1 I use the term 'fairness' to denote the amorphous concept implied in legal principles ranging from good faith to equity intended to realise justice in contract. This article is premised on the idea that these terms are open norms ie rules or standards that have no fixed or restricted meaning, can apply to various situations and enable value judgments. L Hawthorne 'Public Policy: The Origin of a General Clause in the South African Law of Contract' (2013) 19(2) *Fundamina* 300, 300–301; D Bhana & M Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited' (2005) 122 *South African Law Journal* 865, 868.

2 H du Plessis 'The Harmonisation of Good Faith and Ubuntu in the South African Common Law of Contract' (LLD Unisa 2017) at 112–205 (for a detailed legal-historical exposition of 'fairness' in South African contract law).

3 *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC)('*Barkhuizen*').

4 *Bredenkamp & Others v Standard Bank of South Africa Ltd* [2010] ZASCA 75, 2010 (4) SA 468 (SCA) ('*Bredenkamp*').

5 *Barkhuizen* (note 3 above) at para 72.

6 *Bredenkamp* (note 4 above) at para 43–44.

7 Ibid at paras 50–53. See also *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* [2017] ZASCA 176, 2018 (2) SA 314 (SCA) at para 30.

8 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012 (1) SA 256 (CC) ('*Everfresh*') at paras 71–72 (Moseneke J) and at para 23 (Yacoob J).

9 *Botha & Another v Rich NO & Others* [2014] ZACC 11, 2014 (4) SA 124 (CC)('*Botha*').

10 Ibid at para 51 read with paras 45–46.

11 D Bhana 'The Constitutional Court as the Apex Court for the Common Law of Contract: Middle Ground Between the Approaches of the Constitutional Court and the Supreme Court of Appeal' (2018) 34 *South African Journal on Human Rights* 8, 9; R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich* and *Combined Developers v Arun Holdings*' (2015) 27 *South African Mercantile Law Journal* 174, 179–180; D Bhana & A Meerkotter 'The Impact of the Constitution on the Common Law of Contract: *Botha v Rich NO* (CC)' (2015) 132 *South African Law Journal* 494, 505.

of a contract.[12] Bhana and Meerkotter have maintained that as the Court did not explicitly implicate an enumerated right it appears unnecessary to implicate a specific right or value in the Bill of Rights as envisaged by the *Bredenkamp* court.[13] As the *Botha* Court made no express pronouncements on these issues, the legal position remains uncertain.

In this article, I use the Court's understanding of the constitutional value of human dignity as developed over the last two decades to critically engage with these three decisions. I argue that the decision in *Botha* can be interpreted as creating an equitable discretion to declare contractual terms to be unfair or declare the unfair enforcement of contractual terms to be invalid by relying of the constitutional value of human dignity, which is based on a harmonisation between Kantian dignity and ubuntu.[14] For this purpose, the article is divided into the following parts: First, I explain how human dignity is understood in contract law. I start with Beyleveld and Brownsword's dualistic approach to human dignity as based on their individualistic interpretation of Kantian dignity. I then briefly discuss Cornell and Wood's communitarian interpretation of Kantian dignity as an alternative reading of Kant. Thereafter, I rely on Cornell's criticisms of Kantian dignity to bring a comparison with ubuntu to the fore. I rely on the work of Cornell (together with Muvangua) to investigate human dignity through ubuntu and show how Kantian dignity and ubuntu can be harmonised. In the second part of the article, I discuss the Court's approach to human dignity as reflected in constitutional jurisprudence outside the field of contract law which is based on harmonisation between Kantian dignity and ubuntu. Finally, I use the Court's evolving understanding of human dignity and other contract law decisions to critically engage with *Barkhuizen, Bredenkamp* and *Botha*, and argue that the Court is in the process of developing an equitable discretion in the common law of contract.

II APPROACH TO HUMAN DIGNITY IN CONTRACT LAW

As human dignity is an open-ended[15] concept, determining its meaning is not an easy task.[16] Its meaning depends on the specific political and/or moral philosophy used to inform its content.[17] Feldman explains that it is generally viewed as either serving individual or collective interests.[18] The same problem is faced when defining the constitutional value of human dignity

[12] Sharrock (note 11 above) at 179–183.

[13] Bhana & Meerkotter (note 11 above) at 505.

[14] I accept that the constitutional value of the rule of law and the public policy consideration of legal certainty are relevant when dealing with contractual fairness but this topic falls outside the scope of this article. Du Plessis (note 2 above) at 328–333 read with 77–82 (where I argue that an equitable discretion should not necessarily lead to large scale legal and commercial uncertainty if used cautiously, in an incremental manner and within the existing legal principles as far as possible.)

[15] Compare the description of open-ended terms (note 1 above).

[16] *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another* [2013] ZACC 35, 2014 (2) SA 168 (CC)('*Teddy Bear Clinic*') para 52.

[17] D Feldman 'Human Dignity as a Legal Value – Part 1' (1999) *Public Law* 682, 686.

[18] Ibid at 685. See also C Albertyn 'Values in the South African Constitution' in D Davis, A Richter & C Saunders (eds) *An Inquiry into the Existence of Global Values Through the Lens of Comparative Constitutional Law* (2015) 321, 326.

in the South African common law of contract.[19] Therefore, before investigating the meaning of the constitutional value of human dignity in the South African common law of contract, it is necessary to investigate how the dualistic approach (including its philosophical origins) is understood in contract law.

A Dualistic approach to human dignity in contract law[20]

South African contract law scholars generally refer to Beyleveld and Brownsword's work when discussing the role of human dignity in contract law.[21] This necessitates a critical investigation of their work. These authors distinguish between two concepts of human dignity, namely empowerment and constraint, and they trace both concepts back to Kantian dignity.[22] Human dignity as empowerment refers to the case where human dignity promotes individual interests in contract law, while human dignity as constraint promotes communitarian interests.[23]

1 *Human dignity as empowerment*

This conception of human dignity entails the empowerment of a person to live an autonomous life by making her own decisions and taking responsibility for those decisions.[24] Brownsword provides the following definition:

> [I]t is because humans have a distinctive value (their intrinsic dignity) that they have rights *qua* humans. Commonly, it is the capacity for autonomous action that is equated with human dignity and this, in turn, generates a regime of human rights organised around the protection of individual autonomy.[25]

Brownsword and Beyleveld argue that the intrinsic worth of all human beings, and therefore, their dignity, finds support in Kantian ethics.[26] Kant argued that something has a dignity because it has intrinsic value and is of inestimable worth.[27] Kant also maintained that 'the dignity of man consists precisely in his capacity to make universal law, although only on condition of being himself also subject to the law he makes'.[28] Relying on this passage,

[19] D Bhana 'The Substance of Contractual Autonomy in the Twenty-First Century: The South African Experience' (2015) 48 *Verfassun und Recht in Übersee* 491, 494; L Hawthorne 'Constitution and Contract: Human Dignity, the Theory of Capabilities and *Existenzgundlage* in South Africa' (2011) 2 *Studia Universitatis Babes Bolyai Iurisprudentia* at para 4 1; F Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *South African Law Journal* 71, 86; D Bhana 'The Law of Contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 24 *South African Law Journal* 269, 274; A Barnard *Critical Legal Argument for Contractual Justice in the South African Law of Contract* (LLD University of Pretoria 2005) 231–232; G Lubbe 'Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law' (2004) 121 *South African Law Journal* 395, 420–421; Bhana & Pieterse (note 1 above) at 880.

[20] Du Plessis (note 2 above) at 215–235.

[21] Hawthorne (note 19 above) at para 4 1; Barnard (note 19 above) at 231–232; Lubbe (note 19 above) at 420–421; Bhana & Pieterse (note 1 above) at 881.

[22] D Beyleveld & R Brownsword *Human Dignity in Bioethics and Biolaw* (2004) 11ff.

[23] Ibid.

[24] Feldman (note 17 above) at 685.

[25] R Brownsword 'Freedom of Contract, Human Rights and Human Dignity' in D Friedmann & D Barak-Erez (eds) *Human Rights in Private Law* (2001) 181, 183.

[26] Ibid at 191.

[27] I Kant *Grundlegung zur Metaphysik der Sitten* (1785)(trans HJ Paton, 1978) 96.

[28] Ibid at 101.

Brownsword and Beyleveld propose that Kantian dignity can explain why human beings have dignity;[29] and supports human dignity as empowerment that is based on human beings' inherent worth, the latter being founded on their capacity for autonomous action.[30]

Brownsword and Beyleveld state that human dignity as empowerment requires that human beings should be treated as autonomous beings who can make their own decisions and should never be treated as mere things or instruments.[31] They trace this idea back to Kant's second categorical imperative which provides that one should 'treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end'.[32] They rely on this passage to support their argument 'that it is wrong to treat persons as mere things rather than as autonomous ends'.[33] Their interpretation of Kant therefore supports their empowerment conception of human dignity which requires the protection of individuals' 'choices against the unwilled interferences of others'.[34]

According to Brownsword, human dignity as empowerment comprises two aspects: firstly, protection against direct attacks, for example, slavery. Secondly, the creation of the necessary conditions for the realisation of a person's human dignity, which translates as a 'right to support and assistance to secure circumstances that are essential if one is to flourish as a human'.[35] An example of the latter is the various socio-economic rights that must be protected and promoted by the state.[36]

This conception of human dignity is rights-driven because it grounds 'a set of rights claims against others' and reinforces 'claims to self-determination'.[37] It places great importance on individual autonomy and maximises individual freedom which may only be limited to protect the rights of others 'or for some less direct rights-related reason'.[38] Hence it is based on the political philosophies of individualism and economic liberalism which limits state interference in private transactions.[39]

As applied in a contract law setting it means that contracting parties are free to conclude contracts as an expression of their autonomy and that contracts freely entered into must be respected.[40] Hence this notion of human dignity finds expression in the classical law of contract which can also be linked to the political philosophies of individualism and economic liberalism.[41]

[29] D Beyleveld & R Brownsword 'Human Dignity, Human Rights, and Human Genetics' (1998) 61 *Modern Law Review* 661, 666.

[30] Ibid at 666.

[31] Ibid.

[32] Kant (note 27 above) at 91 as quoted by Beyleveld & Brownsword (note 29 above) at 666.

[33] Ibid.

[34] Brownsword (note 25 above) at 183.

[35] R Brownsword 'Human Dignity from a Legal Perspective' in M Düwell, J Braarvig, R Bronsword, D Mieth, N van Steenbergen & Düring (eds) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (2014) 1, 4.

[36] H Botha 'Human Dignity in Comparative Perspective' (2009) 2 *Stellenbosch Law Review* 171, 174.

[37] Beyleveld & Brownsword (note 22 above) at 27–28.

[38] R Brownsword 'Genetic Engineering, Free Trade and Human Rights: Global Standards and Local Ethics' in D Wüger & T Cottier (eds) *Genetic Engineering and the World Trade System: World Trade Forum* (2008) 287, 297–298.

[39] Ibid at 189.

[40] Brownsword (note 25 above) at 193–194.

[41] Ibid at 184–185.

2 *Human dignity as constraint*

Human dignity as constraint refers to the limitation of individual autonomy where the protection and promotion of another's human dignity requires it.[42] It expresses a duty-driven approach to human rights[43] and denotes the correlating duty to respect the human dignity of another as well as the duty to respect another's human dignity as expressed through her specific human rights.[44] This conception of human dignity has been linked to Kant's duty not to 'act contrary to the equally necessary self-esteem of others, as human beings' and the 'obligation to acknowledge in a practical way, the dignity of humanity in every other human being'.[45]

It may also recognise a further indirect duty to respect the community's 'vision' of human dignity.[46] This vision may arise 'where there is a background ethic of care and concern for others (and, concomitantly, a sense of solidarity with and responsibility for others)' which results not only in a concern for one's own flourishing but also that of others.[47] In this context it may denote a duty on individuals to assist in the promotion of the necessary conditions for the realisation of others' human dignity.[48] Therefore, human dignity as constraint provides justification for the promotion of socio-economic rights and substantive equality in the private sphere.[49]

This conception of human dignity allows for a greater limitation of individual freedom[50] and envisages a paternalistic society[51] in which the exercise of individual autonomy may be tempered if it is incompatible with the human dignity of others, or in order to create the necessary conditions for the realisation thereof. In other words, private individuals (and not only the state) are obliged to assist in the promotion of substantive equality and an individual's autonomy may be limited to promote social justice.

In contract law this means that even freely concluded contracts must be tested for conformity to human dignity.[52] Hence human dignity as constraint aligns with the socialist values expressed in modern contract law, and permits state intervention in contracts to protect and promote human dignity.[53]

3 *Tension resulting from the dualistic approach to human dignity*

In Beyleveld and Brownsword's paradigm, the two notions of human dignity are in tension with each other as they pull in opposite directions.[54] Human dignity as empowerment supports contractual autonomy while human dignity as constraint results in its limitation.

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42 Brownsword (note 35 above) at 1.

43 Beyleveld & Brownsword (note 22 above) at 36.

44 Ibid at 37.

45 I Kant *Die Metaphysik der Sitten* (1797)(trans M Gregor, 1996) 209. See also Lubbe (note 19 above) at 421–422; A Barnard-Naude '"Oh What a Tangled Web We Weave…" Hegemony, Freedom of Contract, Good Faith and Transformation – Towards a Politics of Friendship in the Politics of Contract' (2008) 1 *Constitutional Court Review* 155, 206.

46 Beyleveld & Brownsword (note 22 above) at 37.

47 Ibid at 41–42.

48 A Clapham *Human Rights in the Private Sphere* (1993) 148. See also Brownsword (note 35 above) at 4.

49 Botha (note 36 above) at 174.

50 Brownsword (note 38 above) at 297–298.

51 Beyleveld & Brownsword (note 22 above) at 11 and 31, esp 4.

52 Brownsword (note 25 above) at 194.

53 Bhana & Pieterse (note 1 above) at 881 and Lubbe (note 19 above) at 422.

54 Brownsword (note 25 above) at 194.

Brownsword[55] employs the Supreme Court of Israel decision in *Jerusalem Community Burial Society* to illustrate this tension.[56] Mr Kestenbaum entered into a contract with the burial society for his wife's funeral arrangements. A term in the standard provided that the burial society would engrave their tombstones in characters from the Hebrew alphabet only. In accordance with his wife's wishes, Mr Kestenbaum requested the burial society to engrave the tombstone with his wife's name and Gregorian dates of birth and death in Latin characters, which the burial society refused by relying on the above term.[57] The majority of the court annulled the contract term because the term, among other things, infringed upon Mr Kestenbaum's freedom of expression, conscience and human dignity.[58] In the dissenting judgment, it was held that respect for the free will of the contracting party is an essential public policy consideration and should be departed from in exceptional cases only. As the burial society's decision to engrave all its tombstones with Hebrew characters promoted the dignity of the cemetery and took account of the feelings of the community members that used it, the dissenting court argued that the term did not negate public policy.[59] Therefore, human dignity was used to argue both for the enforcement and annulment of the term which led Brownsword to argue that there is a tension between the two concepts.[60]

This tension results from the fact that Brownsword and Beyleveld understand human dignity as empowerment to denote the freedom of a person to make her own choices without the interference of others. The moment her freedom (human dignity) is constrained to protect the freedom (human dignity) of another, there is a tension between the two persons' freedom, and therefore, their human dignity. Defining human dignity as unconstrained freedom always results in one contracting party's dignity being protected while the dignity of the other is compromised. As Brownsword articulates, the problem is then to explain why one contracting party 'should be empowered at the expense' of the other.[61]

For years, the South African courts have grappled with this same question within, as well as outside, contract law – as will be illustrated below.[62] Extrajudicially, one of the Justices of the appeal court even lamented that the constitutional value of human dignity 'display[s] a perplexing capacity to pull in several directions at the same time'.[63]

Next, I rely on Cornell and Wood's communitarian interpretation of Kantian dignity to resolve this tension. I then argue that the Court is in the process of resolving this tension both outside and within the field of contract law by following this communitarian understanding of Kantian dignity.

[55] Ibid at 182, 194–195.

[56] *Jerusalem Community Burial Society v Kestenbaum* CA 294/91, [1992] IsrSC 46(2) 464 (Hebrew). I rely on a translation by Yuval Abrams, available at https://law.utexas.edu/transnational/foreign-law-translations/israeli/case.php?id=1391 ('*Jerusalem translation*').

[57] *Jerusalem Community* (note 56 above); Brownsword (note 25 above) at 182.

[58] *Jerusalem Community* (note 56 above). In his concurring judgment, Barak J held that the contract term violated the human dignity of the deceased and that of her family because neither she (during her lifetime) nor her family was allowed to determine the inscription on the tombstone. Ibid at para 28.

[59] *Jerusalem Community* (note 56 above) (Elon DP, dissenting judgment).

[60] Brownsword (note 35 above) at 11.

[61] Brownsword (note 25 above) at 194–195.

[62] A discussion of the Court's approach outside the field of contract law is discussed in part III and its approach within the realm of contracts is set out in part IV and V below.

[63] Brand (note 19 above) at 86.

B Reconciling the tension between human dignity as empowerment and constraint[64]

In contrast to Brownsword and Beyleveld's individualistic interpretation of Kantian dignity, which defines human dignity as empowerment as unconstrained freedom, Cornell and Wood propose a communitarian Kantian interpretation that defines freedom as a moral freedom which results in the reconciliation of the above tension.

Cornell argues that it is important to understand Kant's conceptualisation of freedom and autonomy.[65] According to Kant, freedom is a special type of causality which is a characteristic of human beings to the extent that they are rational.[66] Kant distinguishes between 'negative' and 'positive' freedom.[67] Negative freedom is a person's ability to resist outside influences and her own immediate natural impulses and desires in order to act towards her own ends for her own long term wellbeing through practical reason.[68] Kant defines freedom as a type of causality that operates according to a law and cannot be lawless,[69] which leads him to argue that positive freedom refers to the idea that free will is the ability people to act in accordance with their own laws.[70] Hence, positive freedom refers to the ability to make decisions in accordance with self-imposed laws.

Kant's positive freedom should be understood in the context of one of his earlier formulations of the categorical imperative, the Formula of Autonomy, which refers to 'the will of every rational being as a will which makes universal law'.[71] For Kant, autonomy does not denote that human beings can do what they want without interference from others, but rather that they are bound only to those laws that they, as rational beings, can lay down upon themselves, provided such laws meet the standard of a universal law.[72] Thus, a free will is a will under moral law,[73] which means there is no tension between a person's freedom and subjecting herself to the moral law.[74] Therefore, Kantian freedom does not mean that you can do what you want without interference from others; it denotes the capacity to lay down moral laws for yourself to which you are bound. The constraint on your freedom is not external or in tension with your freedom as reflected in Beyleveld and Brownsword's human dignity as constraint but is seen as a self-imposed constraint.[75] Although Kantian dignity does not deny that human beings are autonomous beings who plot their own futures and make their own decisions, they

[64] Du Plessis (note 2 above) at 235–252. (For a detailed analysis of Cornell & Wood's work on Kantian dignity.)

[65] D Cornell 'Bridging the Span toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence' (2008) *Acta Juridica* 18, 24–26.

[66] Kant (note 27 above) at 107.

[67] Ibid.

[68] Ibid. See also D Cornell & S Fuller 'Introduction' in D Cornell, S Woolman, S Fuller, J Brickhill, M Bishop & D Dunbar (eds) *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Material Volume 1* (2013) 8.

[69] Kant (note 27 above) at 107.

[70] Ibid. See also A Wood *Kant's Ethical Thought* (1999) 172.

[71] R Johnson & A Cureton 'Kant's Moral Philosophy' in E Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2017) 7.

[72] For Kant, a universal law refers to 'an objective principle valid for every rational being; and it is a principle on which he *ought to act* – that is, an imperative'. (Kant (note 27 above) at 84.) Hence a universal law is a moral law.

[73] Ibid at 107–108.

[74] D Cornell 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity, and Reconciliation' (2004) 19 *South African Public Law* 666; A Barnard 'A Different Way of Saying: On Stories, Text, a Critical Legal Argument for Contractual Justice and the Ethical Element of Contract in South Africa' (2005) 21 *South African Journal on Human Rights* 278, 288–289.

[75] Beyleveld & Brownsword (note 22 above) at 65.

must exercise their autonomy in a moral manner. Hence Kantian dignity does not support an understanding of human dignity as empowerment which denotes unconstrained freedom.[76]

The same type of reasoning applies when interpreting Kant's second categorical imperative that requires that a person should 'always treat humanity … in the person of any other, never simply as a means, but always at the same time as an end'.[77] Wood emphasises that the idea of humanity as an end in itself denotes a person's capacity to set ends for herself and choose ways to achieve them in order to lead a purposive life through her practical reason.[78] In other words, human dignity requires respect for the unique set of ends that an individual pursues. Accordingly, Wood arrives at the following understanding of what it entails to treat humanity in a person as an end in itself:

> [H]uman beings should never be treated in a manner that degrades or humiliates them, should not be treated as inferior in status to others, or made subject to the arbitrary will of others, or be deprived of control over their own lives, or excluded from participation in the collective life of the human society to which they belong.[79]

It is true that Wood's interpretation of Kant's second categorical imperative reflects human dignity as empowerment as respect for a person's unique set of ends and her freedom to make choices without interference from others. However, this freedom is still a moral freedom that should not violate the human dignity of others. In other words, an individual's choices should be respected provided such choices are not immoral.[80] Therefore, when human dignity as empowerment is understood as denoting a moral freedom, it inevitably leads to the endorsement of the idea of human dignity as constraint as reflected in the correlating duty of an individual to respect the human dignity of others.

This leads the discussion to another formulation of Kant's categorical imperative: the Formula of the Kingdom of Ends. Cornell and Wood continue to integrate Kant's 'kingdom of ends' in their interpretation of human dignity, introducing the social ideals of Kantian ethics.[81] Kant's hypothetical kingdom of ends provides that one should '[a]ct on the maxims of a member who makes universal laws for a merely possible kingdom of ends'.[82] Kant defines his kingdom of ends as 'a systematic union of different rational beings under common laws'.[83] Wood explains the relevant passage[84] in Kant's work:

> A collection of *ends* constitutes a 'realm' if these ends are not in conflict or competition with one another, but are combined into a mutually supporting system. … the Realm of Ends commands us to follow maxims involving ends that belong to this system, and it forbids us to adopt ends that would stand in the way of rational beings sharing a system of ends. Ends that are neither required for nor incompatible with the system are permissible.[85]

[76] Beyleveld & Brownsword offer a differing interpretation of this passage. Beyleveld & Brownsword (note 29 above).

[77] Kant (note 27 above) at 91.

[78] A Wood 'Human Dignity, Right and the Realm of Ends' (2008) *Acta Juridica* 47, 53.

[79] Ibid at 52.

[80] S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, Revision Service 6, 2014) at para 36.2(c).

[81] Wood (note 78 above) at 60; Cornell (note 65 above) at 30.

[82] Kant (note 45 above) at 100.

[83] Ibid at 95.

[84] Ibid.

[85] Wood (note 78 above) at 58.

In a similar manner, Cornell argues that Kant's hypothetical kingdom of ends is based on the idea that, as rational beings, we not only have the possibility of aligning our own actions with our own ends, but also with the ends of other rational beings.[86] When we harmonise our own ends with the ends of others, we are aspiring to Kant's imagined kingdom of ends.[87] Kant explains that as members of the kingdom of ends, we are at the same time legislators and subjects of the moral law.[88] Cornell emphasises that this capacity for self-legislation has a social dimension because we should attempt to harmonise our own ends with the ends of others.[89] Therefore, in Kantian ethics, freedom always denotes a moral freedom and the categorical imperative requires human beings to harmonise their ends with the ends of others in a rational and moral manner.

Finally, it is important to note that Kant's internal realm of freedom must be distinguished from the realm of external (legal) freedom which forms part of what Kant refers to as right (*Recht*).[90] In *Die Metaphysik der Sitten*, Kant provides the following universal principle of right:

> Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.[91]

As emphasised by Wood, duties of right are normally enforced through state laws and therefore enforceable by coercion. This is in contrast with ethical duties which are an expression of the individual's capacity to lay down self-imposed moral laws.[92] Therefore, the exact relationship between the internal (moral) and external (legal) realm of freedom is uncertain and the subject of scholarly debate.[93] An argument in favour of the idea that both are based on a unified principle is that Kant grounds the right to freedom on the humanity of human beings, and therefore, on the Formula of the End in Itself.[94]

If it is accepted that the two realms are connected, how then is the internal (moral) realm of freedom represented in the external (legal) realm of freedom? Cornell answers as follows:

> For Kant, we represent the realm of external freedom through a hypothetical experiment of the imagination in which we configure the conditions of a social contract rooted in the respect for all other human beings. Under this experiment in the imagination, we imagine the conditions in which individuals are given the greatest possible space for freedom, as long as it can be harmonised with the freedom of all others.[95]

In Cornell's interpretation, the ideal of the kingdom of ends is utilised as a regulative ideal based on a moral social contract.[96] When we harmonise our own ends with the ends of others

[86] D Cornell 'Is There a Difference That Makes a Difference Between uBuntu and Dignity?' (2010) 25 *South African Public Law* 382, 384

[87] Ibid.

[88] Kant (note 27 above) at 95.

[89] Cornell (note 65 above) at 30.

[90] Wood (note 78 above) at 54–55; Cornell (note 86 above) at 387.

[91] Kant (note 45 above) at 24.

[92] Wood (note 78 above) at 55.

[93] Ibid at 56; Cornell (note 65 above) at 21. For a detailed discussion on the distinction between Kantian ethics and rights, see Wood (note 78 above) at 54–58.

[94] Kant (note 46 above) at 30.

[95] Cornell (note 86 above) at 387.

[96] Cornell & Fuller (note 68 above) at 15. Although Wood argues that Kant's realms of right and ethics are distinct systems with their own rational basis, he later argues that right can be used to further and promote the moral ideal of the kingdom of ends. Wood (note 78 above) at 57 and at 61.

as law-making members in the hypothetical kingdom of ends, we are in fact, reconciling our own freedom with the freedom of others.[97] This is because Kantian freedom is internally self-limiting because freedom is equated to autonomy which involves laying down self-imposed moral laws.[98] Therefore, when freedom is viewed in this way, it results in the resolution of the tension between human dignity as empowerment and human dignity as constraint because respecting the dignity of others is represented as a moral law we have imposed upon ourselves as law-making members in the imagined kingdom of ends.[99] Thus, when we disrespect the dignity of others we are actually failing to respect our own dignity as law-making members in the hypothetical kingdom of ends.[100] We are not legislating together in a community that aspires to the kingdom of ends, and consequently, we are not free in the individual or collective sense.[101] As previously argued, the duty to respect the human dignity of others is a self-imposed constraint which we are able to exercise as part of our positive freedom, and ultimately, it is this capacity for positive freedom that gives us our dignity and our inherent worth.[102] Thus, when we disrespect the dignity of another, we are, in fact, disrespecting our own human dignity.[103]

C Why the communitarian interpretation of Kantian dignity is not enough: making the case for ubuntu

Although Cornell and Wood's more communitarian interpretation of Kantian dignity provides a way to resolve the tension created by Beyleveld and Brownsword's dualistic approach to human dignity, there are still a number of problems with Kantian dignity.[104] Cornell mentions four points of criticism against Kantian dignity to argue for a harmonisation between Kantian dignity and ubuntu.[105]

First, Kantian dignity is a Western conception of dignity which ignores indigenous communities' understanding thereof and undermines proper legal pluralism as envisioned by the Constitution.[106]

Secondly, Kantian dignity does not take account of human beings who do not have the ability to act rationally and therefore Kantian dignity does not affirm the human dignity of all human beings.[107]

Thirdly, it has been argued that Kantian dignity is too individualistic. As shown above, such criticisms may ignore or misunderstand the more communitarian ideas in Kantian ethics. However, as acknowledged by Cornell, Kantian dignity is based on the individual's capacity for reason. Therefore, Kant's hypothetical moral social contract envisaged through the ideal of the kingdom of ends begins with imagined, already individuated individuals who, as free persons,

[97] Cornell & Fuller (note 68 above) at 15.
[98] Ibid at 14–15.
[99] Cornell (note 65 above) at 28.
[100] Cornell & Fuller (note 68 above) at 15.
[101] Ibid.
[102] See the discussion in the text at note 75 above.
[103] Cornell (note 65 above) at 26.
[104] Cornell (note 86 above) at 388.
[105] Ibid.
[106] Cornell (note 65 above) at 19. See also Y Mokgoro & S Woolman 'Where Dignity Ends and uBuntu Begins: An Amplification of, as well as an Identification of, a Tension in Drucilla Cornell's Thoughts' (2010) 25 *South African Public Law* 400, 402.
[107] Cornell (note 86 above) at 388.

contract with each other for their own constraint in order to respect each other's dignity.[108] The moral social contract results in the maximisation of everyone's unconstrained freedom in the external realm of right, which ultimately results in individual correlating rights and duties.[109] This makes it difficult to use the Kantian imagined social contract to justify socio-economic rights and the promotion of substantive equality[110] because both require greater constraint on the freedom of certain members of the community in order to ensure and promote the social and economic equality of all community members.

Fourthly, substantive equality requires an understanding of the existing social and economic differences within a society which involves taking account of the actual lived social and economic conditions of the community members. This is different from Kantian dignity which does not take account of the actual lived circumstances of human beings because it is based on an ideal[111] and human beings' capacity for practical reason whether they actually use this capacity or not.[112] Although Wood concedes that Kantian dignity does not automatically implicate measures to address social inequality, he argues that it can be used as a critique against the ideologies underlying the free market economy which portrays human dignity as unconstrained freedom while in reality the weaker contracting party is in an unequal bargaining relationship and cannot be regarded as free or equal. [113]

D Human dignity through ubuntu

The premise of this article is that the above criticisms can be addressed by ubuntu. To understand how this harmonisation can be achieved, it is necessary to discuss how human dignity is understood through ubuntu. It is not my intention to make an original contribution to the understanding of ubuntu in African philosophy as its meaning is the subject of some controversy which has resulted in criticism against its use as a legal concept.[114] The best approach to establish the legal meaning of ubuntu is to focus on the judicial descriptions of ubuntu.[115] This article draws on the work of Cornell including writings she produced in collaboration with Muvangua relying on prominent scholars in African philosophy and African jurisprudence to elucidate the role and meaning of ubuntu as found in South African law in order to focus attention on the distinction between Kantian dignity and Ubuntu.[116] For the purposes of this article, a brief summary of their arguments is presented here.[117]

[108] Ibid at 388–389; D Cornell & K Van Marle 'Exploring *Ubuntu*: Tentative Reflections' (2005) 5 *African Human Rights Law Journal* 195, 211.

[109] Ibid at 211.

[110] Ibid.

[111] Cornell (note 74 above) at 667.

[112] Cornell (note 86 above) at 388.

[113] Wood (note 78 above) at 61–64.

[114] I Keevy 'The Constitutional Court and Ubuntu's "Inseparable Trinity"' (2009) 34 *Journal for Juridical Science* 61(Ubuntu as a religious worldview that violates s 15(1) of the Constitution); I Keevy '*Ubuntu* Versus the Core Values of the South African Constitution' (2009) 34 *Journal of Juridical Science* 19–58 (Ubuntu as a part of African law and African thinking that is patriarchal in nature and against the foundational constitutional values).

[115] C Himonga 'Exploring the Concept of Ubuntu in the South African Legal System' in U Kischel & C Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 1, 2.

[116] D Cornell & N Muvangua 'Introduction' in D Cornell & N Muvangua (eds) *Ubuntu and the Law: African Ideals and Post-apartheid Jurisprudence* (2012) 1; Cornell (note 86 above) at 382–399.

[117] See Du Plessis (note 2 above) at 225–267 (Detailed discussion of their arguments and the African sources they rely on).

Ubuntu has been linked to the moral theory of humanism[118] and the political and economic theory of socialism.[119] These associations are also noticeable in judicial descriptions of ubuntu. In *Makwanyane*, it was held that ubuntu's 'spirit emphasises respect for human dignity',[120] and since then, the Court has reiterated this link between ubuntu and human dignity on a number of occasions.[121] In *Makwanyane*, ubuntu was also linked to the ideal of social justice[122] and in a number of cases thereafter it was used to promote the realisation of socio-economic rights.[123]

While it can be deduced that ubuntu emphasises respect for human dignity and the promotion of substantive equality, it is necessary to understand how these ideas are understood in African thinking. In *Makwanyane*, Mokgoro J defined ubuntu as 'humaneness' which she translated as 'personhood' and 'morality'.[124] To understand what she meant by these terms, it is necessary to understand how ubuntu denotes the moral development of the individual and the African social bond.[125] Cornell relies on Menkiti[126] to conclude that a human being is intertwined in ethical relations with other community members and that her humaneness is embedded in the community from birth.[127] Therefore, this social bond is a social fact and not an imagined social contract as found in Kantian dignity.[128] Furthermore, it is only through actual ethical relations and engagement with community members and with their support that a person can and must develop towards becoming an individuated moral being.[129] However, this social bond should not be seen as simple communitarianism which denies individual interests.[130] Cornell and Muvangua propose that the reason why Mokgoro J linked the term 'humaneness' to personhood and morality was to denote how a person's development into a unique being (her personhood) is inseparable from her moral development.[131] Therefore, like the communitarian interpretation of Kantian dignity, ubuntu emphasises the inseparable link between morality and freedom.[132] Hence both Kantian dignity and ubuntu understand human dignity as empowerment as denoting a moral freedom. However, as ubuntu reflects

[118] M More 'Philosophy in South Africa Under and After Apartheid' in K Wiredu (ed) *A Companion to African Philosophy* (2004) 149, 156; Y Mokgoro 'Ubuntu and the Law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 1, 2.

[119] More (note 118 above) at 156; Mokgoro (note 118 above) at 3.

[120] *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC)('*Makwanyane*') at para 308 (Mokgoro J).

[121] *MEC for Education, KwaZulu-Natal, & Others v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC)('*Pillay*') at para 53; *Dikoko v Mokhatla* [2006] ZACC 10, 2006 (6) SA 235 (CC) at para 68 (Mokgoro J); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC)('*Port Elizabeth*') at para 37*; Hoffmann v South African Airways* [2000] ZACC 17, 2011 (1) SA 1 (CC) at para 38, fn 31. See also L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2013) 113.

[122] *Makwanyane* (note 120 above) at para 237 (Madala J).

[123] *Port Elizabeth* (note 121 above).

[124] *Makwanyane* (note 120 above) at para 308.

[125] Cornell (note 86 above) at 392.

[126] I Menkiti 'On the Normative Conception of a Person' in K Wiredu (ed) *A Companion to African Philosophy* (2004) 324, 326.

[127] Cornell (note 86 above) at 392.

[128] Ibid.

[129] Ibid.; D Masolo 'Western and African Communitarianism: A Comparison' K Wiredu (ed) *A Companion to African Philosophy* (2004) 483, 493.

[130] Cornell (note 95 above) at 392. See also J Murungi 'The Question of an African Jurisprudence: Some Hermeneutic Reflections' in K Wiredu (ed) *A Companion to African Philosophy* (2004) 519, 523; Masolo (note 129 above) at 493.

[131] Cornell & Muvangua (note 116 above) at 8.

[132] Cornell (note 86 above) at 397.

that a person's dignity is rooted in her personhood (uniqueness) and her embeddedness in the community, it differs from Kantian dignity which is based on the capacity for rationality.[133] Therefore, unlike Kantian dignity, ubuntu confirms the human dignity of every person whether she has the capacity to act rationally or not.[134]

As the community must respect and support the moral development of the individual into a unique being, the community has a duty to respect the human dignity of the individual. In the same way, the individual has a duty to respect the human dignity of other community members.[135] Therefore, ubuntu accords with the idea of human dignity as constraint as reflected in the correlating duty to respect the human dignity of others as based on Kantian dignity.[136] However, this duty goes further than Kantian dignity because it is also concerned with the actual wellbeing of community members. Cornell explains that each community member has a duty to support and promote the community that supports her.[137] Masolo speaks of the duty each person has to share in the responsibility of bringing about an ethical and more humane world which results in 'a thick system of rights and obligations'.[138] This duty entails more than an individual duty that correlates with a specific individual right,[139] and goes further than the harmonisation of individual freedoms to maximise the unconstrained freedom of everyone as reflected in the Kantian right to freedom.[140] Ubuntu is also concerned with the realisation and promotion of the socio-economic wellbeing of all the community members.[141]

Cornell further contends that ubuntu 'has an aspirational and ideal edge' because bringing about a humane world and becoming a moral person in that world is a never-ending task.[142] However, unlike the Kantian ideal of the kingdom of ends that is a regulative ideal, ubuntu is embedded in the social reality and materialises in the ethical actions between community members.[143] It is especially concerned with the wellbeing and welfare of community members because it recognises that the identity and dignity of a human being is embedded in the community.[144] Hence, it takes account of the actual social and economic circumstances of community members.[145] Therefore, as Cornell concludes, ubuntu is a moral demand for social justice and harmony, and consequently promotes the realisation of socio-economic rights and substantive equality.[146] In this way, ubuntu can be linked to the idea of human dignity

[133] Ibid at 397.

[134] *Makwanyane* (note 120 above) at para 309 (Mokgoro J links the inherent dignity of every person to Ubuntu).

[135] Ibid at para 224 (Langa J).

[136] Compare the discussion on human dignity as constraint in the text at note 44 above.

[137] Cornell (note 86 above) at 393. See also D Cornell & K van Marle 'Ubuntu Feminism: Tentative Reflections' (2015) 36(2) *Verbum et Ecclesia* 1, 2; Cornell & Muvangua (note 116 above) at 4.

[138] Masolo (note 129 above) at 495 relying on K Wiredu *Cultural Universals and Particulars: An African Perspective* (1996) 159.

[139] Cornell (note 86 above) at 393.

[140] Compare the discussion on Kant's right to freedom in the text at note 91 above and the criticism levelled against Kantian dignity as discussed in the text at note 108 above.

[141] *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* [2004] ZACC 17, 2005 (1) SA 580 (CC)('*Bhe*') at para 163. See also *Makwanyane* (note 120 above) at para 224.

[142] Cornell (note 86 above) at 396. See also *Makwanyane* (note 120 above) at para 227 (Langa J).

[143] Cornell (note 86 above) at 396.

[144] More (note 118 above) at 157.

[145] *Port Elizabeth* (note 121 above) at para 31(Sachs J insists that the particular circumstances of each case must be considered.)

[146] Cornell (note 86 above) at 396–397.

as constraint as reflected in the duty on the individual to realise the human dignity of other persons through the promotion of socio-economic rights and substantive equality.[147] This is in contrast to Kantian dignity which struggles to support the justification and promotion of socio-economic rights and substantive equality.

Cornell and Muvangua argue that as a person's identity, and attending human dignity, is embedded in the community, the community members are, in a sense, a part of her, because her moral development into personhood happens through her engagement with other community members and her participation in the community's practices and traditions.[148] This idea that the wellbeing and human dignity of the individual is tied up with the wellbeing and human dignity of the other community members is sometimes referred to as human dignity as a collective responsibility or concern and has been utilised by the Court to promote the realisation of socio-economic rights.[149] Although Justice Mokgoro did not explicitly refer to ubuntu in *Khosa*, dealing with the state's refusal to provide social welfare benefits to permanent residents, it has been argued[150] that her following remark is based on ubuntu:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.[151]

E Harmonisation of Kantian dignity and ubuntu

In view of the above analysis, Cornell identifies two similarities between Kantian dignity and ubuntu.[152] Both emphasise the link between freedom and morality. Both also promote human dignity in that they emphasise the inseparableness of personhood and morality.[153] Hence both the communitarian interpretation of Kantian dignity and ubuntu view empowerment conception of human dignity as denoting a moral freedom which necessarily results in the endorsement of human dignity as constraint reflected in the duty to respect the human dignity of others.

Cornell also identifies two important differences between Kantian dignity and ubuntu. First, where Kantian dignity is based on the rational capacity of human beings, dignity through ubuntu is based on the uniqueness of human beings and their embeddedness in the community. Therefore, unlike Kantian dignity, ubuntu recognises the inherent dignity of all human beings.[154] Secondly, the social bond is construed differently in African thinking than that envisaged by Kantian dignity.[155] Kantian dignity as based on a hypothetical social contract results in the maximisation of everyone's unconstrained freedom. In contrast, ubuntu relies on

[147] Compare the discussion dealing with human dignity as constraint in the text at note 48 above.

[148] Cornell (note 86 above) at 393. See also *Pillay* (note 121 above) at para 53.

[149] Albertyn (note 18 above) at 344 and Mokgoro & Woolman (note 106 above) at 403, footnote 10.

[150] Albertyn (note 18 above; Cornell & Muvangua (note 116 above) at 20; Mokgoro & Woolman (note 106) at 403; Cornell &Van Marle (note 108 above) at 213.

[151] *Khosa & Others v The Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* [2004] ZACC 11, 2004 (6) SA 505 (CC)('*Khosa*') para 74. See also *Port Elizabeth* (note 121 above) at para 18 (Sachs J explicitly relied on ubuntu to make a similar point).

[152] Cornell (note 86 above) at 397.

[153] Ibid at 398.

[154] Ibid at 398–399.

[155] Ibid at 399.

a social bond that is a social fact which takes account of the lived circumstances of community members and entails a duty on the individual to recognise and support the socio-economic wellbeing of other community members.[156] Thus, while both Kantian dignity and ubuntu support the idea of human dignity as constraint as reflected in the individual's correlating duty to respect the human dignity of others, ubuntu goes further in that it also denotes an additional duty on the individual to assist in the realisation and promotion of socio-economic rights and substantive equality.

For Wood, the Kantian ideal of the kingdom of ends resonates with the concept of ubuntu, specifically the idea that a human person becomes a person through other human beings.[157] Wood argues that relating Kant's ideal kingdom of ends to ubuntu can assist in 'interpreting the South African Constitution's commitment to the inherent dignity of every human being'.[158] It is perhaps in this light that Wood's proposal, that Kant's kingdom of ends could be used to critique the individualistic notion of human dignity which informs the ideologies of individualism and free trade, can be seen.[159] Hence, it can be argued that it is through ubuntu that the Kantian ideal of the kingdom of ends can be developed to take account of and promote socio-economic rights and substantive equality. As will be seen below, the Court also relied on Kant's kingdom of ends in promoting socio-economic rights and substantive equality within a larger understanding of human dignity as informed by ubuntu.[160]

III THE COURT'S APPROACH TO HUMAN DIGNITY

The Court in *Makwanyane* confirmed that human dignity refers to the intrinsic worth of all human beings which means that they are entitled to equal respect and concern and may not be treated in a degrading or dehumanising way.[161] The Kantian idea that dignity is beyond price and of incalculable worth, as well as Kant's second categorical imperative (treating humanity as an end in itself), was explicitly imported into the constitutional jurisprudence by Ackermann J in *Dodo*.[162] In *Khumalo*, O'Regan J confirmed that human dignity does not only refer to a person's own self-worth but also how she is valued and treated by the members of the community.[163] Therefore, the Court has confirmed the inherent and equal worth of all human beings that results in their entitlement to equal respect and concern as based on Kantian dignity.[164] As the Court has also relied on ubuntu to confirm the inherent dignity of every person,[165] and because it is better suited to the task,[166] this can be viewed as a harmonisation between Kantian dignity and ubuntu.

[156] Cornell & Van Marle (note 137 above) at 3.
[157] Wood (note 78 above) at 60.
[158] Ibid at 60–61.
[159] Compare the discussion in the text at note 113 above.
[160] Compare the discussion in the text at note 181 below.
[161] *Makwanyane* (note 120 above) at paras 26 (Chaskalson J), at paras 271 and 281 (Mohamed J), at paras 313–316 (Mokgoro J) and at para 328 (O'Regan J).
[162] *S v Dodo* [2001] ZACC 16, 2001 (3) SA 382 (CC)('*Dodo*') at para 38. See also Albertyn (note 18 above) at 327, fn 28; Botha (note 36 above) at 202.
[163] *Khumalo & Others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC)('*Khumalo*') at para 27
[164] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, 2014 (6) SA 123 (CC)('*Barnard*') at para 172.
[165] Compare the discussion in the text at note 120 above.
[166] Compare the discussion in the text at note 154 above.

In *Pillay,* dealing with a school learner's right to wear a gold nose-stud in accordance with her South Indian family traditions and culture, the Court explained what it means to treat human beings as an end in themselves. The Court emphasised the importance of freedom in defining human dignity[167] by quoting from Ackermann J's minority judgment in *Ferreira* where he stated that '[h]uman dignity has little value without freedom; for without freedom personal development and fulfilment are not possible'.[168] Langa J then continued as follows:

A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues'. One of those ends is the voluntary religious and cultural practices in which we participate.[169]

The Court's conception of what it means to treat a human being as an end in herself reflects Wood's interpretation of Kant's second categorical imperative. As was shown above,[170] Wood proposed that treating a person's humanity as an end in itself entails respecting her capacity to set her own ends and choose ways to achieve them in order to lead a purposive life through her practical reason. For Wood, like Beyleveld and Brownsword, this means that the autonomy of a person must be respected by not subjecting another's arbitrary will onto that person. Furthermore, Wood emphasised that this means that a person should not be excluded from participating in community life and would include respect for a person's participation in religious or cultural practices.[171] In similar fashion, Botha interpreted the Court's finding to mean that respecting a person as an end in herself 'demands the creation of a space within which individuals are free to forge their own autonomous identities'.[172] Therefore, the Court has developed the constitutional value of human dignity to reflect its empowerment conception which denotes the right to a space in which a person's human dignity can flourish. In this respect, the court also confirmed the state's duty to create and protect such a space for individual autonomy as reflected in the notion of human dignity as constraint.

Although the Court has emphasised the link between human dignity and autonomy in a number of cases,[173] this does not mean that the Court views this freedom as an unconstrained freedom or the individual 'as an isolated and unencumbered being'.[174] In dealing with the right to privacy in *Bernstein*, Ackermann J emphasised the correlating nature of rights and duties:

> The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. … This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen.[175]

It would seem that Ackermann J was influenced by Kant's imagined kingdom of ends as he refers to Kant's 'community of humanity' which 'demands mutual respect as a universal

[167] *Pillay* (note 121 above) at para 63.

[168] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* [1995] ZACC 13, 1996 (1) SA 984 (CC) ('*Ferreira*') at para 49.

[169] *Pillay* (note 121 above) at para 64.

[170] Compare the discussion in the text at note 78 above.

[171] Compare the discussion in the text at note 79 above.

[172] Botha (note 36 above) at 203–204.

[173] *MM v MN & Another* [2013] ZACC 14, 2013 (4) SA 415 (CC) at paras 73–74; *Teddy Bear Clinic* (note 16 above) at para 56; *Barnard* (note 164 above) at para 173 (Van der Westhuizen J).

[174] *Barnard* (note 164 above) at para 174. See also *Bernstein & Others v Bester and Others NNO* [1996] ZACC 2, 1996 (2) SA 751 (CC)('*Bernstein*') at para 65; Ackermann (note 121 above) at 109–111.

[175] *Bernstein* (note 174) at para 67.

moral duty towards persons as *moral persons*'.[176] This can be viewed as an endorsement of the communitarian conception of human dignity as empowerment which entails a moral freedom rather than an unconstrained freedom. As acknowledged by Ackermann J, such an understanding of human dignity necessarily implicates the correlating duty of an individual to respect the human dignity of others as reflected in the idea of human dignity as constraint.

The Court has also relied on ubuntu to emphasise that 'human beings are social beings whose humanity is expressed through their relationships with others'.[177] In *Pillay* the Court relied on ubuntu to emphasise that a person's moral development into a unique human being can only happen through engagement with other community members, and therefore, participation in the community's practices and traditions is inseparably linked to a person's human dignity.[178] As the Court also referred to Kant's second categorical imperative to promote the idea that human dignity denotes respect for a person's unique set of ends, this case illustrates how both Kantian dignity and ubuntu promote human dignity in a way that protects a person's individuality and provides a space for that person to pursue her moral personhood and unique destiny (ubuntu); or her unique moral set of ends (Kantian dignity) within and through engagement with the community which can only happen when the community members respect the human dignity of an individual by creating a space for her to pursue her unique destiny or ends.[179] In this way, the Court has harmonised Kantian dignity and ubuntu to endorse the empowerment conception of human dignity as a moral freedom which necessarily implicates the correlating duty of an individual to respect the human dignity of others as reflected in human dignity as constraint.

Nevertheless, this is not the end of the matter because it is difficult to use Kantian dignity to promote the realisation of socio-economic rights and substantive equality in the private sphere. As explained, human dignity based solely on Kantian dignity does not necessarily implicate a duty on the individual to promote social justice in private dealings.[180] The solution to this problem lies with ubuntu as it is more suited to the task[181] and it has proved particularly valuable in infusing the constitutional value of human dignity with the duty on the state to promote the realisation of socio-economic rights and substantive equality.[182] Recently, in *Barnard*, Van der Westhuizen J extended the application of these duties to individuals when dealing with promotion of substantive equality within the workplace. He relied on both ubuntu[183] and Kantian dignity[184] to make the following statement:

[176] Ibid at para 66, fn 93.

[177] *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC) ('*Dawood*') para 30, fn 42.

[178] *Pillay* (note 121 above) at para 53.

[179] Botha (note 36 above) at 205.

[180] Compare the discussion in the text at note 108 above.

[181] Compare the discussion in the text at note 155 above.

[182] Compare the discussion in the text at note 123 above. See also Himonga (note 115 above) at 15, fn 61.

[183] Van der Westhuizen J referred to the following decisions in which ubuntu was used to develop the constitutional value of human dignity: *Pillay* (note 121 above); *Port Elizabeth* (note 121 above); *Dawood* (note 177 above).

[184] Van der Westhuizen J referred to the following decisions that incorporate aspects of Kantian dignity into South African law: *Khumalo* (note 163 above); *Dodo* (note 162 above); *Ferreira* (note 168 above); *Bernstein* (note 174 above); *Makwanyane* (note 120 above); *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* [1998] ZACC 15, 1999 (1) SA 6 (CC).

> In the context of socio-economic rights, this Court has affirmed that the responsibility for the difficulties of poverty is shared equally as a community because 'wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole'. This would also hold in the context of substantive equality. First, the way in which individuals interact with social groups and society generally has a direct bearing on their dignity. This is true for members of both advantaged and disadvantaged groups. Second, this idea also gives effect to another Kantian way of understanding dignity – that it 'asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves'.[185]

In the first place, Van der Westhuizen J's statement supports the premise that the Court is following the more communitarian interpretation of Kantian dignity that reconciles the tension between human dignity as empowerment and constraint. Cornell argued that Kantian dignity denotes the capacity to lay down moral laws for ourselves and being bound by those laws. This means that freedom can be found only in the realm of morality and there is no tension between our freedom and subjecting ourselves to the moral law. Relying on Kant's ideal kingdom of ends, she concluded that when we disrespect the dignity of others we are actually failing to respect our own dignity as law-making members in the kingdom of ends.[186] These ideas are reflected in Van der Westhuizen J's reasoning when he maintains that substantive equality measures 'can enhance the dignity of individuals, even those who may be adversely affected by them'.[187] Secondly, as was shown above, ubuntu also recognises that the social and economic wellbeing and human dignity of the individual is tied up with the social and economic wellbeing and human dignity of the other community members.[188] This is also reflected in Van der Westhuizen J's reasoning where he states that 'wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole'. Therefore, the Court is in the process of developing the constitutional value of human dignity to include a duty on the individual to assist in the promotion of other community members' socio-economic wellbeing and the realisation of substantive equality, and it is drawing from both Kantian dignity and ubuntu to do so.

To summarise, the Court is in the process of developing a communitarian understanding of human dignity through the harmonisation of Kantian dignity and ubuntu. Both Kantian dignity and ubuntu have been used to endorse the idea of human dignity as empowerment as a moral freedom which results in an individual's correlating self-imposed duty to respect the human dignity of others. Furthermore, this conceptualisation of human dignity as constraint denotes not only a duty to respect the human dignity of others (a harmonisation between Kantian dignity and ubuntu) but also a duty to share in the responsibility of creating the necessary conditions for the realisation of others' human dignity through the promotion of socio-economic rights and substantive equality (a development inspired by ubuntu).

In order to apply this sophisticated understanding of human dignity in the common law of contract, I revisit the three major cases dealing with contractual justice (*Barkhuizen*, *Bredenkamp* and *Botha*) and propose a new interpretation of *Botha* that supports the creation of an equitable discretion to set aside unfair contract terms as well as the unfair enforcement thereof.

[185] *Barnard* (note 164 above) at para 175 quoting from *Khosa* (note 151 above) at para 74.

[186] Compare the discussion of Cornell's interpretation of Kantian dignity in the text at note 65 above.

[187] *Barnard* (note 164 above) at para 175.

[188] Compare the discussion in the text at note 148 above.

IV NECESSARY CONTEXT: CONTRACTUAL FAIRNESS PRE- AND POST CONSTITUTION

Before the Court's sophisticated understanding of human dignity can be applied to these three cases, it is necessary to place them in the context of the legal position in respect of unfair contract terms immediately prior to the enactment of the Constitution as well as the most relevant decisions handed down thereafter.

A Contractual fairness prior to the Constitution: *Sasfin*

Sasfin is the foremost decision dealing with contractual fairness prior to the Constitution.[189] An anaesthetist (Beukes) granted a deed of cession in favour of a finance company (Sasfin) which placed Sasfin in complete control of his earnings. In terms of the deed, on notice of cession to Beukes' debtors, Sasfin would be able to recover all of Beukes' book debts and retain all amounts recovered, whether or not he owed any money to Sasfin. Beukes was incapable of ending this situation.[190]

The court held that a contractual term which is contrary to public policy is unenforceable. It accepted that public policy is a vague and contentious concept, in other words an open norm, but argued that:

> [a]greements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.[191]

Therefore, a court must not hesitate to declare a contract contrary to public policy when necessary, but such power should be exercised with restraint to ensure that the decision does not cause legal uncertainty and is not based on the judge's own subjective perception of fairness.[192]

The court stressed that, on the one hand, public policy generally favours freedom and sanctity of contract. On the other hand, it should also take account of 'the doing of simple justice between man and man'.[193] Finally, in balancing these policy considerations, the court concluded that the provisions of the contract were unconscionable and therefore contrary to public policy. Specifically, the court held that the contract relegated Beukes to the position of a slave in that he was working for the benefit of Sasfin, could be deprived of all his income and was unable to end this situation.[194]

Although the court did not refer to human dignity expressly, it is possible to fit the court's decision within the matrix of the communitarian understanding of human dignity as based on Kantian dignity. In the first place, the public policy consideration of freedom and sanctity of contract is an expression of the idea of human dignity as empowerment in that it protects and promotes a contracting party's contractual autonomy in concluding a contract. Therefore, this public policy consideration supports the enforcement of a contract.[195] However, the court does not view this freedom as an unconstrained freedom that may not be interfered with. Contracts that are 'inimical to the interests of the community', whether illegal, immoral or

[189] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)('*Sasfin*') 7.
[190] Ibid at 7, 13–14.
[191] *Sasfin* (note 189 above) at 7–8.
[192] Ibid.
[193] Ibid at 9.
[194] Ibid at 13–14.
[195] Compare discussion in the text at note 40 above.

socially and economically inexpedient, should not be enforced. These references align with the Kantian ideal kingdom of ends which is based on a social contract in terms of which each community member, as a free individual, has contracted to respect the human dignity of others. Hence a party's contractual autonomy is a moral freedom that may not be exercised in a way that would infringe upon the human dignity of the other party.[196] As shown above, this approach necessarily leads to the endorsement of the idea of human dignity as constraint as reflected in the duty to respect the human dignity of others[197] which can be used to justify the non-enforcement of a contract.[198] In can be argued that the *Sasfin* court expressed this duty through the public policy consideration of simple justice between man and man.

Relying on Kant's second categorical imperative (treating the humanity in another as an end in itself), it can be argued that as the terms of the contract deprived Beukes of control over his life to such an extent that it relegated him to the position of a slave, the contract allowed Sasfin to treat Beukes merely as a means to an end and not as an end in himself,[199] and accordingly, the contract infringed upon Beukes' human dignity. For this reason, the court concluded that the contract was unconscionable and therefore against public policy.

It is important to note that the term 'unconscionable' is an open-ended term and therefore open to different interpretations which enable value judgements.[200] So how to explain the court's resolution of the tension between human dignity as empowerment and constraint through a value judgment that necessarily entails a consideration of the fairness of the contract terms? Lubbe argued that Kant's second categorical imperative does not mean that a contracting party should never treat the other contracting party as a means to her own ends, but rather that she must never treat the other contracting party merely as a means, but always also as an end.[201] He argued that Kant's second categorical imperative 'suggests that in the pursuit of one's own ends, a minimum level of regard for the interests of others is indicated'.[202] This is because contracts are typically bilateral co-operative ventures in terms of which both parties have to perform and both benefit from the contractual relationship in some manner. In other words, each party's contractual performance contributes to the other party's pursuit of her unique ends, while, at the same time, each party also uses the other party as a means in pursuit of her own ends. Hence, contractual terms in a bilateral contract will always reflect two unique set of ends that must be harmonised with each other as reflected in Kant's ideal kingdom of ends.[203] Ultimately, this means that when determining whether a contractual term in such a contract infringes the human dignity of one of the parties, a court has to balance the interests of both parties (as reflected in the contract terms themselves) in order to determine whether

[196] Compare Cornell's interpretation of Kant's freedom as a moral freedom (discussion in the text at note 65 above).

[197] Compare the discussion in the text at note 80 above.

[198] Compare the discussion in the text at note 52 above.

[199] T Floyd 'Legality' in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* (2nd Ed, 2012) at 186.

[200] The court accepted that determining whether a contract is against public policy involves a value judgment. Compare the discussion in the text at note 191 above.

[201] Lubbe (note 19 above) at 421, fn 188 referring to Beyleveld & Brownsword (note 29 above) at 666, footnote 30. See also Woolman (note 80 above) at para 36.2(b).

[202] Lubbe (note 19 above) at 421, fn 188.

[203] G Lubbe '*Bona fides*, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg' (1990) 1 *Stellenbosch Law Review* 7, 20 (Speaks of the need to harmonise conflicting individual interests). Compare Lubbe's views with Cornell's interpretation of Kant's kingdom of ends which entails the harmonisation of ends as discussed in the text at note 86 above.

the term constitutes an unfair infringement upon one of the party's interests (her unique set of ends) and hence violates her human dignity.

By following an approach that aligns with the communitarian understanding of Kantian dignity, the appeal court endorsed the idea of human dignity both as empowerment which denotes a moral freedom and as a constraint reflected in the duty on the individual to respect the human dignity of others. According to the communitarian understanding of Kantian dignity, this constraint is not in tension with the contracting party's autonomy (in other words the party who is prevented from enforcing the contract) because respecting the human dignity of the other party is seen as a self-imposed moral duty that the constraining party has laid down for herself in terms of a social contract.

Therefore, determining whether a contract term is contrary to public policy involves a balancing act between competing values[204] and the balancing act will always be between policy considerations that support the enforcement of the contract, on the one hand (as a reflection of human dignity as empowerment), and policy considerations that support the non-enforcement of the contract, on the other (as reflected in human dignity as constraint).Ultimately, this balancing act involves a value judgment to determine the fairness of the terms. In light of this interpretation, the decision in *Sasfin* can be used to support the existence of the court's equitable discretion to set aside unfair contract terms on the basis of human dignity although the court did not expressly rely on human dignity to reach its decision.

However, the court had a very limited understanding of fairness as it confined itself to an investigation of the fairness of the contractual terms themselves. The court did not take account of the circumstances surrounding the conclusion of the contract or those at the time of its enforcement. In other words, the court did not take account of the socio-economic reality of the contracting parties or the idea of substantive equality. Therefore, although the appeal court's understanding of contractual fairness reflects an understanding of Kantian dignity that entails a moral freedom and the resulting duty to respect the human dignity of others, it does not require an individual to assist in the promotion of the socio-economic wellbeing of the other community members in her private dealings with them. Thus, at the most, *Sasfin* endorses the communitarian understanding of Kantian dignity which results in the maximisation of everyone's unconstrained freedom as reflected in Kant's external realm of right and this is an expression of a more liberal understanding of human dignity that does not promote socio-economic rights or substantive equality.[205]

The appeal court did not refer to the concept of good faith (another open norm), presumably because there was some uncertainty regarding its specific role in promoting contractual fairness in the aftermath of *Bank of Lisbon*.[206] However, Lubbe argued that the principle of good faith could be developed to perform the same function as the policy consideration of simple justice between man and man and that where a contractual term constitutes an unreasonable and one-sided promotion of one party's own interest at the expense of the other party it may be

[204] Lubbe (note 203 above) at 13. See also J Lewis 'Fairness in South African Law' (2003) 120 *South African Law Journal* 330, 334.

[205] Compare the discussion in the text at note 107 above with the line of criticism lodged against Kantian dignity as too individualistic because it does not promote socio-economic rights or substantive equality.

[206] *Bank of Lisbon and South Africa Ltd v De Ornelas* [1988] ZASCA 35, 1988 (3) SA 580 (A)('*Bank of Lisbon*') (Appeal court eliminated the *exceptio doli* and did not transfer its role to the concept of good faith, but held that all contracts are *bonae fidei*. This resulted in some uncertainty in re the exact role of good faith in preventing and correcting contractual unfairness). See also Du Plessis (note 2 above) at 135–141.

contrary to good faith and consequently also against public policy.[207] Similarly, Barnard argued that good faith can be seen as an expression of the duty of an individual to respect the human dignity of others (as reflected in human dignity as constraint) when applied to the common law of contract.[208]

Lubbe's approach was followed by appeal judge Olivier in his minority judgment in *Saayman*.[209] He argued that the *Bank of Lisbon* court did not limit the role of good faith in the common law of contract.[210] He maintained that a court may apply the principles of public interest which include the principle of good faith, but conceded that this must be done carefully to prevent legal uncertainty and the arbitrary decisions.[211] He further stated that public interest does not demand that a party should be held bound to an otherwise enforceable contract where such a contract falls foul of the requirements of good faith.[212] Soon thereafter, Olivier J's approach was followed by the Cape division in *Miller*,[213] and later that same year, the appeal court also referred to his judgment with apparent approval.[214]

B Contractual fairness after the Constitution

Initially, there were indications that the multi-faceted idea of human dignity as empowerment (denoting a moral freedom) and constraint (as reflected in the resultant duty to respect the human dignity of others) – the latter finding expression through good faith – would find application in the common law of contract. In *Mort*, Davis J stated *obiter* that the court must develop the common law of contract in line with the Constitution.[215] He maintained that good faith is shaped by the community's legal convictions with reference to the constitutional values of human dignity, equality and freedom.[216] Freedom supports freedom and sanctity of contract while equality and dignity support the idea that contracting parties –

> must adhere to a minimum threshold of mutual respect in which 'the unreasonable and one-sided promotion of one's own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts'.[217]

[207] Lubbe (note 203 above) at 17–21.

[208] Barnard (note 74 above) at 289.

[209] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* [1997] ZASCA 62, 1997 (4) SA 302 (SCA) ('*Saayman*') at 318.

[210] Ibid at 323.

[211] Ibid at 324 referring to *Sasfin* (note 189 above) at 9.

[212] *Saayman* (note 209 above) at 331.

[213] *Miller & another NNO v Dannecker* 2001 1 SA 928 (C)('*Miller*') at para 19. See also A Louw 'Yet another Call for a Greater Role for Good Faith in the South African Law of Contract: Can We Banish the Law of the Jungle, While Avoiding the Elephant in the Room?' (2013) 16(5) *Potchefstroom Electronic Law Journal* 43, 54; L Hawthorne 'The End of Bona Fides' (2003) 15 *South African Mercantile Law Journal* 271, 273.

[214] *NBS Boland Bank Ltd v One Berg River Drive CC & Others; Deeb & Another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 4 SA 928 (SCA) at para 28.

[215] *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C)('*Mort*') 475 referring to *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) 325–326. See also L Hawthorne 'Legal Tradition and the Transformation of Orthodox Contract Theory: The Movement from Formalism to Realism' (2006) 12(2) *Fundamina* 71, 78–79; Hawthorne (note 213 at 274); P Du Plessis 'Good faith and Equity in the Law of Contract in the Civilian Tradition' (2002) 65 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 397, 411; P Du Plessis '*Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C)' (2002) 35 *De Jure* 385, 385–390.

[216] *Mort* (note 215 above) at 474–475.

[217] Ibid at 475.

Soon thereafter, the court in *Coetzee* also endorsed the communitarian understanding of human dignity as a moral freedom which entails a duty to respect the human dignity of others when it held that a contract term that infringed upon one of the contracting party's human dignity would be considered contrary to public policy.[218] Woolman emphasised that the court's judgment was based on Kant's second categorical imperative as the court stated that the contract infringed upon the soccer player's human dignity because in terms of the contract he was 'helpless' and 'treated just like an object',[219] and hence, not treated as an end in himself.[220] Specifically, the court held that the National Soccer League (NSL) rules as incorporated into the contract treated the 'players as goods and chattels who are at the mercy of their employer once their contract has expired'.[221] Therefore, the court's definition of what it means to treat a person as an end in herself accords with Wood's interpretation of Kantian dignity that endorses the idea that treating a person as an end in herself denotes respect for her unique set of ends which would include that she should not be deprived of control over her life;[222] an understanding which was also endorsed outside the field of contract law by the Court in *Pillay*.[223]

However, in *Brisley,* dealing with the enforceability of a non-variation clause, the court stressed the fact that 'public policy generally favours the utmost freedom of contract'[224] and struck a damaging blow to the principle of good faith when it held that good faith was an abstract value underlying the substantive common law of contract and not an independent substantive rule that can be used to strike down a contract that would otherwise be enforceable.[225] If this would be allowed, the court argued, it would mean that whether a contract would be enforceable or not would depend on what a particular judge viewed as fair and just.[226] The court held that granting a judge such a discretion would ignore the principle of *pacta sunt servanda* and lead to commercial uncertainty.[227] In this respect, the court expressly rejected Olivier J's minority judgment in *Saayman*.[228] Finally, it held that the principles in *Sasfin* cannot be used to prevent the enforcement of contractual terms that are not in themselves contrary to public policy. Further, that even if the principles in *Sasfin* could be extended to the unfair enforcement of terms, it should only be applied in exceptional cases.[229]

Although the court did not recognise good faith as an open norm,[230] it did not hesitate to rely on public policy to deal with contractual unfairness, the latter also being an open-ended

[218] *Coetzee v Comitis & Others* 2001 1 SA 1254 (C)('*Coetzee*') at paras 34 and 41. See also Lubbe (note 19 above) at 422.
[219] *Coetzee* (ibid) at para 34.
[220] Woolman (note 80 above) at para 36.4(*f*). See also Lubbe (note 19 above) at 422.
[221] *Coetzee* (note 218 above) at para 38.
[222] Compare the discussion in the text at note 78 above.
[223] Compare the discussion of *Pillay* (note 121 above) in the text at note 167 above.
[224] *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA)('*Brisley*') at para 31 quoting *Sasfin* (note 189 above) at 9.
[225] *Brisley* (note 224 above) at paras 21 and 22 (Court rejected the views in *Mort* (note 215 above).)
[226] *Brisley* (note 224 above) at para 24.
[227] Ibid.
[228] Ibid at paras 14–22.
[229] Ibid.
[230] Lubbe (note 19 above) at 397. See also Bhana & Pieterse (note 1 above) at 873.

concept.[231] In addition, as the court followed *Sasfin*, its decision can be seen as an endorsement of the communitarian understanding of Kantian dignity that supports a moral freedom (human dignity as empowerment) and the resultant duty to respect the human dignity of others (human dignity as constraint) which results in a balancing act between the interests of the parties as reflected in the contract terms themselves. As in *Sasfin*, the court also limited the investigation of fairness to the contractual terms themselves; and did not take account of the socio-economic circumstances of the parties at conclusion or enforcement of the contract. This resulted in the court emphasising that 'public policy favours the utmost freedom of contract' which reflects the Kantian external realm of right that requires the maximisation of everyone's freedom and does not promote socio-economic rights or substantive equality. In light of the Constitution's commitment to social transformation, the court's decision was met with criticism.[232]

Soon thereafter, the enforceability of an exemption clause that excluded a private hospital's liability for the negligent conduct of its nursing staff was considered in *Afrox*.[233] With reference to *Sasfin* the court accepted that a contractual term which is so unfair as to be against public policy would be unenforceable, but cautioned that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases to prevent the decision being based on the judge's own subjective perception of fairness.[234] This can be viewed as an endorsement of the communitarian understanding of Kantian dignity that reflects a moral freedom and the resultant duty to respect the human dignity of others that results in a value judgment (expressed through the concept of public policy) and requires the court to balance the interests of the parties to determine the fairness of the contract.

The court held that the values informing public policy are rooted in the Constitution and its founding values, namely dignity, equality and freedom.[235] By quoting from appeal judge Cameron's concurring judgment in *Brisley*, the court stated that these values require the courts to show restraint when striking down contracts because contractual autonomy is part of the constitutional value of freedom, and '[s]horn of its obscene excesses', contractual autonomy informs the constitutional value of dignity.[236] So similar to its approach in *Brisley*, the court emphasised the empowerment conception of human dignity in a way which results in the maximisation of the individual's freedom as reflected in the communitarian understanding of Kantian dignity. In doing so, the court further elevated contractual freedom to the status of a constitutional value.[237] However, the court did admit that the unequal bargaining position of the parties is a relevant factor in deciding whether a contract term is contrary to public policy, but argued that its presence alone will not result in the contract term being contrary to public policy.[238] The court thus recognised that the promotion of socio-economic rights and substantive equality could be taken into account when determining the fairness of a contract

[231] Barnard & Naude (note 45 above) at 195; A Barnard 'To Wonderland through the Looking-Glass: Conceiving a Critical Legal Argument for Contractual Justice in the South African Law of Contract' (2006) 17 *Law and Critique* 153, 155; Hawthorne (note 213 above) at 277.

[232] Barnard (note 231 above) at 155–156; Hawthorne (note 213 above) at 76–277.

[233] *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73, 2002 (6) SA 21 (SCA)('*Afrox*') at para 8.

[234] Ibid.

[235] Ibid at para 18.

[236] Ibid at para 22 quoting *Brisley* (note 224 above) at para 94.

[237] Ibid at para 23. See also Bhana & Pieterse (note 1 above) at 877–878; Lubbe (note 19 above) at 415.

[238] *Afrox* (note 233) at para 12.

term, albeit in a very limited way. Again, the court's decision was met with criticism.[239] Finally, the court confirmed that good faith is an abstract value underlying the substantive common law of contract and not an open term that can be used to strike down a contract that would otherwise be enforceable.[240]

V MAKING SENSE OF *BARKHUIZEN*, *BREDENKAMP* AND *BOTHA*

A *Barkhuizen*

The issue of contractual fairness finally arrived in the Court in *Barkhuizen* which dealt with the enforcement of a time-limitation clause in a short term insurance contract. The Court held that constitutional challenges to contractual terms must be determined by testing the terms against public policy, which in turn is informed by the Constitution and the constitutional values of freedom, dignity, equality and the rule of law. A contractual term that is contrary to such values is contrary to public policy and unenforceable.[241]

The Court referred to the test laid down in *Sasfin* which entails a balancing act between the policy considerations of freedom and sanctity of contract on the one hand and simple justice between individuals on the other.[242] It held that such a balancing act necessarily implicates notions of fairness, justice, equity and reasonableness.[243] The Court held that a balance must be found between 'unacceptable excesses' of contractual autonomy, and allowing 'individuals the dignity and autonomy of regulating their own lives'.[244] The Court further expressly rejected the appeal court's contention that the fact that a contractual term is unfair or might operate harshly cannot lead to the conclusion that the term is contrary to constitutional values and principles.[245] These statements can be viewed as a confirmation of the communitarian understanding of Kantian dignity as a moral freedom and the resultant duty to respect the human dignity of others. It further reflects an acceptance that this approach to human dignity necessarily results in a balancing act between the interests of parties as reflected in the contractual terms themselves through a value judgment based on fairness.[246]

However, the Court then laid down a two-part test for determining fairness which resulted in some uncertainty as to the above proposition.[247] The first part of the test concerns the fairness of the clause itself and requires a balancing act between the policy considerations of freedom and sanctity of contract which gives effect to the constitutional values of freedom and human dignity on the one hand, and another policy consideration as reflected in a constitutional right or value (*in casu* the right to access of justice) in support of the non-enforcement of the

[239] D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403, 473–474; Botha (note 36 above) at 212; D Davis 'Private Law After 1994: Progressive Development or Schizoid Confusion?' (2008) 24 *South African Journal on Human Rights* 318, 325; Bhana & Pieterse (note 1 above) at 882; Lubbe (note 19 above) at 421.

[240] *Afrox* (note 233 above) at para 32.

[241] Ibid at paras 28–29.

[242] Ibid at para 50, fn 33 referring to *Sasfin* (note 189 above) at 9.

[243] *Barkhuizen* (note 3 above) at paras 51 and 73.

[244] Ibid at para 70 referring to *Napier v Barkhuizen* [2005] ZASCA 119, 2006 (4) SA 1 (SCA) at para 13.

[245] *Barkhuizen* (note 3 above) at para 72.

[246] Cf the discussion of *Sasfin* in the text at note 195 above.

[247] *Barkhuizen* (note 3 above) at para 56.

contract on the other.[248] This examination is objective in nature as it deals with these values on an abstract level as reflected in the terms of the contract itself.[249] To some extent this approach can still be interpreted as aligning with the *Sasfin* test based on a communitarian understanding of Kantian dignity as explained above.[250] However, it is unfortunate that the Court endorsed the idea of human dignity as empowerment only when it reiterated that contracts freely and voluntarily entered into must generally be enforced. It did not refer to or consider the idea of human dignity as constraint as reflected in the duty to respect the human dignity of the other contracting party which could be used to argue for the non-enforcement of the contract.[251] In other words, the Court did not recognise that the constitutional value of, or right to, human dignity can also be invoked on the other side of the balancing scale to limit contractual freedom and that this would necessarily implicate the notion of fairness because it entails a balancing act of the different parties' interests as reflected in the contractual terms themselves. The Court's failure to consider the idea of human dignity as constraint created legal uncertainty as to whether a court had an equitable discretion to set aside unfair contract terms or if a party arguing for the non-enforcement of the contract always has to implicate a specific fundamental right before fairness becomes relevant.[252]

The Court further held that if the clause objectively does not violate public policy, it must be determined whether the clause itself violates public policy in light of the relative situations of the contracting parties, which would include an assessment of the bargaining positions of the parties.[253] This determination is subjective in nature.[254] Therefore, the Court's reasoning reflects a conceptualisation of human dignity as constraint which denotes not only a duty to respect the human dignity of others but also to promote socio-economic rights and substantive equality in private dealings with others. This is an extension of *Sasfin* in which the determination of fairness was limited to the contract terms themselves. As *Sasfin* is based on an understanding of Kantian dignity which struggles to justify and promote socio-economic rights and substantive equality, it can be argued that this extension was inspired by ubuntu.[255] As was shown above, human dignity through ubuntu results in a duty on the individual to promote the socio-economic wellbeing of the other community members.[256] This is further supported by the fact that the Court recognised that public policy as an open norm should

[248] Ibid at para 57. See also Bhana & Meerkotter (note 11 above) at 507; L Hawthorne 'Contract Law: Contextualization and Unequal Bargaining Position *Redux*' (2010) 43 *De Jure* 395, 398; Brand (note 19 above) at 84–85; Barnard-Naude (note 45 above) at 198; D Bhana 'The Role of Judicial Method in the Relinquishing of Constitutional Rights' (2008) 24 *South African Journal on Human Rights* 300, 314.

[249] *Barkhuizen* (note 3 above) at para 59 (Court refers to the 'objective terms' of the contract). See also Hawthorne (note 248 above) at 398; Botha (note 36 above) at 212.

[250] Compare the discussion in the text at note 246 above.

[251] Brand (note 19 above) at 85; Bhana (note 19 above) at 274; Lubbe (note 19 above) at 420–421.

[252] D Bhana 'Contract Law and the Constitution: *Bredenkamp v Standard Bank of South Africa* (SCA)' (2014) 29 *South African Public Law* 518, 508; PJ Sutherland 'Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 1' (2008) 3 *Stellenbosch Law Review* 390; PJ Sutherland 'Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 2' (2009) 1 *Stellenbosch Law Review* 50; Bhana (note 248 above) at 314–317.

[253] *Barkhuizen* (note 3 above) at para 59.

[254] M Wallis 'Commercial Certainty and Constitutionalism: Are They Compatible?' (2016) 133 *South African Law Journal* 545, 552–553; Hawthorne (note 248 above) at 398.

[255] D Bhana & N Broeders 'Agreements to Agree' (2014) 77 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 164, 175; Cornell & Muvangua (note 116 above) at 24; Hawthorne (note 248 above) at 400.

[256] Compare the discussion on the differences between Kantian dignity and ubuntu in the text at note 154 above.

be 'informed by the concept of *ubuntu*'.[257] Thus, the Court expanded the limited scope of substantive equality considerations as set out in *Afrox*[258] and this development is the result of a harmonisation between Kantian dignity and ubuntu.

The second part of the test for fairness investigates whether, in spite of the fact that the clause itself does not violate public policy, enforcement of the clause would be fair in light of the circumstances which prevented compliance with it.[259] Again, the second part of the test is subjective in nature and promotes substantive equality.[260] Accordingly, it is also inspired by ubuntu.[261] It is further an extension of the fairness test in *Sasfin* as it is concerned with the unfair enforcement of a contract term, and not only whether the contract terms themselves are fair or not. Again, this reflects a conceptualisation of human dignity as constraint which denotes not only a duty to respect the human dignity of others but also to share in the responsibility of creating the necessary conditions for the realisation of others' human dignity through the promotion of substantive equality. This development can also be viewed as a harmonisation between Kantian dignity and ubuntu.

Finally, the Court *obiter* questioned the restricted role of good faith in the common law of contract.[262]

B *Bredenkamp*

The Supreme Court of Appeal in *Bredenkamp* attempted to clarify the legal uncertainty created in *Barkhuizen*.[263] This case dealt with the exercise of a contractual right that entitled the bank to close a client's bank accounts on reasonable notice and for any reason. Relying on *Barkhuizen*, the client argued that the bank was required to exercise this right fairly and for good cause.[264] In other words, without implicating a constitutional value or right in support of the non-enforcement of the contract, the client relied on the second part of the test for fairness in *Barkhuizen* that deals with the unfair enforcement of a contract term.[265]

The court stated that the judgment in *Barkhuizen* did not hold that the enforcement of a valid contractual clause must be fair and reasonable where no public policy consideration in the Constitution or elsewhere is implicated.[266] Therefore, fairness and reasonableness become relevant only when a specific constitutional value or right is implicated and it must be determined whether the clause or its enforcement is contrary to public policy.[267] As indicated by the court in *Barkhuizen v Napier*,[268] this balancing act will be between freedom and sanctity of contract that gives effect to the constitutional values of freedom and human dignity, on the one hand, and another policy consideration as reflected in a constitutional right or value

[257] *Barkhuizen* (note 3 above) at para 51.
[258] Compare the discussion of *Afrox* in the text at note 238 above.
[259] *Barkhuizen* (note 3 above) at para 56.
[260] Ibid at para 59. See also Wallis (note 254 above) at 552–553; Bhana & Meerkotter (note 11 above) at 504; Bhana (note 252 above) at 509.
[261] See again the sources listed in note 255 above.
[262] *Barkhuizen* (note 3 above) at para 82.
[263] *Bredenkamp* (note 4 above) at para 6.
[264] Ibid at paras 1, 25–26.
[265] Compare the discussion in the text at note 259 above.
[266] *Bredenkamp* (note 4 above) at para 50.
[267] Ibid at paras 43–44.
[268] *Barkhuizen* (note 3 above) at para 57.

in support of the non-enforcement of the contract, on the other. As mentioned before, this balancing act is objective in nature.[269] This means that a court must first identify the relevant policy considerations in support of the non-enforcement of the contract as reflected in specific constitutional values and/or rights before it may apply the second part of the test for fairness which is subjective in nature.[270]

By following the Court's approach in *Barkhuizen*, the appeal court recognised that human dignity can be invoked in support of contractual autonomy and sanctity as reflected in its empowerment conception to argue for the enforcement of the contract. However, it also failed to recognise that human dignity as a constitutional value or right can also be invoked on the other side of the balancing scale in support of the non-enforcement of the contract and that this would necessarily implicate the notion of fairness. Due to this failure, the appeal court rejected the idea that fairness is an overarching requirement in the common law of contract,[271] and expressly stated that an equitable discretion cannot be allowed because it would defeat the rule of law entrenched as a founding constitutional value.[272]

This approach allowed the Court to avoid applying the subjective test and hence it did not take account of the socio-economic position of the parties and the issue of substantive equality between the parties was not addressed. Consequently, the *Bredenkamp* decision was criticised because it endorsed a very liberal conception of human dignity and freedom and did not promote social justice.[273] Although the Court accepted that contractual freedom is not an unconstrained freedom, the court emphasised the empowerment conception of human dignity which results in the maximisation of the individuals' freedom to contract.[274] Thus, the court's approach aligns more with the communitarian understanding of Kantian dignity than an understanding of human dignity informed by ubuntu that requires a greater limitation on an individual's freedom in order to promote substantive equality in private dealings. This is supported by the fact that the *Bredenkamp* court made no reference to ubuntu.

It could be argued that the court's failure to consider how human dignity is understood through ubuntu, resulted in Yacoob J's call for ubuntu to inform the notion of public policy in the common law of contract in *Everfresh*.[275]

C *Botha*

As mentioned in the introduction, the Court's decision in *Botha* was criticised because it created legal uncertainty as to the role of fairness in the law of contract.[276] In this article, I try to resolve some of this legal uncertainty by arguing that the Court's decision reflects an

[269] Compare the discussion in the text at note 249 above.

[270] The second part of the test states that if the clause itself is reasonable and does not violate public policy, it should be determined whether the clause should be enforced in light of the circumstances which prevented compliance with the clause.

[271] *Bredenkamp* (note 4 above) at paras 50–53.

[272] Ibid at para 39 referring to s 1(*c*) of the Constitution. The role of the constitutional value of the rule of law as relating to contractual fairness falls outside the scope of this article.

[273] Bhana (note 252 above) at 515.

[274] Ibid.

[275] *Everfresh* (note 8 above) at para 23.

[276] Compare the discussion in the text at note 9 above. See also L Hawthorne 'Rethinking the Philosophical Substructure of Modern South African Contract Law: Self-actualisation and Human Dignity' (2016) 79 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 286; Wallis (note 254 above) at 554–557.

understanding of human dignity as both empowerment and constraint, the first denoting a moral freedom and the latter reflected in the duties on an individual to respect the human dignity of others and to promote the socio-economic conditions for the realisation thereof.

The facts in *Botha* concerned the enforcement of a cancellation clause in an instalment sale of immovable property between Botha (as buyer) and a trust (as seller). The cancellation clause provided for the cancellation of the agreement and the forfeiture of all sums already paid by Botha in the event of a breach by her. The contract also provided that Botha could demand transfer of the property in terms of s 27 of the Alienation of Land Act 68 of 1981 (ALA) after she had paid at least half the purchase price.[277] After Botha had paid three quarters of the purchase price, she began to default on the payments and the trust sued for cancellation and eviction.[278] In turn, Botha demanded transfer of the property in terms of s 27 of the ALA as provided for in the contract.[279]

One of Botha's main contentions was 'that the enforcement of the cancellation clause, where more than half the purchase price (had) been paid, and in the face of a demand for a transfer pursuant to s 27, (was) contrary to public policy'.[280] In determining this question, the Court held that public policy generally requires enforcement of contractual obligations freely and voluntarily undertaken and that this gives effect to the constitutional values of freedom and human dignity.[281] This is an endorsement of human dignity as empowerment that supports the enforcement of the contract.

In support of her case, Botha contended that the enforcement of the cancellation clause by the trustees was contrary to public policy because it violated her constitutional rights.[282] It is not stated which constitutional rights Botha implicated in her application before the Court but most likely she relied on her rights to dignity and equality as these were the rights cited before the Supreme Court of Appeal.[283] Therefore, it can be argued that Botha invoked human dignity as the specific constitutional right or value in favour of the non-enforcement of the contract term as required by the Court in *Bredenkamp*.[284] Furthermore, by linking human dignity and equality, the idea of human dignity as constraint as endorsed by the Court refers not only to a duty on the individual to respect the human dignity of another but also the duty to promote the realisation of the latter's human dignity through the promotion of substantive equality.[285]

The Court then applied this idea of human dignity as constraint which it conceptualised through the principle of good faith:

The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest

[277] *Botha* (note 9 above) at para 4.
[278] Ibid at paras 5–6.
[279] Ibid at para 8.
[280] Ibid at para 19.
[281] Ibid at para 23.
[282] Ibid at para 19.
[283] Ibid at para 15.
[284] Bhana & Meerkotter (note 11 above) at 505 (Argue that the Court did not explicitly implicate an enumerated right as required by *Bredenkamp*.)
[285] The idea of substantive equality is linked to human dignity and equality. *Botha* (note 9 above) at para 28.

without regard to the other party's interest. Good faith is the lens through which we come to understand contracts in that way.[286]

Although this statement was made in respect of the application of the *exceptio non adimpleti contractus* to the facts of the case, the Court later stated that the enforcement of the cancellation clause and the concomitant forfeiture of the purchase price already paid was unfair[287] for the same reasons because it constituted a disproportionate penalty in circumstances where three-quarters of the purchase price had already been paid.[288]

The Court's decision can therefore be viewed as an application of the test for fairness as set out in *Barkhuizen* and as further expanded upon in *Bredenkamp*. By referring to both parties' human dignity[289] the Court recognised that determining the fairness of a contractual term or the enforcement thereof will always entail a balancing act between the human dignity of the contracting party who wants to enforce the contractual term as expressed through the maxims of freedom and sanctity of contract and the human dignity of the other contracting party who avers that the contractual term or its enforcement infringes her human dignity as expressed in the demand that a human being should never be treated merely as a means to an end, but always also as an end. This means that the unique set of ends of both parties must be balanced which entails that the court has to weigh up the interests of both parties in order to determine whether the contractual term or its enforcement constitutes an unfair infringement of one of the party's interests and hence violates her human dignity. Consequently, by impliedly invoking the concept of human dignity as constraint through the principle of good faith the Court was able to apply the subjective test for fairness in determining whether the enforcement of the cancellation clause was unfair.

In coming to the decision that the enforcement of the cancellation clause was unfair, the Court took specific notice of the fact that the cancellation in the specific circumstances of the case would entail the forfeiture of almost three-quarters of the purchase price that had already been paid by Botha while the trust would keep the property. The Court thus balanced the interests of the parties and came to the conclusion that the enforcement of the contract term would be unfair.[290]

As the Court linked the concept of good faith to both duties as reflected in human dignity as constraint, namely to respect *and* promote the realisation of the human dignity of the other contracting party through substantive equality, the decision relies by implication on ubuntu. As was argued above,[291] the subjective part of the test for fairness which includes considerations based on substantive equality is an expression of ubuntu because it requires an investigation into the contracting parties' actual social and economic conditions. Accordingly, ubuntu can

[286] *Botha* (note 9 above) at para 46.

[287] The court specifically speaks of the 'fairness of awarding cancellation'. *Botha* (note 9 above) at para 51.

[288] Ibid.

[289] Ibid at para 46 (Court speaks of the 'reciprocal recognition of the dignity … of the respective contracting parties'.) See also S Woolman 'On the Reciprocal Relationship between the Rule of Law and Civil Society (2015) *Acta Juridica* 374 (Contends that a necessary precondition for any viable system of law requires that each citizen recognize all other citizens as worthy of 'equal concern and respect'.)

[290] I am not arguing that the public policy consideration of legal certainty is irrelevant in determining whether contract terms or their enforcement are contrary to public policy. However, such an investigation falls outside the scope of this article. For academic criticism that *Botha* aggravated the existing uncertainty regarding the law, see Wallis (note 254 above) at 554–557.

[291] Compare the discussions in the text at notes 255 and 261 above.

be construed as the subtext. Thus, it is unfortunate that the Court did not refer to ubuntu expressly as doing so could have enabled the Court to consider further factors in favour of the non-enforcement of the cancellation clause. For example, Hawthorne argued that the parties were in an unequal bargaining relationship and that Botha had 'little negotiating power' in concluding the contract.[292] A further possible factor is the fact that Botha used the property to operate a laundry service through a closed corporation of which she was the sole member.[293] Losing the property could well have resulted in her losing the business that provided her with a substantial part (if not the sole source) of her income.[294] Therefore, enforcement of the cancellation clause, coupled with the forfeiture of the purchase price already paid, might well have resulted in the deprivation of Botha's livelihood.

V CONCLUSION

The above analysis illustrates that the Court is in the process of developing both aspects of human dignity as empowerment and constraint in the common law of contract which is the result of the harmonisation of Kantian dignity and ubuntu. Human dignity as empowerment denotes a moral freedom while human dignity as constraint refers to the duty to respect the human dignity of the other party as well as the duty to promote the realisation of the other party's human dignity through the idea of substantive equality. The contracting party wishing to enforce the contract term relies on freedom and sanctity of contract, while the other contracting party who wants to prevent its enforcement avers that the contractual term infringes her human dignity, as expressed in the demand that a human being should never be treated merely as a means to an end, but always also as an end. This approach inevitably requires a balancing act between the interests of the parties as reflected in the contractual terms themselves as well as taking account of the circumstances surrounding the conclusion and enforcement of the contract. Hence the notion of fairness is implicated when determining whether a contractual term or its enforcement is contrary to public policy.

Finally, it is therefore submitted that the proper appreciation of the constitutional value of human dignity in the common law of contract results in a general equitable discretion to declare contractual terms or their enforcement unfair and therefore invalid. Furthermore, it is possible to interpret the Court's decision in *Botha* as creating such an equitable discretion by expressing the idea of human dignity as constraint through good faith.

[292] Hawthorne (note 276 above) at 299.

[293] *Botha* (note 9 above) at para 3.

[294] The relevance of these factors are supported by Bhana & Meerkotter (note 11 above) at 505 (Argues that the facts of the case could have implicated the rights to property (s 25 of the Constitution) and freedom of trade, occupation and profession (s 22 of the Constitution).)