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Quo vadis the Constitutional Court's jurisprudence in private law?

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In 1982, a young academic at the University of Witwatersrand, Edwin Cameron, wrote a devastating account of Chief Justice LC Steyn's impact on South African law. It described in clarion detail how Steyn as Chief Justice destroyed the remains of a jurisprudence of the Appellate Division which through the 1940s and 1950s had acted as a guardrail against the erosion of human rights by a determined executive. Upon his elevation to Chief Justice, Lucas Steyn ensured, by contrast, that the Court would defer at every opportunity to the racist and authoritarian policies of the National Party government. In a memorable phrase, Cameron described the Chief Justice thus:

> LC Steyn had a towering but parsimonious intellect; ... he was a scrupulous but ungenerous judge; his intent to rid South African law of its unique and fundamental connection with English law was not only jurisprudentially and historically unjustified, but ultimately quixotic; ... he was an unfettered – of his own volition – executive minded judge.[1]

Thirty-nine years have passed since Justice Cameron dissected the record of LC Steyn. During that time Justice Cameron has enjoyed a variegated career of great distinction, culminating in his elevation to the Constitutional Court. He too possesses a towering intellect but it is neither parsimonious nor ungenerous. In stark contrast to the man whom he correctly excoriated, Cameron has contributed hugely to the reconstruction of South African law in the direction of the promotion of human rights and the vindication of the constitutional dream of a social democracy society based on freedom, dignity and equality.[2]

1 E Cameron 'Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38 at 40.

2 See H Cheadle, D Davis & N Haysom *South African constitutional law* (2002) ch 1, in which it is argued that the Constitution of the Republic of South Africa,

I feel sure that Justice Cameron would not disagree with the proposition that the constitutional journey towards the society idealised in the constitutional text has a long way to go. It is about the line of legal march of the present Constitutional Court that this contribution is written in honour of a great jurist.

1 The question of the control of private power

In another celebrated article, this time by Karl Klare,[3] it was argued that the South African Constitution,[4] in sharp contrast to a liberal constitutional text, was concerned with social and economic redistribution, at least in part, providing for a horizontal scope, the promotion of a participatory democracy and multiculturalism. Turning to the question of horizontality, Klare argued that the Constitution 'intends to irradiate democratic norms and values into the so-called "private sphere", particularly the market, the workplace and the family'.[5] Klare based these observations on the structure of section 8 of the Constitution. Section 8 performs three tasks: all law is subjected to the provisions of Chapter 2, the Bill of Rights; the State is bound thereby; and, where applicable, so are natural persons. Section 8 also recognises that juristic persons may be bearers of rights. The text reads thus:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right, and
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

1996, read as a whole, seeks to promote social democracy.

3 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 153.

4 Constitution of the Republic of South Africa, 1996.

5 Klare (n 3) 155.

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

This chapter is concerned with the extent to which these provisions of the Bill of Rights have been applied to natural and juristic persons within the context of private law in general and the law of contract in particular; hence the scope and meaning of section 8 become critical in order to conduct an inquiry into how the Constitutional Court has negotiated the interpretative hurdles posed by the section in its development of private law. Apart from section 8, the Constitution provides in terms of section 39(2) for the development of common law, guided by the spirit, purport and objects of the Bill of Rights. The implication of this section will be considered later.

2 The Constitution and private law: The role of section 8

It can be argued that constitutional rights may affect legal relationships between private persons in four different ways:[6]

(1) The constitutional right binds private persons and accordingly applies to the conduct of such persons and forms the basis of a cause of action or defence to a cause of action.
(2) The right binds private persons but is given effect to by a statutory provision or by the common law which may be developed by the court in accordance with that right.
(3) The right does not bind private persons but applies to all law governing the relationship between them and forms the basis of a challenge to the constitutional validity of any statutory provision, common-law rule or customary-law rule that may be applicable to the dispute between such persons.
(4) The right does not bind private persons but the values underlining the right must be applied in the development of the common law or customary law.

Stated in these terms, the second of these classifications was the model chosen by the drafters of the South African Constitution as set out in

6 See for a general discussion Cheadle, Davis & Haysom (n 2) ch 3.

subsections 8(2) and (3) of the text.[7] The fourth category is to be found in the wording of section 39(2).

The manner in which the text of section 8 operates can be illustrated thus. A plaintiff seeks relief from court, having been rejected by the landlord as a tenant on the basis of her race. Assume further that there was no legislation prohibiting this form of discrimination.[8] A plaintiff would be faced with an exception that she has no common-law cause of action in that the common law of property permits a landowner to choose his or her tenant without legal constraint. A judge would, on the basis of section 8, be faced with an argument that the constitutional right to equality, contained in section 9, applies to private parties.[9] Hence the judge would be required to seek a common-law rule that vindicates this application of the equality right, or would be required to develop a new common-law right relating to landlord and tenant based on the application of the right to equality and, if necessary, would consider any limitation to this new common-law right. Subsequent to this decision, a similar case would be decided on the basis of the new common-law right and not on the basis of the Constitution. Absent an applicable constitutional right, then, in terms of the fourth classification, section 39(2) of the Constitution comes into play. The normative framework of the Constitution, being the values of freedom, dignity and equality, can be invoked to develop the applicable common law.

The focus of this article is on both of these classifications. It is to section 8(2) and (3) that we must first turn. This enjoins a four-step process to be followed by a court seeking to give content to these two provisions:[10]

7 Cheadle, Davis & Haysom (n 2) ch 3.

8 For the purposes of this illustration, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has not been passed.

9 See especially s 9(4) of the Constitution.

10 This argument is derived from chapters 1 and 3 of Cheadle, Davis & Haysom (n 2), which remains the one analysis on horizontality and the structure of s 8 which is based on the law relating to pleadings. This is regrettably lacking in pieces dealing with horizontality where an absence of such critical knowledge is apparent. See, for eg, D Bhana 'The horizontal application of the Bill of Rights' (2013) 29 *South African Journal on Human Rights* 351 and J van der Walt 'Progressive indirect horizontal application of the Bill of Rights' (2001) 17 *South African Journal on Human Rights* 341 (which is extremely useful, however, regarding the significance of s 39(2)).

(1) The court must determine whether private persons are bound by the right which is being invoked. This is an enquiry framed by section 8(2).
(2) If the answer to this step is positive, the court will then apply any legislation giving effect to the right in terms of section 8(3)(a).
(3) In the absence of legislation giving effect to the applicable right, the court is enjoined to apply a common-law rule or, if necessary, develop one to give common-law content to the applicable constitutional right. This process is undertaken in terms of section 8(3)(a). In so doing, a court may develop a common law rule which contains a limitation of the right in accordance with the section 36(1), the general limitations clause. In this way, the new common-law rule is fashioned. This development work is done in terms of section 8(3)(b).
(4) Once the new rule of common law has been developed, it is applied to the conduct of private persons in any future dispute to which it is relevant.

The animating idea behind this structure is that, once a statutory provision or a common-law rule giving concrete effect to a constitutional right has been constitutionally validated or developed, that is the end of the constitutional role in such a dispute. In other words, parties wishing to litigate the same dispute will now base their case on a validated or new common-law rule as opposed to relying directly on a constitutional right. The implication of this structure is that the new common law, as explained earlier in the tenant example, is given content through the relevant constitutional right and now applies to the same conduct of private persons in all future disputes, which will no longer directly raise a constitutional issue.

In this way, the constitutional drafters sought to ensure that the common law would be given sufficient constitutional content and the two systems of law would be aligned under the prism of the Constitution. There would be no need, subsequent to the development of a new rule, to found a cause of action or plead a case based directly on a constitutional right. Once section 8's set of steps have been implemented in a given context, the constitutional right would play no further role in the adjudication of disputes to which the newly developed common-law rule would now apply.

3 The Constitutional Court grapples with section 8

The Constitutional Court first engaged with section 8 and its implications in *Khumalo v Holomisa.*[11] The question raised was whether the common law of defamation, as developed by the courts at that time, was inconsistent with the Constitution and, in particular, whether the right to freedom of expression as enshrined in section 16 should now reach into the common law of defamation and ensure changes to it.

In her judgment, O'Regan J found that it was clear that the right to freedom of expression triggered direct horizontal application, in this case as contemplated in subsections 8(2) and (3) of the Constitution.[12] In other words, as the applicants were part of the media, section 16 of the Constitution applied directly to them, albeit that they were private parties. This, in turn, prompted a further question as to whether the common law of defamation unjustifiably limited the right to freedom of expression. If it did, then O'Regan J held that it would be necessary to develop the common law in a manner contemplated by section 8(3) of the Constitution.[13] O'Regan J then proceeded to engage in an analysis of the existing common law of defamation, particularly in the light of the then recent development of the defence of reasonable publication in *National Media Ltd v Bogoshi.*[14] As O'Regan J noted, the defence of reasonable publication, as *Bogoshi* had developed it

> avoid[s] a zero-sum result and strikes a balance between the constitutional interests of plaintiffs and defendants. It permits a publisher who can establish truth in the public benefit to do so and avoid liability. But if a publisher cannot establish the truth, or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable. In determining whether publication was reasonable, a court will have regard to the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity.... The defence of reasonable publication avoids therefore a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity.[15]

11 [2002] ZACC 12.
12 *Khumalo* (n 11) para 33.
13 *Khumalo* (n 11) para 34.
14 1998 (4) SA 1196 (SCA).
15 *Khumalo* (n 11) para 43.

For these reasons, O'Regan J held that it had not been shown that the common law, as developed in *Bogoshi*, was inconsistent with the provisions of the Constitution.

The upshot of this judgment is that the Constitutional Court was not required to engage in an active development of the common law or of statutory interpretation. The Court grasped the significance of the requirements set out in section 8 and provided guidance for future application of the provision. In particular, O'Regan J specifically referred to section 8 and held that constitutional incompatibility with a common-law rule which is relevant to the resolution of the dispute before the court means, not that the court should apply the applicable constitutional right directly, but should seek rather to engage in the crafting of a common-law rule that adequately reflects the constitutional position.[16] This judgment represents the high watermark of the development of section 8 by the Constitutional Court. Sadly, the promise of further jurisprudential development has receded significantly since then, as is evidenced in recent judgements of the Court.

4 The incoherence of *Pridwin*

The structure of section 8 confronted the Court most recently in *AB v Pridwin Preparatory School*.[17] In this case, a school had terminated its contract with the parents of two learners, resulting in their expulsion from the school, without giving the parents or the learners the opportunity to make any representations prior to the termination. The school was an independent private school. Thus, the first issue to be decided was whether the fundamental interests of the child as enshrined in terms of section 28(2) and the right to basic education in terms of section 29(1)(a) of the Constitution applied to an independent school in terms of section 8(2). In all the four judgments which were delivered by members of the Court, it was correctly decided that the two rights applied to an independent school and thus both had horizontal application. In the majority judgment, Theron J noted:

> In subjecting private power to constitutional control, section 8(2) recognises that private interactions have the potential to violate human rights and to perpetuate

16 *Khumalo* (n 11) paras 32-33.
17 [2020] ZACC 12.

> inequality and disadvantage. Independent schools, like Pridwin, are not exempt from constitutional obligations and the demands for transformation of private relations.[18]

The judgment proceeded to engage in an extremely lengthy excursus into the implications of sections 28 and 29 of the Constitution, leading to the following conclusion:

> A finding that section 28(2) required the School to seek representations on the children's best interests prior to taking the decision to remove them does not reach beyond the context of exclusion of children from an independent school. The same circumscription would apply in relation to a finding on whether the School's impairment of the right to a basic education was justifiable for purposes of section 29(1)(a).[19]

On the basis of the analysis set out in the previous parts of this chapter, Theron J was obliged to move from the section 8(2) component of the enquiry to section 8(3) and thus craft a rule of common law to protect the constitutional rights infringed by the school. But one searches in vain for any reference to section 8(3) in her judgement. She found that the school was required to have regard to the best interests of the two learners and thus there was a legal obligation upon the school to afford them an opportunity to be heard prior to a decision being made to have them removed.[20] Failure to so comply had a detrimental effect on their best interests, but instead of applying section 8(3) and therefore developing a new rule of common law which would require schools in these circumstances to conduct a fair hearing prior to any such decision, all that the judgment says is the following:

> Pridwin's decision to terminate the Parent Contract was unconstitutional due to the failure to afford the applicants an opportunity to be heard on the best interests of the boys, in breach of sections 28(2) and 29(1) (a) of the Constitution.[21]

Regrettably, a further judgment in this case came to a similar conclusion. This one was authored by Nicholls AJ and is equally problematic. This judgment recites, almost by way of a style of ritual incantation, the rights contained in sections 28 and 29 of the Constitution and then moves to apply these rights to the contract entered into between parents and the

18 *Pridwin* (n 17) para 131.
19 *Pridwin* (n 17) para 188.
20 *Pridwin* (n 17) paras 189-195.
21 *Pridwin* (n 17) para 209.

school: 'the contractual autonomy of parties is curtailed when dealing with the right of basic education and the best interests of the child'.[22] In these instances, Nicholls AJ held that 'the enforcement of the contract must be subject to the contractual precepts outlined above because of the direct applicability of rights in the Bill of Rights'.[23] But one searches in vain for any analysis of section 8 in this judgment. To add to the confusion, the judgment devotes considerable discussion to whether the principle of *pacta sunt servanda* must give way in such a case by invoking *Barkhuizen v Napier*,[24] a judgment that relies on the public policy doctrine in terms of section 39(2) as opposed to direct horizontality.[25]

The sharp point is the following. It may be that section 39(2) can be used to reconfigure public policy and hence justify a conclusion that a contract voluntarily entered into cannot be enforced as it offends a newly sourced form of public policy. By contrast, however, a direct application of section 28 based on subsections 8(2) and (3) will give rise to a new rule of common law as opposed to the far more imprecise and uncertain application of public policy, based on abstract values.

It was thus left to Justices Cameron and Froneman to attempt a redemption of this totally unsatisfactory application of section 8. They suggest, in what might be termed a clarificatory judgment, that in effect a new rule emerges from their colleagues' judgments, which 'did not exist under the common the law or in terms of any legislation'.[26] They thus to that extent found that there had been a development of the common law under section 8(3)(a).

That a clutch of Constitutional Court justices in two separate judgments, written some 25 years after the introduction of the Constitution and almost 20 years after *Khumalo v Holomisa*, were unable to apply section 8 in the manner which would show at least some fidelity to the text and an appreciation of the purpose thereof illustrates how far our jurisprudence still has to travel to reach a destination of conceptual

22 *Pridwin* (n 17) para 91.
23 *Pridwin* (n 17) para 91.
24 [2007] ZACC 5, which Nicholls AJ had discussed at *Pridwin* (n 17) paras 61, 65-67.
25 *Pridwin* (n 17) paras 61, 65-67, in which there is a passing reference to s 8. In para 91, Nicholls AJ adds that the result would be the same if public policy was invoked as it would be contrary to public policy to enforce a contract that infringes the constitutional rights of children.
26 *Pridwin* (n 17) para 216.

transformative coherence. Justices Cameron and Froneman were clearly alive to the implications of section 8(3); but it only adds to the confusion that they were required to inform the reader as to what provision Theron J and Nicholls AJ might have intended but failed to apply in their two voluminous judgments.

So, what should have occurred? In terms of section 8(3), read with section 36(1), a new common-law rule should have been developed to the effect that no child may be expelled from a school without a procedurally and substantively fair reason and that, concomitantly, the school has an obligation not to make any decision without recourse to these safeguards. This would mean that a new rule would have been crafted to apply to similar conduct of a school in a future case. That was the clear purpose of section 8(3), which the judgments of both Theron J and Nicholls AJ elided without any rigorous consideration.[27]

On the basis of the analysis set out in this contribution, a court has two options in cases like *Pridwin*: if an enumerated constitutional right is clearly applicable, then the court must, in the absence of an existing common-law rule, develop one; or, in the absence of a constitutional right that is applicable, then the court is in the realm of seeking to examine how abstract values that are sourced in the Constitution will be applied to the instant case. As already noted, the two sections of the Constitution that are at play here are, respectively, section 8 and section 39(2).

27 The academic commentary on the case has not addressed these problems successfully. In an otherwise instructive article, N Ally & D Linde '*Pridwin*: Private school contracts, the Bill of Rights, and a missed opportunity' (2021) 10 *Constitutional Court Review* 275 appear to conflate s 8 with s 39(2): 'where the process mandated in section 8 leads a court to develop the common law, section 39(2) also becomes operative' (at 291). The mistake is made in failing to distinguish between the case where a private party grounds a cause of action in an enumerated right (s 8) and the development of the common law through the prism of public policy, not on the basis of a right but by recourse to the spirit, purport and objects of the Bill of Rights (s 39(2)). And when Alistair Price refers, in his commentary on the case, to the imposition of 'novel constitutional obligations' ('Contractual fairness: Conflict resolved?' (2021) *Acta Juridica* 321 at 342) it should be emphasised that once a new rule is developed, it is no longer novel. It is part of the common law.

5 *Beadica* and the role of section 39(2)

The outcome of *Beadica 231 CC v Trustees for the time being of the Oregon Trust*[28] only adds to the confusion in the Constitutional Court's jurisprudence when applied to private parties. In the main judgment, Theron J correctly commences her analysis by setting out the problem confronting the Court as follows:

> This application concerns the proper constitutional approach to the judicial enforcement of contractual terms and, in particular, the public policy grounds upon which a court may refuse to enforce these terms.[29]

On their own, the facts of this case should have caused the Court to tread with considerable circumspection. The appellants were a series of close corporations which had entered into franchise agreements with a company, Sale's Hire, to operate the latter's franchise business for a period of ten years. The appellants operated their businesses from premises leased from the first respondent, a trust, of whom one of the trustees was also the sole member of Sale's Hire. All of the appellants had been long-term senior employees of Sale's Hire. An agreement between Sale's Hire and the National Empowerment Fund had been concluded in terms of which the latter provided the necessary finance for the appellants to acquire and operate Sale's Hire franchise businesses as part of its mandate to promote black economic empowerment initiatives. In terms of the agreement, Sale's Hire was appointed as the coordinator of these funding arrangements and was required, in terms thereof, to facilitate the financing process between the fund and the black-owned franchisees. In terms of the agreement, Sale's Hire undertook to train the appellant franchisees to operate their business and to provide them with ongoing business support and mentorship. The franchise agreements required that the franchisees operated their franchise business from an approved location – in this case, the premises owned by the trust. Simultaneously, the appellants concluded substantially identical lease agreements with the trust for the premises in which they would conduct their businesses, commencing for an initial period of five years. The lease agreement granted each of the appellants an option to renew their respective leases

28 [2020] ZACC 13.
29 *Beadica* (n 28) para 1.

for a further five years provided that the appellants gave the trust written notice of their exercising the option of renewal at least six months prior to the termination date of the initial lease.

It was common cause that the appellants had failed to give written notice of their intentions to renew the lease within the notice period as provided for in the renewal clause. Although there was correspondence between the various appellants and the trust with regard to the renewal clause, it was not disputed that the appellants' business would collapse if Sale's Hire exercised its contractual powers to terminate the franchise agreements, which decision would be triggered by the appellants being evicted from the approved premises.

Sadly, that is exactly what happened. The appellants were evicted from their business premises, which effectively meant the end of their businesses. This triggered litigation with mixed results. The appellants were successful before the High Court – where I gave the judgment[30] – but the Supreme Court of Appeal ('SCA') reversed.[31] Before the Constitutional Court, the appellants contended that the strict enforcement of the contractual terms governing the renewal of their leases was contrary to public policy. In short, the termination of the lease agreements would bring an end to their franchise agreements and the consequent collapse of their businesses, together with the failure of a black-empowered initiative which had been financed by the Fund.[32]

Beadica, like *Pridwin*, raised the development of the law of contract under the shadow of the Constitution. But the case was different to that of *Pridwin* in that it was difficult to ground a cause of action in a direct application of a constitutional right. *Beadica* thus posed a related but different challenge, in that, in this case, section 39(2) of the Constitution is the relevant provision. In turn, *Beadica* concerns the question of the extent of the Court's commitment to a constitutionally infused law of contract and thus the potential role of indirect horizontality.

30 *Beadica 231 CC v Trustees, Oregon Unit Trust* [2017] ZAWCHC 134.
31 *Trustees, Oregon Trust v Beadica 231 CC* [2019] ZASCA 29.
32 *Beadica* (n 28) para 13.

5.1 The majority judgment

After a description of the facts, Theron J engaged in a lengthy discussion of South African contract law,[33] and, in particular, the role of the *exceptio doli*, which established a defence against the exercise of bad faith by a contracting party.[34] The learned justice referred to a range of Appellate Division decisions which had reaffirmed the approach that agreements that offended public policy could be struck down by courts, subject to a caveat that the power should be exercised sparingly and only in the clearest of cases.[35]

Turning to the constitutional jurisprudence that had emerged from the Constitutional Court,[36] Theron J referred, in particular, to the judgements in *Barkhuizen v Napier*.[37] Here the majority held that public policy, as informed by the Constitution, imports 'notions of fairness, justice and reasonableness', thus ensuring the Court takes account of the need to do 'simple justice between individuals' which value was informed by the concept of ubuntu.[38] Theron J went on, in an exhibition of exquisite ambiguity, to state that the principle of *pacta sunt servanda* 'is a profoundly moral principle on which the coherence of any system relies'.[39] But what is this profoundly moral principle other than a source of a particular market economy that works certain forms of distributional consequences that can be devastating to the weaker party as was evident in *Beadica*? As Jaco Barnard-Naudé has perceptively noted, certainty as cherished by the *dicta* that informed the *Barkhuizen* approach to contract must be evaluated in terms of a level of indeterminacy that characterises a legal system, particularly one committed to legal transformation.[40] Expressed differently, it may be asked: what trumps what? Is it a case of ubuntu-informed law or the jurisprudence of JC de Wet – which still reigns supreme some 70 years after his contribution to

33 *Beadica* (n 28) paras 21-27.
34 *Beadica* (n 28) para 21 fn 31, citing R Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1990) 663-68.
35 See eg *Eerste Nationale Bank v Saayman NO* 1997 (4) SA 302 (SCA) 324.
36 *Beadica* (n 28) paras 29 ff.
37 Above n 24.
38 *Beadica* (n 28) para 35, citing *Barkhuizen* (n 24) paras 51, 73.
39 *Beadica* (n 28) para 87.
40 J Barnard-Naudé '*Bona fides* and *ubuntu*: A response to Dale Hutchison' (2021) *Acta Juridica* 85.

the law of contract emerged from Stellenbosch, based on the assumption of unfettered freedom enjoyed by competing contracting parties and which dominated the thinking of generations of judges including in recent contractual litigation?[41]

Significantly, the promise of resolving this question of the sanctity of the written contract and the context in which its terms were agreed was raised in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,[42] where Moseneke DCJ postulated the development of the law of contract on the grounds that the common law required development under the shadow of the Constitution, provided that the case before the Court had been properly pleaded. This caveat provided the Court with plenty of forensic wriggle room, in that the problem of pleadings appeared to justify the absence of even some direction which could have been set out as to the suggested trajectory of the law of contract's development.[43] Theron J refused to accept the invitation offered by Moseneke DCJ's *dictum* and preferred the approach adopted in *Brisley v Drotsky*,[44] where the SCA refused to elevate notions of good faith or fairness to substantive rules of contract law. Ostensibly the facts of *Beadica* were an insufficient basis to develop the law.[45]

I have spent some time describing the manner in which Theron J employed a contradictory strategy, perhaps best described as a form of approbating and reprobating. In her judgement, she says 'transformative adjudication requires courts to "search for substantive justice, which is to be inferred from the foundational values of the Constitution ... that is the injunction of the Constitution – transformation'.[46] But, as has occurred in the cases to which I have made reference, Theron J nods in the

41 See JC de Wet & JP Yeats *Die Suid-Afrikaanse kontraktereg en handelsreg* (1949). For a robust defence of this libertarian approach to contract, coupled with a few grudging concessions to the constitutional era, see the contribution of Justice Fritz Brand, the outstanding but traditionally orientated private law judge of the modern era: FDJ Brand 'The role of good faith, equity and fairness in South African law of contract: A further instalment' (2016) 27 *Stellenbosch Law Review* 238.

42 [2011] ZACC 30.

43 *Everfresh* (n 42) paras 71-74 (holding that the issue could not be decided because it was not properly pleaded). Yacoob J, dissenting, would have remitted the matter to the High Court for resolution.

44 [2002] ZASCA 35.

45 *Beadica* (n 28) paras 91-98.

46 *Beadica* (n 28) para 74, quoting D Moseneke 'Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309 at 316.

direction of the transformation of private law before finding a range of excuses derived primarily from a particular reading of the facts to justify why the case does not justify the development of the law of contract. The claim of the inadequacy of pleadings ensured that the generalised statements about the need to develop the common law through the prism of the Constitution were never translated into practical jurisprudence. Expressed differently, what would a transformed law of contract look like if the core assumption of the moral principle of contractual autonomy is significantly qualified by the values of dignity and equality – as must be the case if section 39(2) of the Constitution triggers legal transformation in the law of contract?

This question was squarely raised by *Beadica* but not answered. Suddenly the claim about the importance of transformative jurisprudence as a guide to the Court's jurisprudence was forgotten and instead the following was penned:

> The public policy imperative to enforce contractual obligations that have been voluntarily undertaken recognises the autonomy of the contracting parties and, in so doing, gives effect to the central constitutional values of freedom and dignity.[47]

The learned justice concluded that our constitutional scheme is predicated on what is best described as a libertarian view of the market. A more plausible, social democratic reading does not get a look-in. If that sounds too 'western' in ideological approach, then the communitarian norm of ubuntu should have stirred a moment of caution. Instead, the Court preferred a style of contract law that is more in keeping with the model initially developed by De Wet, rather than one seeking to achieving a greater measure of fairness congruent with the normative framework based upon the spirit, purport and objects of the Constitution.[48] It is regrettable that the core purpose of section 8 and, to a large extent, section 39(2) of the Constitution – both of which sections were inserted into the constitutional text to ensure that private power is interrogated through a constitutional lens, particularly when it has a public effect – has been relegated to a ritual mention and no more. Applying what,

47 *Beadica* (n 28) para 92.

48 Compare DM Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403; DM Davis 'Where is the map to guide common-law development?' (2014) 25 *Stellenbosch Law Review* 3.

at best, can only be referred to as a formalistic approach to the law of contract, Theron J concludes that there were no circumstances that prevented the appellants from complying with the terms of the renewal clause contained in the leases entered into by the respective parties.[49] In the learned Justice's view, the only inference to be drawn was that the appellants simply neglected to comply with the applicable clauses in circumstances where they could have easily met their obligations.[50] It followed that the appellants had failed to discharge the onus resting on them to demonstrate that, in the circumstances of this case, the enforcement of the clauses would be contrary to public policy.

5.2 The minority judgment

The question can then be asked: does my criticism of the majority judgment eschew the factual restrictions emphasised by Theron J? For an answer, one need look no further than the incisive minority judgment of Froneman J, concurred in by Madlanga J, which shows that there may be some transformative life left in the private-law jurisprudence of the Constitutional Court.[51] Froneman J noted that the conceptual framework which lies at the heart of the majority judgment found its essential source in the work of JC de Wet: that is, in the conceptual framework of contract law which was based on an underlying normative premise which held that the personal autonomy and individual freedom that contract law provides guarantees an ethically acceptable result.[52] It follows that the role of a court is to safeguard this normative premise, based as it is on a substantive conception of individualism, alternatively a libertarian view of the world.[53] This approach is clearly at war with the transformative vision of the Constitution which Theron J mentions but then simply disregards. Froneman J, by contrast, reveals a refreshing

49 *Beadica* (n 28) paras 93-94.
50 *Beadica* (n 28) para 95.
51 There is a similar transformative embrace in a further minority judgment of Victor AJ.
52 *Beadica* (n 28) paras 130-131.
53 L Boonzaier 'Contractual fairness at the crossroads' (2021) 11 *Constitutional Court Review* 229 at 243 captures this point as follows: 'This sudden outbreak of neoliberalism, even within a Court reputed as its enemy, is likely to have commercial practitioners salivating. But what should the rest of us make of all this?'

fidelity to these implications of the Constitution and its vision when he says:

> What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to these [constitutional] values. This approach leaves space for *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with constitutional values even where the parties consented to them.[54]

Translated into an application to the factual matrix of *Beadica*, Froneman J correctly noted that the following facts were significant: the appellants were 'unsophisticated' business people who were 'not versed in the niceties of law'; they had acquired their businesses in terms of a black economic empowerment scheme that was designed to facilitate business ventures to be run by historically disadvantaged persons.[55] It was not contested in any of the evidence placed before the Court that this lack of business experience meant that the appellants were not aware of the exigencies and implications of contract law. Froneman J described the factual position thus:

> [The appellant's] lack of sophistication is, ironically, illustrated by the content of the renewal notices. None were written by lawyers. The first was 'a formal request to propose a renewal on our already existing lease agreement with the option to purchase', expressing the hope that the proposal would receive favourable consideration and indicating that the franchisee should be contacted if further discussion was necessary. The second was also for consideration of an offer to purchase and, in the interim, for 'the draft of the renewal of [the] premises lease'.[56]

Froneman J also noted that there was a request from another appellant that a new lease agreement for the franchisee be prepared. In summary, the evidence placed before the Court showed clearly that there was a deliberate attempt on the part of the appellants to renew their leases, albeit not in the form that was contractually required. By invoking the concept of proportionality,[57] it was clear that:

> The disproportionate unfairness between their conduct and that of the first respondent is equally clear. Their prejudice in losing their businesses is obvious against that the first respondent, who loses nothing. And the inequality in

54 *Beadica* (n 28) para 175.
55 *Beadica* (n 28) paras 196-197.
56 *Beadica* (n 28) para 198.
57 Froneman J had derived this from academic writing and especially the Constitutional Court's judgment in *Botha v Rich NO* [2014] ZACC 11.

bargaining power between the applicants as franchisees and their franchisor is there for all to see.[58]

5.3 Commentary

This contribution has sought to make two core arguments: In the first place, it has been argued that the ambition of the direct horizontal model set out in subsections 8(2) and (3) of the Constitution has, in the main, not been fulfilled through the recent constitutional jurisprudence of the Court. Secondly the possibility that section 39(2) could have contributed to a meaningful transformation of private law has not taken place – certainly not in the law of contract.

What then does one make of a judgment from the majority of the Court that emphasizes meticulous compliance with the form of a contract over 'simple justice between contracting parties'[59] and grants an order which reflects a level of disproportionality, as noted in the minority judgments? The obvious unfairness of the outcome of the litigation must raise questions as to the Court's commitment to the transformation of contract law and therefore the reasons for its failure to address the distributional consequences which flow therefrom. How does an outcome which would have made JC de Wet proud square with a Constitution which seeks to develop a new normative order, one which bridges the individualism of the old legal order that stands to be transformed into a fusion with the communitarian vision of the new sourced in the idea of ubuntu? The 1996 Constitution promised the development of a normative foundation where a South African community could emerge in which each was responsible for the other, in which the society to be built would be predicated upon a level of respect, care and concern for the other. The vindication of this new normative foundation is vital to the construction of a new South African nation. The point, however, is that, as Karl Klare might have anticipated,[60] a conservative legal culture has shown far greater influence over private law than have the possibilities of section 8 and section 39(2) to legal renovation. What De Wet achieved in terms of prompting legal change from the late 1940s has regrettably

58 *Beadica* (n 28) para 202.
59 See famously *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9G-H.
60 Klare (n 3).

been mostly absent in the constitutional era, though legal renovation had been demanded by the constitutional text.

The *Beadica* judgment is not, however, without its supporters who see an overemphasis on the values of the Constitution as a threat to the dominant paradigm. Writing extra-curially, Fritz Brand considered that the majority judgment was 'distinguished by its admirable progression of reasoning and clear expression of thought'.[61] Brand's fundamental point is that the rule of law requires that the law be clear, certain, and ascertainable. It should indicate to contractual parties what is required of them so that they can regulate their conduct accordingly.

For this reason, it is argued that attempting to introduce a form of collectivism into the law of contract, in the manner suggested by Duncan Kennedy,[62] can only undermine the imperative of certainty. Let us accept that there is a need to take account of individual rights as we build a new South African community and weld this into a new model which also emphasises the nature of community. This development is manifestly at war with legal certainty, at least in the short term, as the law is brought into line with the Constitution.

The potential dichotomy between individualism and collectivism requires careful interrogation. Kennedy asserts that an individualistic approach to the law of contract, sourced in classically legal thought, was based on the 'fundamental theory' that 'there should exist an area of individual autonomy or freedom or liberty within which there is no responsibility at all for effect on others'.[63] On this basis, 'there are only two legitimate sources of liability: fault, meaning intentional or negligent interference with the property or personal rights of others, and contract'.[64] The content of contractual duties is specified by the nature of the contract, which reflects the intention of the parties in the exercise of their individual freedom.[65] What Kennedy then refers to as the scepticism against an individualistic model of contract is based on three fundamental propositions: the discrepancy between community

61 FDJ Brand 'Equity and certainty in contract law' [2021] *Acta Juridica* 141 at 164. This chapter pays particular attention to this article as Brand is far and away the most eloquent representative of this approach.
62 D Kennedy 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1685.
63 Kennedy (n 62) 1728.
64 Kennedy (n 62) 1728-1729.
65 Kennedy (n 62) 1729.

versus autonomy, regulation versus facilitation, and paternalism versus self-determination.[66] The first of these dichotomies concerns the extent to which one person should have to share or make sacrifices in the interests of another even in the absence of an express agreement or other clear manifestation of intention. The second, being regulation versus facilitation, concerns the issue of bargaining power as determinative of the distribution and the allocation of resources for different users. The question arises as to whether the stronger party has pressed to her advantage her own interest, which exercise of power is then acceptable to the public mores of the legal system. The individualist would consider that a judge ought not to appoint herself as a regulator of the use of economic power. The final division is between paternalism and self-determination. A party to an agreement in which she incurred a legal obligation now seeks to absolve herself from this obligation on the grounds that the obligation so incurred runs counter to her real interests. The beneficiary of the agreement or of the particular right so enjoyed refuses to let the obligor out of this agreement. The issue which now arises is whether this duty is enforceable. On the basis of a communal perspective, there is an obligation to consider real interests of the parties – both at the bargaining stage and at the enforcement stage.

Brand's essential riposte is that if a court seeks to tamper with the individualistic underpinnings of the law of contract and the exercise of individual autonomy as evidenced in the contractual arrangement, the result cannot be a reasonably predictable outcome and will not enable individuals to enter into contractual relationships with the belief that their bargain as they understand it will be enforced.[67] In other words, judges going beyond the intention of the parties as evidenced solely in the written agreement is a road to unacceptable uncertainty. Needless to say, Brand also protests that he accepts that abstract values of fairness and good faith and equity are 'fundamental to our law of contract' and that they 'are implemented … in the evolution of implied terms or the *naturalia* of contracts, and the interpretation of contracts'.[68] He also argues that courts over many years have sought to respond to the change in needs and values of society by incremental development without creating

66 Kennedy (n 62) 1733-1737.
67 Brand (n 61) 167-68.
68 Brand (n 61) 169.

wholesale legal and commercial uncertainty,[69] which would result from a communitarian embrace. But his is an unarticulated ideological choice. It is not inevitable that this approach is the only representation of a model for contract law. And the Constitution represented a clear break from the past. Hence the demand of the constitutionally-based legal systems could not always be met by development at tortoise-like speed. The Constitution mandated a new legal methodology as opposed to traditional common-law thinking.

Take the facts of *Beadica* as an example. The total embrace of individualism should not be allowed to pass without qualification. In *Beadica* the dispute arose in respect of unsophisticated beneficiaries of a black economic empowerment scheme who most certainly do not regard the work of JC de Wet as their bedtime reading. Clearly, they had the intention to renew their leases and most certainly could never have legitimately expected that their entire business would be destroyed by a formalistic application of an express term contained in the lease. One has to ask rhetorically the following question: what country is one living in when a result such as this is legally sanctioned? In a country of egregious inequality, with a legacy of more than 300 years of racist rule which continues to haunt our country to this day, how is it possible not to consider that our law of contract infused, as it should be by constitutional values, cannot, at least, seek to vindicate these so-called abstract constitutional values in practice as opposed to a tepid form of academic declamation?

Somewhat surprisingly, Judge Brand ends his article with reference to the Canadian Supreme Court case of *Uber Technologies Inc v Heller*.[70] Brand embraces the majority judgment in this case and suggests that his vision 'as to the way forward' is similar to that adopted by the majority judgment.[71] Given his criticism of the minority judgment by Froneman J in *Beadica*, this concession appears to be a jurisprudential own goal. Consider what Abella and Rowe JJ said when they agreed that the particular arbitration agreement, sought to be invoked by Uber against an Uber driver, was unconscionable:

69 Brand (n 61) 170, quoting FDJ Brand 'The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution' (2009) 126 *South African Law Journal* 77 at 87.
70 2020 SCC 16.
71 Brand (n 61) 171.

> Unconscionability is an equitable doctrine that is used to set aside 'unfair agreements [that] resulted from an inequality of bargaining power' ... [It] is widely accepted in Canadian contract law, but some question remains about the contents of a doctrine ... [T]he classic paradigm underlying freedom of contract is the 'freely negotiated bargain or exchange' between 'autonomous and self-interested parties'. At the heart of this theory is the belief that contracting parties are best-placed to judge and protect their interests in the bargaining process. It also presumes equality between the contracting parties and that 'the contract is *negotiated*, *freely agreed*, and therefore *fair*'. ... Courts have never been required to take the ideal assumptions of contract theory as 'infallible empirical proposition[s]'. Equitable doctrines have long allowed our judges 'to respond to the individual requirements of particular circumstances ... humanizing and contextualizing the law's otherwise antiseptic nature'. Courts, as a result, do not ignore serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests ... In these kinds of circumstances, where the traditional assumptions underlying contract enforcement lose their justificatory authority, the doctrine of unconscionability provides relief from improvident contracts. When unfair bargains cannot be linked to fair bargaining – when they cannot be attributed to one party's 'donative intent or assumed risk' ... courts can avoid the equitable effects of enforcement without endangering the core values on which freedom of contract is based. ... This Court has often described the purpose of unconscionability as the protection of vulnerable persons in transactions with others. We agree. Unconscionability, in our view, is meant to protect those who are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain that was made.[72]

That the Canadian Supreme Court was divided, with two minority judgments delivered by Brown and Cote JJ, does not detract from the fact that the majority of the Court applied a doctrine of unconscionability as indicated. How much more so is such a doctrine appropriate given the normative framework of the South African Constitution, with its core values of freedom, equality and dignity, as well as the consistent references to ubuntu by the Constitutional Court? By contrast, Brand writes:

> [W]hat we may learn from the judgment of the majority in *Uber* is that the introduction and application of the doctrine of public policy, outside the ambit of pertinently guaranteed constitutional rights, requires the formulation of parameters and guidelines with regard to the factors and considerations that should weigh with the courts in determining whether the unfairness and equity

72 *Uber* (n 70) paras 54-60 (citations omitted; emphases in original).

> resulting from the implementation of a contract term in the particular case can be said to have reached the high level of offending public policy.[73]

It would however be wise to examine precisely what the purpose of section 8 of the Constitution is in its attempt to render constitutional values congruent with the common law. This is precisely what the minority judgment in *Beadica* by Froneman J sought to achieve.

6 Conclusion

The defence of the jurisprudence of the *Beadica* majority notwithstanding, it is submitted that the two judgments analysed reveal that the Court is jurisprudentially light years away from grasping this core challenge of ensuring that the excesses of private power, so central to the production and resilience of apartheid South Africa, are rendered accountable to constitutional values. To be sure, contractual autonomy is sourced in the constitutional right of freedom.[74] But the normative framework of the Constitution read holistically also promotes fairness and the scrutiny of private power. Hence courts are required to engage in a balancing exercise, and an engagement with proportionality of outcome, as the majority in the *Uber* judgement sought to achieve. This may pose a challenge to adjudication, but that is surely not unique to the law of contract.

In summary, the Court in *Pridwin* failed to grasp the interpretative challenge posed by section 8 and thereby passed up the opportunity of providing clear guidance to the courts of the country in the bridging of the gap between existing common law and the *Grundnorm*, being the Constitution. In *Beadica*, the failure to grasp the core implication of section 39(2) has resulted in eschewing the interests of those whom the Constitution promised would be treated with equal concern and respect. By contrast, the majority judgments, at worst, continued to dabble in a formalistic jurisprudence dressed up to sound progressive by way of recourse to a veritable range of analytical references, philosophical texts and comparative law, which the judgement then failed lamentably to integrate into the foundational reasoning which underpinned the outcome. At best, this judgement followed a number of earlier

73 Brand (n 61) 175.
74 *Brisley* (n 44) para 94 (Cameron J); *Barkhuizen* (n 24) para 57.

judgements, in particular *Barkhuizen*,[75] where the highwater mark was the reference to the Constitution, before a legal scurry is made towards a narrow reading of the facts.

Recently Justice Cameron has written of some work undertaken by legal academics which offers

> [t]he possibility of a détente: a bold conception of good faith need not be the 'monster' the SCA once perceived, but it must be 'domesticated' through processes more careful and lawyerly than those the Constitutional Court has applied. But that has not yet been realised in practice. In the Constitutional Court's approach the SCA perceives no legal rules or doctrines, only a loose discretion whose exercise threatens to be adventitious. The disconnect is neither doctrinally nor functionally satisfactory, and academics have rightly expressed dissatisfaction with the polarization, which has become more severe.[76]

There is much wisdom in this attempt at reconciliation. It is however the central argument of this essay that it is not only the SCA which has turned its face on a viable attempt to develop a body of contract law which is congruent with the normative framework of the Constitution. It awaits a sustained exposition by the Constitutional Court, fashioned on the basis of applying the Constitution in the best possible light. Regrettably, the Constitutional Court has failed to develop 'legal rules or doctrines' which might provide guidance to the courts across the country and which would herald a significant change to the foundations of the law of contract developed so many years ago by De Wet. True, as

75 Above n 24. See, for the kind of academic contribution in which the Constitution disappears from sight to be replaced with a vague and unsubstantiated idea of free-floating fairness, D Hutchison 'From *bona fides* to *ubuntu*: The quest for fairness in the South African law of contract' [2019] *Acta Juridica* 99, particularly at 124: 'A more satisfactory approach, I venture to suggest, would be to insist on an objective standard of fair dealing or good faith behaviour in the implementation of contracts. Enforcement of a contract term would then depend not on a particular judge's perception of whether the conduct of the plaintiff was improper, but on whether the conduct would be regarded as commercially unacceptable by reasonable and honest people in the particular context.' What is the foundation for this test, save for what a judge considers to be the unacceptable result? Not only does this argument need a good dose of theory of adjudication – even R Dworkin *Law's empire* (1986) would have provided clarity – but it also raises the question: how is this a preferable test to one grounded on an articulated normative foundation sourced in the Constitution?

76 E Cameron & L Boonzaier 'Venturing beyond formalism: The Constitutional Court of South Africa's equality jurisprudence' (2020) 92 *Rabel Journal of Comparative and International Private Law* 786 at 830, quoted in *Beadica* (n 28) para 179 (Froneman J).

I have noted, De Wet is merely a ghostly presence, and there are many references to the imperative for transformation, the importance of the values of the Constitution and the need to infuse them into the common law. However, the old paradigm remains resilient. These recent cases do not provide cause for optimism. *Beadica* proved to be an abysmal failure when viewed against the need to craft distributively just consequences for those who remain economically disadvantaged.[77] Similarly, two of the judgements delivered in the *Pridwin* case misunderstood or elided over the very purpose of section 8. We must therefore wait for the integration of the Constitution and the common law of contract to which Judge Cameron referred. We also wait for a coherent application of section 8 of the Constitution. Underlying this challenge is a need for the Constitutional Court to articulate a clear normative vision of the Constitution which renders all power with public implications accountable and promotes the idea of a South African community in which individual rights are respected but where the concept of a South African community is not destroyed. Regrettably too little of the hard work has been done in the past 25 years.

77 In his article, Brand references my own prior criticism that our contract-law jurisprudence lacks an appreciation of realist insights: Brand (n 61) 146, quoting D Davis 'Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution' (2011) 22 *Stellenbosch Law Review* 845 at 850. Needless to say, no attempt is made to engage with the implications of realism in respect of the distributional consequences of legal rules in general and contractual rules in particular. See eg Robert Hale's important statement: 'The market value of a property or of a service is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others.' See his 'Bargaining, duress, and economic liberty' (1943) 43 *Columbia Law Review* 603 at 625.