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*Unequal bargaining power in the law of contract: An analysis of its common law treatment by the courts and of the devices that can be used to develop inequality as a defence to challenge the validity of a contract.*

This mini-dissertation is submitted in partial fulfilment of the regulations for the L.L.M degree at the University of Kwa-Zulu Natal.

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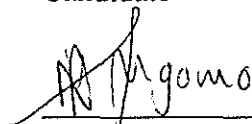
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## Chapter 1

### INTRODUCTION

Inequality of bargaining power in South African contract law is not a specific ground that can be used to challenge the validity and enforceability of contracts. This is evident from recent case law which emphasises that inequality of bargaining power may be a factor used in the determination of whether a contract is invalid or unenforceable on the basis of public policy.<sup>1</sup> This seems to be the only role for inequality in our law of contract.

This paper examines whether inequality of bargaining power between contracting parties should be a ground that can be used to challenge the validity of contracts. It considers the devices of contract law that can be used to support this development, by examining the role of inequality within the context of economic duress at the formation of a contract, the potential effects of ubuntu, the Consumer Protection Act and of the Competition Act. In doing this, the paper examines aspects of South African law which have not been addressed in contract law in great detail by courts to date, and which may collectively provide a mechanism to challenge the validity and enforceability of a contract entered into in situations of unequal bargaining power.

Before one delves into a discussion on inequality of bargaining power, one needs to first consider the basic concept of a contract in terms of our law. Contracts require certain ingredients for enforceability between parties.<sup>2</sup> The parties must meet all the requirements and intend that legal consequences will flow for the contract to be formed.<sup>3</sup> As a general rule, it is assumed that when parties meet and bargain about contracts and the terms that govern them, they do so on an equal footing.<sup>4</sup> Bargaining power is a feature in the formation of a contract and refers to the abilities of the parties to bargain in such a way that the contract will favour each party's interests.

Abuse of unequal bargaining power refers to a situation where a party to the bargain in a stronger position (e.g. financially, or for some other reason) uses his or her power in an

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<sup>1</sup>*Afrox Healthcare BPK v Strydom* 2002 (6) SA 21 (SCA).

<sup>2</sup>According to Du Plessis, J 'The law of Contract in South Africa: Private law' Oxford University Press (2009). These requirements are consensus, capacity, formalities, possibility, and certainty.

<sup>3</sup>Poole J 'Textbook on Contract Law' 9<sup>th</sup> Ed (2008) Oxford University Press.

<sup>4</sup>*Lloyd's Bank v Bundy* 1975 QB 326.

unscrupulous manner to obtain a 'better deal' over the other party to the bargain.<sup>5</sup> This may often translate into a situation where a corporate Goliath manages to further its own interests to the detriment of a helpless consumer.<sup>6</sup>

The courts have touched on inequality in several judgements and are of the view that inequality of bargaining power will be a factor in determining whether a contract is invalid and unenforceable for being against public policy.<sup>7</sup> The courts feel that discrepancies in the bargaining powers of parties will not necessarily lead to situations where contracts favouring the stronger party should be pronounced invalid for being contrary to public policy.<sup>8</sup> In the three *Breedenkamp* judgments,<sup>9</sup> the issue of inequality arose for consideration. Jajbhay J, in the interim relief judgement, stated that common law should be developed in such a manner as to prevent large entities from taking advantage of their superior bargaining power over their customers in situations which may lead to unfairness.<sup>10</sup> Lamont J, in the final relief judgement, differed in respect of the position of the customer in the bargain, and held that the facts did not indicate an actual position of inequality between the parties.<sup>11</sup> Harms JA in the Supreme Court of Appeals shared the same sentiments as Lamont J and held that the enforcement of a contract entered into between parties of unequal bargaining power must implicate an identifiable constitutional value in order for it to be open to a challenge on the basis of unfairness.<sup>12</sup> From the above it appears that mere inequality is not grounds to challenge contractual validity, unless it implicates on the constitutional values of the parties.

The current role of unequal bargaining power is determined in terms of case law. According to *Afrox* it is a factor in considering whether a contract or its enforcement offends against public policy.<sup>13</sup> The question, however, is when does it offend against public policy? Another issue to consider is that inequality may implicate fairness, and this will call for a consideration of the significance of the fact that our contract law currently does not recognise a specific substantive equity defence.

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<sup>5</sup>Barnhizer, DD 'Bargaining Power in Contract theory' (2005) *Bepress Legal Series* 814.

<sup>6</sup> Ibid.

<sup>7</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at par. 8.

<sup>8</sup> Ibid para 12.

<sup>9</sup> 2009 ( 5) SA (GSJ). 2009 (6) SA 277 (GSJ). 2010 (4) SA 468 (SCA).

<sup>10</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2009 (5) SA 304 (GSJ) at 68.

<sup>11</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2009 (6) SA 277 (GSJ) at 26. The court pronounced on this after looking at several factors in para 25 of the judgment pertaining to the strength of the customers position when contracting.

<sup>12</sup> *Breedenkamp and another v Standard Bank of South Africa* 2010 (4) SA 468 (SCA) at p487.

<sup>13</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

Academics, including Bhana and Pieterse,<sup>14</sup> advance several arguments in favour of developing this ground by pointing to the practical realities of non-recognition of inequality as a basis for voiding a contract. They feel consensus is often present in form and not in substance.<sup>15</sup> They advance that the realities of unequal bargaining power undermine freedom and can lead to situations of economic coercion since current contractual rules are not equipped to deal with such disparities in bargaining positions.<sup>16</sup> They argue that sanctity of contract is applied in a manner that may result in abuse of power by the stronger party, endorsement of social inequality, and the impairment of dignity and freedom.<sup>17</sup> They advocate that the question to be asked, which the SCA failed to do in the *Brisley*<sup>18</sup> and *Afrox* cases, is when inequality becomes legally relevant in a contract.<sup>19</sup> They also feel that rules of incorporation of contract terms can be developed to take cognisance of inequality of bargaining powers as well as using the concept of legality as a portal of entry for considerations of unequal bargaining power.<sup>20</sup>

There are differing views on the role that inequality currently plays in our contract law (the first being those set out in *Afrox* and the suggestions made by Bhana and Pieterse), and the second being the potential role it should play in our law of contract. This paper proposes the development of a concise ground of inequality at the formation and subsistence of contracts, touching on the role of inequality within the context of economic duress, ubuntu, the Consumer Protection Act, and the Competition Act, discussed below. Before launching into the substance of the analysis, I will just include a few brief words about the doctrine of duress, which is currently poised on the brink of development in our law of contract.

Duress is described as the wrongful and unlawful compulsion (such as threats of physical violence) that induces a person to act against his or her will.<sup>21</sup> In the context of contract law this happens when a person is coerced by the wrongful conduct of another to enter into a contract under conditions that deprive the former of his or her free will.<sup>22</sup> Because of this the contract concluded would be voidable on the grounds of improperly obtained consensus. In

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<sup>14</sup> Bhana D & Pieterse M : 'Towards a reconciliation of contract law and constitutional values: *Brisley and Afox revisited*' (2005) 122 *SALJ* 865.

<sup>15</sup> Ibid 884.

<sup>16</sup> Bhana & Pieterse at par. 885.

<sup>17</sup> Bhana & Pieterse at par.886.

<sup>18</sup> *Brisley v Dotsky* 2002 (4) SA 1 (SCA).

<sup>19</sup> Bhana & Pieterse at par. 887.

<sup>20</sup> Ibid 888.

<sup>21</sup> <http://research.lawyers.com/glossary/duress/html>. Accessed 23 July 2012.

<sup>22</sup> Du Plessis J 'The law of Contract in South Africa: Private Law' Oxford University Press 2009.

*Medscheme Holdings v Bhamjee*<sup>23</sup> the concept of economic duress was touched on by the court where it was said that the use of economic pressure could be actionable in South African law as unlawful duress, but that such cases would be rare and exceptional.<sup>24</sup> The court therefore confirmed the recognition of economic duress in our current law although it did not find the matter before it to amount to an economic duress matter. The court considered the matter as constituting hard bargaining between the parties and declared that something more was required for economic bargaining to be illegitimate or unconscionable and therefore to constitute actionable economic duress.<sup>25</sup> The more recent case of *P Gerolomou Construction (Pty) Ltd v Van Wyk*,<sup>26</sup> appeared to be a case of economic duress but was pleaded as a case of undue influence.<sup>27</sup> Here it was held that to use a threat of breaching contract to induce an economically weaker party to act to its own disadvantage regarding an accrued contractual right may be subversive of freedom and human dignity.<sup>28</sup>

A number of academics have called for the enforcement of the recognition of a doctrine of economic duress in South African law, in order for it to conform to American and European jurisprudence in this regard. Glover advocates for the adoption of a two-pronged economic duress test as applied in other jurisdictions to establish when actionable economic duress is present in a given case.<sup>29</sup> Despite such calls, our courts have not been faced with a case of economic duress post *Medscheme Holdings* (with the possible exception of the *Gerolomou* case), and as such our law has not pronounced on it or set out the test to be used to prove such duress. I will, however, return to this issue later in the paper in the context of the analysis of inequality of bargaining power.

Chapter two of the paper will consider the meaning of inequality of bargaining power. It examines the current South African position of the laws treatment of inequality at contracting, what the practical realities of such a position are, and whether it can be recognised as a ground by which contracts, contractual terms and provisions may be challenged for being against public policy in terms of validity and enforceability purposes. The English position is largely similar to our South African law, so I will examine the American position and attempt to highlight approaches that can be adopted into our law.

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<sup>23</sup> *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA).

<sup>24</sup> Ibid 18.

<sup>25</sup> *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* at par. 18.

<sup>26</sup> *P Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500.

<sup>27</sup> Ibid at par. 24.

<sup>28</sup> *Gerolomou Construction (Pty Ltd) v Van Wyk* at par. 24.

<sup>29</sup> Glover 'The test for duress in the South African law of contract' 2006 (123) *SALJ* 98-125.



Chapter three begins with a discussion of the devices that can be used to support developing or strengthening inequality as a defence for public policy challenges of contracts. In Chapter 3.1 I will discuss the doctrine of economic duress. In dealing with economic duress I draw from American and English authority on what the current test for it is. This portion considers the role that a doctrine of economic duress can play in addressing inequality and how this can be done since the two concepts appear unrelated and deal with different aspects of the contracting process.

The next part of the paper, chapter 3.2 contains a discussion of the potential role that the constitutional value of ubuntu may play in developing inequality as a defence to challenge contracts, contractual terms and provisions for being against public policy. Ubuntu of course, has been described as an important constitutional value, although not expressly enshrined in our Constitution, so its effect will be of importance in considering the potential role of inequality in the contractual context. I debate whether ubuntu really is a constitutional value, and the reasons why ubuntu may be especially important in dealing with inequality, in light of the content ascribed to this principle by courts and other commentators.

In part 3.3, I discuss the impact of the Consumer Protection Act on inequality. I examine whether the CPA recognises situations of unequal bargaining power, and determine what protection is given to consumers. This part briefly examines the role that the Act will potentially play in informing the courts approaches to private contractual relationships. For the purposes of my paper the discussion will be limited to Section 40 of the Act.

The last device that I look at is the Competition Act. Chapter 3.4 examines how it impacts on situations of unequal bargaining power where there is a dominant party in the market who abuses its dominance to gain an advantage in the market and whether anything can be adopted from there to further develop unequal bargaining power.

The final part, Chapter four consists of my conclusions and recommendations. It summarises the current South African position regarding the role of inequality, and considers whether the development of our legal system requires and favours the recognition of a defence of inequality of bargaining power for challenging the validity of a contract in terms of public policy. It also looks at how the devices of ubuntu, economic duress, the Consumer Protection Act, and the Competition Act will impact and promote on such development, if deemed necessary.

## Chapter 2

### UNEQUAL BARGAINING POWER

#### *The meaning and relevance of inequality of bargaining power at contracting*

Bargaining power is “the exercise of power used in the specialised relationship of a bargain.”<sup>30</sup> A party has bargaining power when they can intelligently affect a preferred outcome in a bargaining relationship.<sup>31</sup> Inequality of bargaining power refers to a situation under which parties to a contract may not be equal in their power to dictate the terms and conditions under the contract. In terms of the law, it is not manifestly unfair for a stronger party to use the advantage it has in bargaining power.<sup>32</sup> The inequality defence was first raised in the English case of *Lloyd's Bank v Bundy* where Lord Denning held that there are ‘situations where courts will set aside a contract where the parties have not met on equal terms and where one party is *so strong* that as a matter of common sense it is not right that one should be able to push the weaker party to the wall.’<sup>33</sup> This view appears to be in line with the South African position that requires courts to intervene in instances of excessive unfairness from unequal bargaining power.<sup>34</sup>

From the above, the position is that a party must be so strong that common sense requires intervention, and for purposes of intervention the inequality must result in abuse by the stronger party. With this in mind and the fact that our contract law is informed by Roman/Roman-Dutch and English law, inequality of bargaining power is not a distinct defence that can be used to challenge contracts, contract terms, or provisions. The reason for this is that in terms of English law it is difficult to define inequality, and because it doesn't have clearly defined limits it poses a risk to freedom of contract, which forms a basis for contract law.<sup>35</sup>

Freedom of contract requires that people should be able to contract with whomever they wish. The above submission tends to imply that inequality in itself cannot be used as a defence to vitiate contracts that have been freely entered into, as doing so would undermine

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<sup>30</sup> Barnhizer DD ‘Bargaining Power in Contract Theory’ (2005) *Bepress Legal Series* 814 p9.

<sup>31</sup> Ibid at p. 9.

<sup>32</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

<sup>33</sup> Lord Denning in *Lloyd's Bank v Bundy* 1975 QB 326 at p. 299, J Beatson ‘*Anson's Law of Contract*’ 29<sup>th</sup> ed Oxford University Press 2010 p299.

<sup>34</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

<sup>35</sup> Thal ‘The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness’ (1988) 8 *OJLS* 17.

their basis. The inequality defence has been rejected by English judges who feel that it is not necessary for the achievement of justice, helpful in the development of law or to invoke such a rule of public policy.<sup>36</sup> This view is correct however it is necessary to consider how the issue of inequality of bargaining power as a factor to public policy challenges has been treated in recent South African case law before the Supreme Court of Appeal and the Constitutional Court.

### *Inequality before the courts in South Africa:*

The position of unequal bargaining power as a defence to challenge contract validity in the South African context came before the Supreme Court of Appeal in *Brisley v Drotosky*.<sup>37</sup> The majority of the SCA held that contractual non-variation clauses are freely negotiated between the parties and they protect the interests of both weaker and stronger parties under the contract.<sup>38</sup> The court held that there were no unequal bargaining power discrepancies between the parties in regard to the non-variation clause.<sup>39</sup> Olivier J, in a separate concurring judgment, held that 'it is inherent to societal notions of contractual justice that courts should be more proactive in protecting contracting parties in comparatively weak bargaining positions.'<sup>40</sup> Cameron J agreed with the majority regarding inequality, saying that the Shifren principle aided 'weak' as well as 'strong' parties and there was therefore no evidence of issues of unequal bargaining power.<sup>41</sup>

Our law's treatment of claims of inequality was further examined in *Afrox Healthcare v Strydom*,<sup>42</sup> wherein the court affirmed that contracts, contract terms, or provisions which are contrary to public policy are unenforceable.<sup>43</sup> With regard to the exemption clause before it, the court stressed that it is incorrect to find it against public policy on the basis of the differences in bargaining power between the parties.<sup>44</sup> Regarding the bargaining powers of

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<sup>36</sup> *Pao on v Lau Yin Long* 1980 AC 614 at 634.

<sup>37</sup> *Brisley v Drotosky* 2002 (4) SA 1 (SCA); which dealt with a non-variation clause in a contract of lease which provided that any amendment of the contract would have to be reduced to writing and signed by the parties for it to be valid. The lessor then attempted to invoke the cancellation clause and cancel the contract based on the lessee's persistent breach of the contract by not paying the rental at the stipulated date.

<sup>38</sup> Bhana D & Pieterse M 'Towards a reconciliation of contract law and constitutional values: *Brisley and Afrox revisited*' (2005) 122 *SALJ* 865 at p. 872.

<sup>39</sup> *Brisley* at par. 7.

<sup>40</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at par. 8.

<sup>41</sup> *Brisley* at par. 94-5.

<sup>42</sup> *Afrox* In this case Strydom raised inequality after suffering operative harm after the negligence of a nurse of Afrox. In trying to institute action against Afrox, Afrox relied on the exemption clause in the admission documents to exclude their liability.

<sup>43</sup> *Afrox* at par. 7.

<sup>44</sup> *Afrox* at par. 11-14; 24.

the parties, the court stressed that it could not be said that mere inequality in bargaining power would lead to a finding that every contract which favours the stronger party is invalid, because it is contrary to public policy, nor was there sufficient evidence to show that Strydom was in a weaker bargaining position.<sup>45</sup> The court reasoned however that inequality would be a factor in considering if a contract offends against public policy.

In light of these views on the potential role of inequality, the question then becomes when does a contract offend against public policy? In *Sasfin (Pty) Ltd v Beukes*<sup>46</sup> Smalberger J explained that 'an agreement will be against public policy if it is contrary to the interests of the community.' He held that,

[t]he interests of the community or the public are of paramount importance in relation to the concept of public policy. Agreements 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.<sup>47</sup>

In *Baart v Malan*<sup>48</sup> it was held that an agreement will be contrary to public policy if it is 'unconscionable and incompatible with the public interest'.<sup>49</sup> In *Botha v Finanscredit*<sup>50</sup> the court said 'public policy favours the utmost freedom of contract and takes into account the need to do simple justice between man and man.' The court went on to say 'the power to declare a contract contrary to public policy should be exercised sparingly and only where impropriety and a level of public harm are evident.'<sup>51</sup> In *Brisley* Harms JA stated that public policy is now rooted in the Constitution and the fundamental values that enshrine it.<sup>52</sup> He held that contractual clauses that are offensive will be struck down not because public policy requires it but because our Constitution (and the values it enshrines, including public policy) requires it.<sup>53</sup> In *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*<sup>54</sup> the court looked at the tendency of the contract holding that a contract will be

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<sup>45</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at par.12.

<sup>46</sup> 1989 (1) SA (1) (A). This case dealt with the validity of a deed of suretyship operating unfairly against Beukes.

<sup>47</sup> *Ibid* 8.

<sup>48</sup> *Baart v Malan* 1990 (2) SA 862 (E). Where a woman undertook to pay her entire income as maintenance for her 4 minor children to her ex-husband upon him attaining custody at the dissolution of marriage.

<sup>49</sup> *Ibid* 869.

<sup>50</sup> *Botha (now Griessel) and another v Finanscredit (PTY) LTD* 1989 3 (SA) 773 (A); case dealt with sureties who bound themselves as such so as to obtain credit facilities for a Company.

<sup>51</sup> *Ibid* 783.

<sup>52</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at par. 3; this view was confirmed by Ngcobo J in *Barkhuizen v Napier* 2007 (5) 323 (CC) at par. 28.

<sup>53</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>54</sup> 2004 (5) SA 248 (SCA).

against public policy if its implementation results in unconscionable, immoral, or illegal conduct.<sup>55</sup>

From the above it can therefore be accepted that public policy is now rooted in the Constitution.<sup>56</sup> It refers to the interests of the community, public interest, and doing simple justice between man and man. Conduct that falls foul because of unconscionability or impropriety will not be in keeping with the Constitution (public policy).

In *Barkhuizen v Napier*<sup>57</sup> the court held that a time bar clause in an insurance contract was not manifestly unreasonable nor was it manifestly unfair.<sup>58</sup> In applying *Afrox*, the court looked at the subjective factors of both parties holding that the relative situations of the contracting parties is a relevant consideration in making a determination on whether a contractual term offends public policy.<sup>59</sup> The court found there to be no unequal bargaining power as Barkhuizen was a sufficiently affluent South African who drove a BMW, as warranting a determination of him being of equal bargaining strength with his insurer.<sup>60</sup> Court further held that it is important to endorse the relevant situations of the parties to the contract especially in our unequal society.<sup>61</sup>

A court held *pacta sunt servanda* raises the question of whether an agreement between parties is a real one, essentially whether consensus has been truly reached. This is determined by looking at the power imbalances between the parties and questioning whether true consensus could be reached.<sup>62</sup> However the facts of the case did not require the court to employ its mind to this.<sup>63</sup> The court looked at the evidence before it, holding that there lacked evidence to support a contention that the contract was not freely concluded, nor that there was unequal bargaining power between the parties, nor that the time bar clause had not been drawn to

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<sup>55</sup> Ibid 258.

<sup>56</sup> *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* at par.258.

<sup>57</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) where the court had to decide on the constitutionality of a time bar clause that limited the Insured's right to seek judicial redress.

<sup>58</sup> *Barkhuizen* at par. 63.

<sup>59</sup> *Barkhuizen* at par.59

<sup>60</sup> *Napier v Barkhuizen* 2006 (4) SA 1 (SCA)

<sup>61</sup> Ibid.

<sup>62</sup> *Barkhuizen* at par 87.

<sup>63</sup> *Barkhuizen* at par 88.

Barkhuizen's attention.<sup>64</sup> The court found indications to the contrary and therefore found against Barkhuizen.<sup>65</sup>

Sachs J who gave minority judgement held that 'parties to a contract must have mutual respect in which the unreasonable and one-sided promotion of one's own interests 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.'<sup>66</sup> Although good faith is not expressly recognised as a constitutional value or principle, public policy is informed by good faith and fairness.<sup>67</sup>

In *Breedenkamp and Others v Standard Bank*<sup>68</sup> Jajbhay J found the contract permitted Standard Bank to unilaterally amend its terms and conditions in exercising its discretion; he found that these powers can be exercised in an oppressive manner if the bank terminates without good cause.<sup>69</sup> Jajbhay further held that a clause that gives a powerful bank (essentially in a stronger bargaining position) the right to simply close an account while destroying a party's prospects of participating in the modern commercial world without giving good reason or a hearing, is unjust and oppressive.<sup>70</sup> For that reason the common law must be developed in a manner that will prevent a large entity like Standard Bank from behaving as it has.<sup>71</sup>

In the application for final relief before Lamont J, Lamont stated the question was whether the parties bargained equally, freely, and voluntarily.<sup>72</sup> It was argued that prior to concluding the contract; the bank's bargaining power was such that it was able to impose terms on the appellant.<sup>73</sup> He held that although the contract was contained in standard form contract and although it might have seemed that the parties were unequal in their bargain, in looking at the subjective factors of the appellant, the court found the appellant to be "a desirable entity to have as a customer, being an international commodities trader reputedly of great wealth and

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<sup>64</sup> *Barkhuizen* at par.66.

<sup>65</sup> Such being that the insurance contract required him to submit a claim within 30 days of the accident, he did so within 8 days. On this basis the court couldn't find in his favour, he submitted no reason why he was prevented in that 2 year period from instituting his claim.

<sup>66</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>67</sup> *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at par. 12-22.

<sup>68</sup> 2009 (5) SA 304 (GSJ); 2009 (6) SA 277 (GSJ); 2010 (4) SA 468 (SCA). Standard Bank took a decision to unilaterally close the appellant's bank accounts after it had word of the appellant's name being listed on the Specially Designated Nationals list. This listing occurred as a result of him being a financial backer of Robert Mugabe, being involved in tobacco smuggling amongst others.

<sup>69</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2009 (5) SA 304 (GSJ) at p. 318.

<sup>70</sup> *Ibid* at p. 319.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2009 (6) SA 277 (GSJ) at p. 285.

<sup>73</sup> *Ibid* at p.286.

unlikely to be susceptible to being forced into concluding a contract with Standard Bank.”<sup>74</sup> The judge held the applicant could choose to bank with whom he wanted and on the terms that he wished, and that an oligopoly of banks in South Africa had no bearing on the matter as nothing indicated that Standard Bank was the only bank Breedenkamp could have contracted with.<sup>75</sup> Lamont J used these subjective factors as was the case in *Barkhuizen* in finding the applicant not in a bargaining disadvantage. Both parties concluded their contract on an equal footing, and were able to implement their knowledge freely.<sup>76</sup>

On appeal to the SCA, Harms JA agreed with Lamont finding the appellants’ subjective characteristics (of being “a commodities trader reputed to be of good wealth, not easily swayed into contracting a particular way) which entitled them to banking facilities to be a commercial consideration in determining the bargaining strength of the parties.” He failed to see how someone can insist on opening a bank account with a particular bank, or where there is an existing account, insist that the banker/customer relationship continued against the will of either one of the parties.<sup>77</sup> Harms JA contended that the impact of the decision to close the accounts of the appellants was not because of the bank closing the accounts but rather a result of the appellants’ names appearing on the OFAC list.<sup>78</sup> He found the impact of the decision to close the accounts was not the result of an abuse of private power approximating public power, or of a stronger bargaining position by the bank.<sup>79</sup>

The *Breedenkamp* judgements brought the issue of fairness into play, with its continuous repetition in the judgements. This principle is not expressly provided for in our Constitution or in our general law of contract.<sup>80</sup> However, inequality may implicate fairness, and a party using their stronger position to obtain an advantage against a weaker party may be subversive of fairness. In *Barkhuizen* the court said several times that fairness would be a requirement for finding a contract or its provisions to be in line with public policy.<sup>81</sup> The court went as far

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<sup>74</sup> Ibid.

<sup>75</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2009 (5) SA 304 (GSJ) at p.287.

<sup>76</sup> Ibidat p. 286-287.

<sup>77</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2010 (4) SA 468 (SCA) at p.485.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid at p. 484-485.

<sup>80</sup> *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM). This case dealt with the validity of the Shifren principle in a non-variation clause. At p278 the court held ‘Like the concept of good faith (bona fide), fairness may be regarded as an ethical value ‘that underlies and informs the substantive law of contract’, but it is not an independent constitutional or contractual principle in terms of which contracting parties may escape their obligations.’

<sup>81</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at p. 344.

as to employ a two stage test to determine when a contract would be unfair.<sup>82</sup> The majority held that the first stage involved a determination of whether the clause ( in *Barkhuizen* this was the limitation in seeking judicial redress, in this case the clause was that of Standard Bank to unilaterally close the accounts ) is unreasonable. If it is, then it should be determined whether it should be enforced in light of the circumstances preventing non-compliance.<sup>83</sup> There were frequent references to fairness in *Barkhuizen*, which appears to suggest that fairness is a factor in determining whether a contract offends against public policy. Unfortunately, if this was the intention of the Constitutional Court it should have expressly provided so and there would have been no need for us to draw inferences on the subject.

Jajbhay J in *Breedenkamp* stated that ‘a party to a contract can’t impose a term on another party, if it would be applied or enforced in an unfair manner.’<sup>84</sup> Before Harms JA the approach of Jajbhay J was rejected, and it was held that ‘there is no such thing as an overarching principle in contract law of fairness which allows a contract to be challenged on the notion of its fairness.’ Harms JA concluded that ‘fairness is a slippery concept, not a freestanding concept for the exercise of a contractual right.’<sup>85</sup>

Likewise in *Nyandeni Municipality*<sup>86</sup>, Alkema J stated that a contract would not offend against public policy just because it operates in an unfair manner, furthermore fairness can be seen as an ethical value that underlies substantive contract law but is not an independent constitutional principle that can be used by parties to escape their obligations.<sup>87</sup>

In light of the above authority, it can be accepted that fairness is not a freestanding factor to take into consideration for the validity of contracts.<sup>88</sup> In *Sasfin* it was held that it is not unfair contracts that are unenforceable for being contrary to public policy, but ones that are *so* unfair that they are unconscionable, inimical to the interests of the community, contrary to law or morality, and run counter to social and economic expedience.<sup>89</sup> In *Brisley* the court reasoned that what is needed is extraordinary unfairness.<sup>90</sup>

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<sup>82</sup> *Barkhuizen* at p. 341.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2009 (5) SA 304 (GSJ) at p. 315.

<sup>85</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2010 (4) SA 468 (SCA) at p.484.

<sup>86</sup> *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM).

<sup>87</sup> *Ibid* at p. 278.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at par. 8.

<sup>90</sup> *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at par. 43.



It can be submitted that fairness can be a factor taken into account together with other factors in finding a contract invalid. Objectively speaking it would seem that only in extreme cases of unfairness will a contract be struck down for being against public policy.

In the more recent unreported judgment of *Jordan v Farber*<sup>91</sup> the court looked at the *Afrox* decision holding; that although the courts found no inequality on the facts before it, it does not take away from the principle stated in that case, namely that the situations of the contracting parties are a relevant consideration when determining if a contract offends against public policy.<sup>92</sup> The court looked at the factors before it, holding that although the agreement was freely and voluntarily entered by the parties, it was an agreement between an attorney and his client.<sup>93</sup> By virtue of this the court noted that attorneys yield tremendous power over their clients who depend on them to handle stressful situations.<sup>94</sup> In approaching the Respondent, the Applicants were in a vulnerable state that made them unable to refuse or scrutinise the advice given. The Respondent knew that the Applicants were emotionally and economically in trouble, which made it clear that the Applicants could not have been on par with, or in a stronger position than the Respondent.<sup>95</sup> The court held this to be indicative of the Respondent's immense bargaining power over the Applicants.

The cases illustrate how inequality is a factor to be taken into account in determining whether a contract offends against public policy. In *Brisley*, *Afrox*, and *Barkhuizen* inequality was mentioned with no sufficient evidence for the court to properly pronounce on it. This may be seen as an important reason as to why the court in these cases reasoned as it did. In *Breedenkamp* inequality was a more cogent argument and had it been argued more comprehensively perhaps the court would have decided the matter differently. It might have resulted in a more concrete and precise precedent on the role of inequality in our law of contract. In *Jordan* the court considered the factors before it on the bargaining powers of a vulnerable client and attorney, holding that there was unequal bargaining power which made the lease contracts in question against public policy. Other factors were the conflict of interest of the attorney in concluding a contract with his client, in terms of which the attorney stood to benefit.

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<sup>91</sup> *Jordan v Farber* (1352/09) [2009] ZANHC 81.

<sup>92</sup> *Jordan* at par. 15.

<sup>93</sup> *Jordan* at par. 16.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

A contract offends against public policy if it does not take cognisance: simple justice between man and man,<sup>96</sup> is inimical to the interests of the community,<sup>97</sup> or results in unconscionability.<sup>98</sup> Inequality may implicate fairness, but as fairness is not expressly provided for in the Constitution or our contract law, mere unfairness stemming from inequality will not suffice. According to the reasoning in *Sasfin*, unfairness in bargaining powers must be so unconscionable that it is inimical to the interests of the community (public policy). *Afrox* held that inequality is an element of public policy challenges, with no distinction made as to which other factors come into play, or the weighting of inequality in determining public policy. This public policy is informed by our bill of rights and constitutional values. This is a limited view and developing it will help to develop inequality as a stronger factor for public policy challenges.

### *The limited view of inequality*

“The reality of the South African position is that the classical model of contract that envisages consensus on the basis of arm’s length negotiations between parties of equal bargaining power has become generic and has led to it being applied indiscriminately outside its theoretical context, regardless of clear inequalities in bargaining power and resources between the parties.”<sup>99</sup> This classical theory rests on assumptions that individuals who contract do so freely and with true consensus, and that intervention by courts would stifle both the freedom and will of the parties concerned. The courts are reluctant to interfere, and refrain from doing so by applying the principle of *pacta sunt servanda*, which envisages sanctity of contracts which requires people to keep their promises.

This classical theory is not strongly grounded in reality, as there are situations involving apparent absolute disparity in bargaining power between parties which may affect consensus.<sup>100</sup> In these situations no amount of bargaining by the weaker party can make the stronger party come to the bargaining table at the weaker party’s level, or affect the terms of the parties’ interactions and negotiations.<sup>101</sup> An obvious example of this is banking relationships where terms are imposed by banks on consumers; generally no amount of

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<sup>96</sup> *Botha (now Griessel) and another v Finanscredit (PTY) LTD* 1989 3 (SA) 773 (A).

<sup>97</sup> *Sasfin (Pty) Ltd v Beukes* 1989 () SA (1) (A).

<sup>98</sup> *Baart v Malan* 1990 (2) SA 862 (E).

<sup>99</sup> Bhana D & Pieterse M: ‘Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited’ (2005) 122 *SALJ* 865 at par. 882.

<sup>100</sup> R Fischer ‘Getting to Yes’ 2<sup>nd</sup> Ed 1991 at p. 97-107.

<sup>101</sup> *Ibid.*

negotiation can alter the bank's terms.<sup>102</sup> The only remedy would be for a consumer to approach and obtain banking facilities from another bank that offers more favourable terms (Breedenkamp). Intervention is therefore needed to protect the interests of the weaker party to the bargain.

### *Inequality and the fundamental principles of South African contract law*

Bargaining power cannot be ignored by a system of contract law, as "it is too real, too intuitively obvious, and if ignored it will be too destructive to the legitimacy of contracts as a mechanism for regulating private orderings."<sup>103</sup> This proposition forms the basis upon which inequality may play a role in respect of the validity of contracts. As much as courts may wish to uphold the classical theory of contract on the premise of *pacta sunt servanda*, ignoring bargaining disparities is subversive to the sanctity of contracts as legitimacy is stunted; situations may be present where there is no true meeting of minds on the terms of a contract and no legal recourse is given to the party in a weaker bargaining position because inequality is not a self-standing defence upon which to challenge validity.<sup>104</sup>

Consensus is rarely the product of lengthy negotiations of people in more or less the same bargaining position as envisaged by assumptions underlying the classical theory.<sup>105</sup> Contracting parties are often placed in situations where they can choose who they contract with but they have to agree to a contract on terms that have already been presented to them; the terms are imposed rather than negotiated between the parties.<sup>106</sup> This happens regularly with consumers contracting with banks, retail stores, or other juristic entities. Contract terms are contained in standard form contracts presented on a take-it-or-leave-it basis, and there is little negotiation between a consumer and the entity on the gist and terms of the contract. To illustrate by means of an example: A contracts with B on terms of B's choosing. The terms are presented to A in a standard form contract. If A does not agree with the terms there is not much room for negotiation. A will find another party, C, to contract with who will do so on terms which A is happier with. There is still not much negotiation between A and C on the terms; as C also imposes its terms on A.

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<sup>102</sup> *Breedenkamp and Another v Standard Bank of South Africa* 2010 (4) SA 468 (SCA).

<sup>103</sup> Barnhizer DD "Bargaining power in Contract Theory" (2005) *Bepress Legal Series* 814 at p. 2.

<sup>104</sup> Bhana D & Pieterse M : 'Towards a reconciliation of contract law and constitutional values: *Brisley and Afrox* revisited' (2005) 122 *SALJ* 865 at par. 883.

<sup>105</sup> *Ibid* at par. 882.

<sup>106</sup> *Ibid* at par. 883.

Inequality can arise where there are situations of economic necessity when A is compelled to contract with B without reaching true consensus on the matter. This remains a problem as contracts continue to be upheld on the basis of long-standing rules of contract founded on the consensus of the parties. This can be impacted by economic duress where economic harm will result if A refuses to contract with B on the terms that have been imposed by B.

The realities of these inequalities in bargaining power undermine the notion of freedom of contract.<sup>107</sup> This is because, historically, “freedom of contract worked as an organising principle for a different and simpler time in which parties contracted on relatively equal footing.”<sup>108</sup> In earlier centuries freedom of contract developed where the commercial needs of an economy depended on small traders and artisans competing for the same customers, these contractual arrangements were negotiated piecemeal between parties of roughly the same bargaining strengths.<sup>109</sup> This illustrates the problems with freedom of contract in the modern setting, as it remains based on historical bargains where there were a limited number of traders of equal strength, and where a true meeting of minds was the rule.<sup>110</sup> Changes in commercial practice have caused the concept of freedom of contract to make less sense in modern day commerce where parties are rarely autonomous entities of sufficiently equal strengths with equal protection.<sup>111</sup> Commentators feel there is a gap between the theoretical foundations of freedom of contract and actual practice in commercial and consumer marketplaces. Freedom of contract needs to distinguish between old and new models of contract.<sup>112</sup> I submit that this is a correct approach as freedom of contract cannot rest on archaic principles; it needs to constantly evolve in line with the evolving contractual law framework which is influenced by society and commerce.

“Sanctity of contract is now discordant with inequality as it allows abuse of power by the stronger party to the detriment of the weaker party, thereby facilitating social inequality (which is in conflict with the constitutional values of equality, dignity, and freedom).”<sup>113</sup> The

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<sup>107</sup> Bhana D & Pieterse M : ‘Towards a reconciliation of contract law and constitutional values: *Brisley and Afrox revisited*’ (2005) 122 *SALJ* 865 at par. 884.

<sup>108</sup> Barnhuizer DD “Bargaining Power in Contract Theory” (2005) *Bepress Legal Series* 814 at p. 22.

<sup>109</sup> *Ibid.*

<sup>110</sup> Barnhuizer DD “Bargaining Power in Contract Theory” (2005) *Bepress Legal Series* 814 at p. 25.

<sup>111</sup> *Ibid.*

<sup>112</sup> The old model envisages the manifestations of assent in the parties’ words or conduct. This assent is formalized in an offer that is accepted with consideration given. The new model takes into account disparities in bargaining power, TD Rakoff ‘Contracts of Adhesion: An essay in reconstruction’ 96 *Harvard Law Review* (1983) at p.1183.

<sup>113</sup> Bhana D & Pieterse M ‘Towards a reconciliation of contract law and constitutional values: *Brisley and Afrox revisited*’ (2005) 122 *SALJ* 865 at par. 884.

court in *Barkhuizen* highlighted how unequal our society is; enforcing sanctity of contracts in a manner that does not take cognisance of our social inequalities restricts the development of our contract law.<sup>114</sup> Inequality, especially social inequality, influences individuals' participation in commerce and the growth of our economy. Courts cannot ignore the recognition of inequality by turning a blind eye to it in the context of sanctity of contract. This is based on the fact that the continued relevance of a system based on contract sanctity is impacted by inequality.

Bhana & Pieterse submit that the realities of inequality can be addressed by "calling for the constitutional development of our common law that will establish a new balance of, on the one hand, the dictates of the marketplace and *pacta sunt servanda*, and on the other hand, the interests of the vulnerable and weak in society."<sup>115</sup> Terms of contracts can be developed to take account of inequalities by extending the *naturalia* of contracts to include terms to the effect that where there is material inequality in bargaining power, the weaker party cannot be forced into a situation where they contract out of their fundamental rights as set out in our Bill of Rights.<sup>116</sup>

### *The role of inequality in other jurisdictions*

In terms of English law, there appears to be a rejection of inequality as a defence to challenge contract validity,<sup>117</sup> this is because it is undefined what type of conduct will factor in making this determination; and inequality too wide and problem some for courts to act on it alone.<sup>118</sup> Writers submit that for court intervention inequality alone is not sufficient, some other factors need to be present. This view was supported in *Alec Lobb v Total Oil*<sup>119</sup> where it was held that inequality itself is not sufficient; the restraint complained of must be oppressive and unconscionable.

Some reasons for this rejection include the fact that inequality cannot be a ground to challenge invalidity since there is no way for the party in the stronger position to rid himself of that advantage nor would it be to the advantage of the weaker party to prohibit contracts

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<sup>114</sup> Barkhuizen DD "Bargaining Power in Contract Theory" (2005) *Bepress Legal Series* 814 at p. 59.

<sup>115</sup> Bhana D & Pieterse M 'Towards a reconciliation of contract law and constitutional values: *Brisley and Afrox revisited*' (2005) 122 *SALJ* 865 at par. 887.

<sup>116</sup> *Ibid.*

<sup>117</sup> *National Westminster Bank v Morgan* 1975 (AC) 686 at 708 where Lord Scarman held that unequal bargaining power will be of relevance in some undue influence cases however he questioned the need to erect a general principle of relief against inequality of bargaining power.

<sup>118</sup> M Suff 'Essential Contract Law' *Cavendish Publishing Limited* 1997 at p.74.

<sup>119</sup> *Alec Lobb v Total Oil* [1985] 1 WLR 173.

between them.<sup>120</sup> Invalidity needs to depend on the stronger party taking an unfair advantage; if there is no unfair advantage taken inequality *per se* cannot be said to lead to invalidity.<sup>121</sup> Further to this, an argument in support of this rejection stems from the fact that having exact equality between parties is unlikely and highly improbable due to factors unique to parties that affect their bargain.<sup>122</sup> Further to this, if one party to the bargain is in a slightly stronger position, it helps to fuel the bargain by enabling them to bargain better and concur in the result.

In America, judicial attempts have been made to define inequality and give it a coherent meaning.<sup>123</sup> US courts distinguish between two kinds of unequal bargaining situations. The first is where the weaker party lacks meaningful alternatives, and is acting out of necessity and inability to negotiate terms. The second kind of inequality exists where factors which relate to the characteristics of the parties or the characteristics of the transaction evidence the existence of inequality.<sup>124</sup> These requirements are relevant as they may assist in the development of our law's treatment of inequality.

To develop a precise inequality defence, courts can look at whether there is a lack of meaningful alternatives at the weaker party's disposal as this can determine whether the weaker party consented to the term or was coerced into consenting.<sup>125</sup> Having a lack of meaningful alternatives is readily evident in some cases and can often be seen as representative of real inequalities in bargaining power when a weaker party has to choose between suffering harm or succumbing to the proffered terms. Courts will look at the alternatives that were available to a party rather than accepting the proffered terms. If there were alternatives available to the weaker party this can help the courts to conclude that the weaker party did not lack meaningful alternatives.

Lack of meaningful alternatives can factor in developing the defence for inequality as one cannot say a party was in a weaker position if they were at liberty to contract with another party on different and more favourable terms. This seems to be the view adopted in *Breendenkamp* where there was reference to an oligopoly of Banks. The court found that *Breendenkamp* was easily able to approach other banks for banking facilities- thereby stifling

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<sup>120</sup> Furmston M.P '*Cheshire, Fifoot and Furmston's Law of Contract*' Oxford University Press 2006 at p. 23.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Barnhizer DD 'Inequality of bargaining power' (2004) *University of Colorado Law Review*.139 at p.61.

<sup>124</sup> Ibid. Characteristics that have the effect of affecting inequality include wealth, education knowledge consumer status and gender amongst others.

<sup>125</sup> Barnhizer DD 'Inequality of bargaining power' (2004) *University of Colorado Law Review*.139 at p. 64.

the argument of lack of meaningful alternatives. To illustrate this using the *Afirox* judgment, a meaningful alternative would have been for Strydom to go to another hospital that would admit him without the exemption clause in the admission documents. Given our society, we know that exemption clauses in hospital admission documents are common and Strydom would not have been in a position to find another hospital which would contract with him free of the exemption clause. This illustrates categorically that a patient will always be without meaningful alternatives in such a situation, further affirming the need for an inequality defence. Strydom would have to find a contract that admits him with an exemption clause which is flexible regarding liability.

Another element or indicator of inequality is the subjective one dealing with the status of the parties.<sup>126</sup> The factors that affect the determination of status-based approaches to inequality include the particular classes of individuals, their education, and social status which tend to enforce the incapability of treating others equally in market-based transactions. These status-based inquiries have been used by American courts as proxies for bargaining power disparities.

They are subjective inquiries; that examine each of the contracting parties to determine if one party occupied 'better' status than the counterpart which enabled him/her to promote his/her cause in the contracting over that of the counterpart. Status based-characteristics appear to be what the court used in *Barkhuizen* when it held that *Barkhuizen* was not in a weaker position to his insurer in that he travels in a vehicle seemingly appurtenant to a reasonably affluent middle-class lifestyle.<sup>127</sup>

Status-based claims are dependent on the societal inequalities between contracting parties which is a factor also relevant in South Africa jurisprudence. I submit that looking at status-based claims as an indicator of contractual inequality is subversive of the Constitutional right to equality (s9) as there is direct discrimination against the party of 'better' status. I submit that a party must abuse his status to 'get a better deal' against his contractual counterpart for the status-based characteristics to implicate equality.

### ***Our societal inequality***

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<sup>126</sup> Barnhizer DD 'Inequality of bargaining power' (2004) *University of Colorado Law Review*.139 at p.77.

<sup>127</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at par.15.

In *Barkhuizen* the court stressed the need to take cognisance of the relative bargaining situation of the parties to a contract (as these are influenced by inequality) as they can help determine if a contract is contrary to public policy. This determination is needed especially in a society as unequal as ours.

This societal inequality stems from our apartheid past.<sup>128</sup> Although South Africa is a post-apartheid democratic country, the benefits of our growing economy have not helped to reduce endemic social inequalities. The legacy of apartheid left us as one of the most unequal countries in the world with massive levels of social, economic, and political inequalities. Improvements have been made to redress these (such as Black Economic Empowerment (BEE) programmes), but the level of social inequality remains constant 18 years after our democracy.<sup>129</sup> It would seem that our courts need to take cognisance of this in considering whether conduct offends against public policy, since social inequality will have a bearing on what the interests of communities are, as well as on whether true consensus can be said to be present in a contract.

In applying the realities of our society, the court in *Barkhuizen* looked at the judgment of *Mohlomi*<sup>130</sup> where it was held that South Africa is

a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most people who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.<sup>131</sup>

This societal inequality results in many people concluding contracts without equal bargaining power or a true understanding of what they are doing.

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<sup>128</sup> TD Oyedemi 'Social Inequalities in the South African ICT access policy agendas' *International Journal of Communication*, 3 (2009).

<sup>129</sup> Ibid.

<sup>130</sup> *Mohlomi v Minister of Defence* 1997 (1) SA (CC). The case dealt with a 1 month restriction to seek judicial redress against the department of defense.

<sup>131</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at par. 64.



The same sentiments were shared in the judgment of *Du Plessis v De Klerk* where the court held that our society 'is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable.'<sup>132</sup>

Similarly in *Soobramoney*<sup>133</sup>, Chalakson J held

[w]e live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.<sup>134</sup>

The constitutional court has persistently recognised the social and economic inequalities of post-apartheid South Africa. As such it is problematic to enforce the classical theory of contract founded on freedom and sanctity of contract in its present form as it is not illustrative of the inequalities of the country. A continued adoption of the classical theory of contract in its present form does not take cognisance of these inequalities and ignores a fundamental factor affecting parties to a contract.

Because of the realities of social inequality, courts must give more attention to situations of unequal bargaining power where a party is so disadvantaged in concluding a contract that he should be given a defence to escape injustices that can result if a contract is enforced. These injustices occur where the inequality results in abuse of private power between contracting individuals.

### *Abuse of Private Power*

In *Du Plessis v De Klerk* decided under the Interim Constitution, the court held 'the Bill of Rights does not have a general direct horizontal application but it can have an influence on the development of the common law as it governs relations between individuals.'<sup>135</sup> From this

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<sup>132</sup> *Du Plessis and others v De Klerk* 1996 (3) BCLR 658 (CC) 163. The case dealt with a claim of defamation before the coming into effect of the Constitution. The court had to pronounce on whether chapter 3 of the Interim Constitution was applicable to the dispute between the parties involved.

<sup>133</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC). This case dealt with the right to access adequate health care facilities where the applicant, *Soobramoney* required dialysis from State Hospital due to kidney failure.

<sup>134</sup> *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC) at par. 11.

<sup>135</sup> *Du Plessis and Others v De Klerk* 1996 (3) BCLR 658 (CC) at par. 62.

it appears that the Bill of Rights is applied vertically, and not between private persons. In delivering the majority judgment, Kentridge AJ held that it was open to private persons to argue for direct horizontal application of the Bill of Rights. Because of this limited view of horizontal application of the Bill of Rights, the promulgation of the final Constitution aimed to remedy this by providing explicitly for direct horizontal application.<sup>136</sup>

Section 8 (1) of the Constitution provides that it binds all law, and this wording is interpreted to mean that the common law, customary law, and legislation are all subject to the Constitution. Before our constitutional democracy all law was subject to the constitutional principles of common law, however the promulgation of the Constitution essentially reversed this.<sup>137</sup> As our Contract law is based primarily on common law, it is subject to constitutional scrutiny regardless of how it is concluded and who contracts.<sup>138</sup> Section 8(2) extends this application to private individuals only to the extent that the rights contained therein are applicable to them.

In *Du Plessis, Madala J* agreed with the judgment of Kentridge but differed in that 'subscribing to the view that the Constitution's operation is limited to verticality only .... [I]n many instances the abuse in the exercise of power is perpetrated less by the State and more by private individuals against other private individuals'.<sup>139</sup> The court further held that our Constitution aims at establishing freedom and equality in a grossly disparate society and that "no one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring the benefits of an open and democratic society based on freedom and equality."<sup>140</sup> The judgment of Mokgoro helps identify social inequality that fuels abuse of private power. He held:

The unique and stark reality in South Africa is that decades of injustice associated with apartheid gave rise to gross socio-economic inequalities that persist at every level of our society. The disparities between the beneficiaries of State-imposed racial discrimination and its victims, which will doubtless endure for many years to come, makes oppression and

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<sup>136</sup> Klare K 'Legal culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at p1.79.

<sup>137</sup> *Democratic Alliance & Others v Acting National Director of Public Prosecutions & Others* 2012 (3) SA 486 (SCA).

<sup>138</sup> [http://butterworths.ukzn.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.ukzn.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu).

<sup>139</sup> *Du Plessis and Others v De Klerk* 1996 (3) BCLR 658 (CC) 163 at p.151-154.

<sup>140</sup> *Du Plessis* at p.147.

discrimination in the 'private' sphere both possible and likely. Indeed, in practical terms, the average South African may now be more likely on a day-to-day basis to have her or his human dignity and other fundamental rights threatened by the actions of entities and individuals, who are not in any sense organs of State, than by agents clothed with public power.<sup>141</sup>

In *Mort v Henry-Shields*<sup>142</sup> the court noted the case as being illustrative of a situation in which an attorney can charge huge fees on a contingency basis; a context ripe for profitable exploitation which raises the question of the application of the doctrine of *bona fides*.<sup>143</sup> The court further noted further that the unreasonable promotion of one party's interests at the expense of the other infringes on good faith in such a manner as to outweigh the public interest in upholding sanctity of contract. The Constitution was promulgated to keep all conduct in keeping with it; any oppressive, unreasonable, and unconscionable contracts fall foul of the Constitution. The court noted that to do this the very nature and manner in which the parties create a contract must be examined. From this, unreasonableness can be interpreted to trump enforceability.<sup>144</sup> I submit that if the nature and manner in which parties contracted includes an abuse of power by the stronger party (in this case the Respondent law firm which knew that the parent of the minor child was depressed and distressed), the court will not enforce the contract on the ground of the unreasonableness, oppression, and unconscionability stemming from abuse of power at the hands of the stronger party. On the facts of this case, the court held there was no unreasonableness or oppression in the conduct of Henry Shields-Chiat (this case essentially refereed to abuse or private power although it was not expressly identified as private power).

In *Advtech resourcing v Kuhn & Another*<sup>145</sup> the court held that a transformative Constitution needs to engage itself with the concepts of power and the community. Davis J further held that the intention of the Constitution must surely be extended to all legal concepts, including the principles of contract. This judgement appears to be an approval of the majority view in

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<sup>141</sup> *Du Plessis* at p. 168.

<sup>142</sup> *Mort NO v Henry-Shields Chait* 2001 (1) SA 464 (C). In this case the applicant relied on good faith as a defence against an exorbitant fee charged by the respondent firm for legal representation of his minor child who was involved in a motor vehicle accident.

<sup>143</sup> *Mort* at par. 473-474.

<sup>144</sup> *Mort* at par. 475.

<sup>145</sup> *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C). The case involved a restraint against an employee affecting the rights contained in s22 of the Constitution that prohibited her from taking up employment with a recruiting firm in direct competition with that of her previous employer Advtech.

*Du Plessis* where power is confined to vertical application between public bodies and the community. Davis highlights that this limited approach needs to be extended, but does not concern himself with doing so or how to do so.

The Mort view parallels that of *Den Braven v Pillay*<sup>146</sup> where Wallis AJ in delivering judgment, incorrectly held that power under the Constitution vests in the three spheres of government, and extending that power to private individuals would be an unlikely construction of the Constitution. He finds support in this by saying that s8 (2) rights extend to private individuals to the *extent* they are applicable to them. If the right and the duty or entitlement flowing from it cannot be separated then it cannot be applied to private persons in contractual settings. The problems with this judgment lie in that Wallis AJ essentially reverted back to the position in *Du Plessis*, (and unlike *Advtech* does not propose that the Constitution must be transformed). In holding that the power vested in the three spheres of government as rights in the Bill of Rights cannot be separated from their entitlements, Wallis was saying that power flowing from the Bill of Rights can only be held in public bodies, and there can therefore be abuse of public not private power, as the rights in the Bill of Rights can only be tampered with / hindered by public bodies in terms of the Constitution.<sup>147</sup>

In *Mozart Ice Cream v Davidoff*<sup>148</sup> Davis J accordingly rejected the view of Wallis in *Den Braven*, and pointed out that there should be no reason to remind the legal community of the importance of power and the abuse thereof that occurs in private hands. He went on to find support for this in the dissenting passage of Madala J in the *Du Plessis* case where it was held that the abuse of power is not confined to the relationships between a government and its citizens, but extends to the relationships between individuals.<sup>149</sup> Davis further held that power is subject to the Constitution which is tasked with transforming legal concepts in the image of the Constitution.

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<sup>146</sup> *Den Braven SA (Pty) Ltd v Pillay & Another* 2008 (6) SA 229 (D). This case dealt with a restraint of trade agreement imposed against Pillay from taking up the employ of a company in competition with his preceding employer, Den Braven.

<sup>147</sup> Although Wallis J said this, he upheld the restraint of trade agreement holding that s22 rights to trade, occupation etc do not directly apply to restraint of trade agreements.

<sup>148</sup> *Mozart Ice Cream Franchises (Pty) v Davidoff and Another* 2009 (3) SA 78 (C). The case dealt with a restraint of trade agreement between the appellant and the respondent that the appellant wanted enforced upon the respondent wanting to disenfranchise itself from Mozart's Ice Cream and trade in Ice Cream from the same premises under a different name.

<sup>149</sup> *Du Plessis and Others v De Klerk* 1996 (3) BCLR 658 (CC) 163.

In the Barkhuizen judgment, Sachs affirmed the recognition of abuse of public power holding that the unreasonable one-sided promotion of one's own interests at the expense of another infringes the principle of good faith to such a degree as to outweigh public interest in the sanctity of contracts and leads to contracts which are against the Constitution. In Breedenkamp the court found no abuse of private power that warranted interference by public bodies.

### *Inequality & the abuse of private power*

Given the current position of inequality in our law, I submit that to develop inequality as a challenge against public policy, the inequality must be exercised in an abusive manner. This abuse of the power relations between contracting parties will result when a party in a stronger bargaining position uses it in an oppressive, unconscionable, and unreasonable manner to warrant court interference and a finding that the contract offends not only against public policy, but more importantly the Constitution, which requires legal concepts to be in keeping with its image.

I submit that this issue of abuse of private power resulting from inequality needs addressing by the courts to allow greater substantive fairness between contracting parties taking into account our existing societal inequality. I submit that this will be done through utilising mechanisms in contract law to provide greater scope for assistance in this. The devices that I will focus on for this are 1) the potential role that the doctrine of economic duress will play and 2) the potential role that the constitutional value of ubuntu will play. I will also look at the bearing that section 40 of the Consumer Protection Act has, and its impact on the abuses of power between a supplier and a consumer as well as the abuse of power in terms of the Competition Act which aims to promote free trade in the market.

## Chapter 3

### DEVICES THAT CAN BE USED TO DEVELOP UNEQUAL BARGAINING POWER IN SITUATIONS OF ABUSES OF PRIVATE POWER?

#### 3.1 ECONOMIC DURESS

Duress and unequal bargaining power are two seemingly unrelated concepts. Unequal bargaining power relates to the role bargaining power disparities play in the fairness of contracts as well as in finding contracts against public policy. Duress relates to consensus of parties at contract formation and finding whether a contract was concluded through improperly obtained consensus. The connection lies in the role that unequal bargaining power plays in causing a party in a stronger position to exert pressure on another at the formation of a contract, or in modifying a contract that coerces the latter to submit to terms or suffer economic harm (i.e. if a party submits to the contract due to the pressure, his consent could be affected by coercion). To support this Dalzell is of the view that economic duress occurs as a result of a party possessing momentary greater bargaining power to coerce additional terms or payments from a weaker party which can occur at the formation of a contract or at the subsistence of it due to changed circumstances between the parties.<sup>150</sup>

#### What is economic duress?

Our law of contract only recognises two kinds of duress, namely duress of goods and of a person. Economic duress is illegitimate commercial pressure on a party to a contract which induces him or her to enter into a contract which amounts to coercion of the will so that it affects his consent.<sup>151</sup> The enquiry of economic duress is whether the circumstances are such that the aggrieved party is entitled to be relieved of the moral and legal consequences of his or her actions.

In terms of South African law, the traditional long standing test of duress was advanced by Wessels.<sup>152</sup> This five-prong test requires there to be the (1) actual violence or reasonable fear of violence; (2) fear caused by a threat of some considerable evil to the party or his family;

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<sup>150</sup> Dalzell J 'Duress by Economic Pressure' 20 *N.C.L Rev* 237 (1941).

<sup>151</sup> MR Cassim '*Medscheme Holdings (Pty) Limited and Another v Yusuf Bhamjee: The Concept of Economic Duress*' (2005) 122(3) *SALJ* 528.

<sup>152</sup> Wessels JW *The Law of Contract in South Africa* 2 ed (1951).

(3) threat of imminent or inevitable evil; (4) threat or intimidation which is *contra bonis mores*; and (5) pressure used which has caused damage. This test has been criticised in that it has set back the development of our law causing it to lag behind other jurisdictions.<sup>153</sup> Be that as it may, the test still stands and a party wishing to rely on duress to vitiate his or her consent bears the onus of proving it by applying the above-mentioned traditional test to his case. There has been a way forward that recognises the ground of economic duress. This development recognises that the threat can be to cause economic harm or ruin to the weaker party should they not agree to conclude a contract on the terms presented to them by the stronger party.

### **The current test for economic duress**

Glover submits that the test adopted in America and England be used in South Africa to test for cases of economic duress. This test is two-prong: the first element is a proposal inquiry which requires one party to make a threat that is *contra bonis mores* or illegitimate. The second element is referred to as a choice inquiry; this requires a threat to induce a contract, leaving the other party no reasonable choice or alternative but to submit to the threat and enter into the contract.

The proposal inquiry encompasses two requirements: that of a threat, and that of the threat being *contra bonis mores*. In terms of the first requirement, the threat must be an unwelcome proposal with the intention to induce the other party to choose a course of action the proposer desires. The threat is usually implicit but it need not be expressly given; an implied threat can be given through silence or conduct. The second requirement of the proposal inquiry has been understood in other jurisdictions to mean that the threat should be illegitimate or improper. To assess if a threat is *contra bonis mores*, the courts will look at: whether it was made intentionally, the relationship between the parties, the circumstances that put one party in a position to threaten the other, and various other considerations.

The American Case of *Austin Instrument v Loral*<sup>154</sup> was illustrative of a situation where there was deliberate exploitation of changes in circumstances. This happened as a result of wanting to get a fresh advantage out of a contractual relationship to which the proposer had no right.

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<sup>153</sup> Glover G'Developing a test for Economic Duress in the South African Law of Contract: A comparative perspective ' 2006 (123) *SALJ* 285-314.

<sup>154</sup> *Austin Instrument v Loral* 29 N.Y 2d 124 (1971). In this case Loral won a tender to supply radar nets for the American navy that he subcontracted to Austin. He won a second tender and Austin demanded that subcontract be tendered to him at a higher price or he would stop production under the initial subcontract.

The court held that Loral was prevented from exercising free will when agreeing to price increases subject to contract modification and as such it was a classic case of economic duress. The court further held that given the situation it was perfectly reasonable for Loral to consider itself in a distress situation, as Loral did a substantial portion of its work with government and failure to deliver under a tender contract would have resulted in decreased chances of future contracts. Given the evidence attained, Loral also satisfied the court in proving that in the circumstances he was unable to obtain the gears in question through other sources within a reasonable time.

In terms of the second element of the test, the choice inquiry, a finding of the contract being *contra bonis mores* will not amount to economic duress; something more is required. The inquiry in this regard also has two requirements: whether the threat caused or induced the recipient to manifest his or her assent to the contract, and whether the recipient of the threat was justified in manifesting his contractual assent in response to the pressure.

The first leg of the test requires that the threat must have induced the contract or its modification. This examination is done in terms of factual causation by looking at whether the threat induced the aggrieved party into contracting. In the Judgement of *Du Preez*, the court held that the party bearing the onus must show that he would not have concluded the contract but for the duress. Once this is done the next requirement examines whether assent to the contract was justified. This means examining the reasonableness of the induced party's conduct and whether they had any other alternatives but to submit to the illegitimate threat. For this leg of the inquiry, succumbing must be the only reasonable and viable option available in the circumstances. According to Glover what is of relevance is whether the induced party could have had recourse to the legal system? If not, were there any other remedies available that did not require recourse to the legal system? Should it be that the aggrieved party had recourse to the legal system or other avenues, then one cannot say the conduct was reasonable in the circumstances.

### **Economic duress before the courts**

Our law previously did not recognise economic duress. It appears that the courts have confirmed such recognition in recent case law.



In *Medscheme Holdings v Bhamjee*<sup>155</sup> the court noted that Dr Bhamjee signed acknowledgments of debts under the belief that a failure to do so placed the future of his lucrative business at risk. Whether that belief was induced by a threat is of no consequence. The question is whether the threat constituted duress. The court held that there seems to be no reason why threats of economic ruin should not be recognised as duress in appropriate cases, although such cases are likely to be rare. The court further held that it is not unlawful to cause economic harm, or even economic ruin to another, nor can it be unconscionable to do so in a competitive industry. The court agreed with the opinion of Van Heerden that hard bargaining isn't the equivalent of duress, even where the bargaining is a result of an imbalance in bargaining power. *Something more*, that was absent before the court, needed to be present for the court to find the existence of economic bargaining to be illegitimate and unconscionable and thus constituting duress.<sup>156</sup> In this case the court recognized the validity of the doctrine of economic duress but did not find the case before it as amounting to one of such duress.

Again in *Geromolou v Van Wyk*<sup>157</sup> the case appeared to be one of economic duress but was argued under the defence of undue influence. The court held that the Defendant knew the Plaintiff was under financial pressure and needed to pay his workers who were waiting outside to be paid. There was disparity in their respective economic powers and the Defendant's knowledge that the Plaintiff could not afford a protracted dispute. The court further held that the Defendant took advantage of the Plaintiff's situation to persuade him to conclude a transaction to his disadvantage, which manifested unfairness.<sup>158</sup>

The court found there to be undue influence, holding at paragraph 24 that,

[i]t is entirely permissible for one party to exploit the economic weakness of the other when a genuine settlement of a disputed indebtedness is involved but it is quite another thing when an economically powerful party withholds what is admittedly owing to an economically weaker party in order to seek commercial advantage. *Pacta sunt servanda* is a prescription that is intimately connected with the constitutionally protected values of freedom and human dignity. It follows that to use the threat of breaching a contract to induce an economically less powerful contractual counterpart to act to his disadvantage in relation to an accrued

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<sup>155</sup> *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA). This case dealt with a doctor who claimed he was made to sign two acknowledgements of debts under duress where the harm threatened was economic. Basis for this fear, he says was that Medscheme would tell all its employees to go to other doctors for medical attention as Dr Bhamjee's fees were exorbitant in comparison to those of other doctors in the area.

<sup>156</sup> Ibid 346.

<sup>157</sup> *P Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (5) SA 339 (SCA).

<sup>158</sup> Ibid at par. 20-21.

contractual right, the enforcement of which is not contrary to public policy, is subversive of freedom and human dignity. In the present case, the defendant's conduct further trespassed upon the plaintiff's constitutional right to have his dispute with the defendant adjudicated by fair legal or other process. In my view the plaintiff has established the element of unconscionability required. If there were a contract of compromise, the plaintiff was entitled to avoid it. Accordingly, the rejoinder of undue influence must be sustained.<sup>159</sup>

However problems with this finding is that undue influence is premised on improper pressure exerted on a party that induces him to enter into a contract.<sup>160</sup> The pressure is subtle and involves an erosion of the victim's ability to exercise free and independent judgment in the face of threats or intimidation. The core of undue influence is that it is subtle and exerted by one party to another without the latter realising that his free will is being compromised. Undue influence requires there to be some form of special relationship between the parties. In *Geromolou* the pressure was not subtle, it did not affect the Plaintiff's free and independent judgment, and there was no special relationship between the parties, which are core requirements of undue influence. Rather the pressure was blatant, the Defendant (the construction company) was able to exercise free and independent judgment, it eroded the Plaintiff's consent as it amounted to a threat or intimidation to submit to the contract on unfavourable grounds and there was no special relationship between the parties. The court called it undue influence when the case contained none of the express requirements of undue influence.

### **Understanding economic duress**

Cassim in her article discussing the *Medscheme* case<sup>161</sup> observes that economic duress is the imposition, oppression, or taking of an undue advantage of the necessity or weakness of another person.<sup>162</sup> She states that the Supreme Court of Appeal's understanding of the essential characteristic of economic duress is flawed. Speaking of the first acknowledgement of debt signed by Bhamjee, she submits that if one enters into an unfavourable agreement because one considers it worthwhile, does not necessarily mean that one is not acting under economic duress. The fundamental state of duress during which a person is induced to act involuntarily or is deprived of volition, does not mean that duress overpowers the will and all

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<sup>159</sup> *P Gerolomou Constructions* at par.24.

<sup>160</sup> Du Plessis J 'The law of Contract in South Africa: Private Law' Oxford University Press 2009 at p.141.

<sup>161</sup> Cassim MR 'Medscheme Holdings (Pty)Ltd v Bhamjee: The Concept of Economic Duress' 122 *SALJ* 528 (2005).

<sup>162</sup> *Lafayette Dramatic Production Inc v Ferentz* 9 NW 2d 57 (1943).

choice, but rather that it deflects a person's will and choice into choosing the lesser between two evils. Thus a person who acts under duress intends to do what he does but does so unwillingly with his intentional submission arising from the fact that he has no other practical choice.

In *Medscheme* the court leaned towards a finding that, for a threat of economic harm to amount to economic duress, the threat must be unlawful or unconscionable.<sup>163</sup> This means that if a threat is made lawfully it can still amount to duress should it be unconscionable, and this amounts to lawful act duress. In accordance with Cassim's findings of the *Medscheme* judgment, American and English courts also distinguish between lawful and unlawful act duress with these courts finding duress where a person threatens to do what he had a legal right to do, should the threat result in unconscionability. To illustrate this will happen where a lessor kicks a lessee out of premises in accordance with a lease for unpaid rent. The conduct will be unconscionable if done in a manner infringing on the constitutional rights and values of the lessee if the continued presence of the lessee did not impact on the rights of the lessor.

The bona fides of the parties also play an important factor in determining whether there has been economic duress. This is important as it impacts on the unconscionability of a party's conduct. If a party makes a threat they erroneously believe they are entitled to make, it supports a finding that the conduct of the parties will amount to hard bargaining if it is done in accordance with a lawful threat. This seems to have been the view of the Supreme Court of Appeals in *Medscheme* regarding the second acknowledgment of debt. However good faith will not detract from the unlawfulness of the threat made under unlawful act duress.<sup>164</sup>

As a general principle a threat by someone in a superior bargaining position to exercise a legal privilege will not automatically amount to economic duress if the exercise of the threat is not necessarily illegitimate or improper. Cassim submits that it is unclear in what situations the courts will allow for exceptions to this principle.<sup>165</sup>

### **Economic duress as a device for unequal bargaining power**

In *Medscheme*, the court held that something more is required for commercial pressure used in hard bargaining to amount in duress, similarly in *Geromolou*, the court held that the

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<sup>163</sup> Ibid at p. 534.

<sup>164</sup> Cassim MR' *Medscheme Holdings (Pty)Ltd v Bhamjee*: The Concept of Economic Duress' 122 *SALJ* 528 (2005) at p. 536.

<sup>165</sup> Cassim MR' *Medscheme Holdings (Pty)Ltd v Bhamjee*: The Concept of Economic Duress' 122 *SALJ* 528 (2005), at p.537.

‘influence’ must implicate constitutional values. The court in *Medscheme* gave no indication of what is meant by this ‘something more’ or when this ‘something more’ would suffice. I submit that this ‘something more’ means that the court will conclude for duress if the conduct complained of implicates on constitutional values of the party threatened.

Economic duress will implicate constitutional values if it amounts to an abuse of private power by a stronger party. This finds support in that Cassim submits that there are an increased number of people entering the business world who require greater scope of protection than what is provided for under lawful act duress. Because of our country’s historic social circumstances and the disparities emanating from that, our law should go beyond a narrow enforcement of lawful act duress and must consider that *contra bonis mores* contains social and normative considerations. These considerations will help as they require the line between hard bargaining and duress to be drawn in a manner that is not too narrow, as is at present.

Cassim submits that the general principle is that a party in a stronger position who threatens to exercise a legal privilege, will not amount to duress unless the threat is illegitimate. However threats can be legitimate and implicate on the interests and constitutional values of the weaker party and as such should warrant the court’s interference. In its present form lawful duress holds that people contract “on an equal footing”. Applied in the South African context it does not consider the socio-economic disparities between contracting parties, thereby indirectly allowing for abuse of private power. When economic duress cases come before the courts in our law, lawful act duress determinations must consider that South Africa people do not necessarily contract on equal footing because of social disparities emanating from Apartheid. If parties contract and the party in the stronger position acts against the other to enforce a result they are entitled to, it will be considered economic duress if in acting, the stronger party implicates on the constitutional values of the weaker. In such a case the court should hold that there is improperly obtained consensus stemming from a threat affecting the constitutional values of the weaker.

I submit that this view is not limited only to cases of economic duress but the same can be said of situations where there is not even a threat. If parties ordinarily bargain in situations of inequality where a stronger party implicates a weaker party’s constitutional values, courts should be in a position to say that the actions of the stronger party amount to abuse of private

power thereby warranting court interference since the conduct is unconscionable, unreasonable, oppressive, and therefore contrary to public policy.

This will have two effects. If a challenge is based solely on economic duress that implicates constitutional values, this will implicate the consensus between the parties when they contracted. If the court is satisfied that the duress has implicated constitutional values, this will result in a finding that the consensus between the parties was improperly obtained so as to vitiate it. If a challenge is based on the inequality between the contracting parties (it does not have to stem from economic duress) and such inequality is exercised in a manner that amounts to abuse of private power because it is unconscionable, unreasonable, or oppressive, then the court will find the contract to be unenforceable. Abuse that implicates on public policy by being adverse to the interests of the weak, simple justice between persons, and constitutional values will be invalidated and unenforced in constitutional challenges.

In the latter situation the consensus does not emanate from a threat (economic duress); it emanates from abuse of private power. Van der Merwe<sup>166</sup> submits that our contract law should have a catch-all provision that allows for defences flowing from improperly obtained consensus that is not provided for in common law. Although this defence is advanced for improperly obtained consensus, it can still be used for public policy challenges where there is a range of factors involved in determining that conduct offends against public policy. These factors include the inequality of the parties, whether there has been an abuse of circumstances and other factors that will affect the result that the contract will achieve. Van Der Merwe is a proponent of this general defence as there are situations where a specific defence cannot be applied to the facts. This does not however, mean that the courts should not develop the law to allow for these circumstances.<sup>167</sup>

I propose that a catch-all provision for public policy will suffice, especially with aspects such as good faith, unfairness, and inequality (in its present form) that are on their own insufficient for independent defences as they fall short of the specific requirements of conduct that contrary to public policy or the Constitution. However where a contract is challenged that evidences elements of unfairness, inequality, and abuse, having a catch-all provision will assist as the courts will have a remedy to assist the vulnerable in protecting their interests.

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<sup>166</sup> Van Der Merwe *'Contract: General Principles'* 3<sup>rd</sup> Ed (2007).

<sup>167</sup> Ibid at p. 131+135.

### 3.2 UBUNTU

In *Barkhuizen* the court said that ‘public policy is informed by the concept of ubuntu’.<sup>168</sup> In light of the courts’ pronouncements on the possible role of inequality in respect of a public policy challenge to contracts (in the cases mentioned earlier), it is therefore important to ascertain the role of ubuntu as a device to develop inequality as a defence to challenge a contract for being against public policy.

#### What is ubuntu?

The concept of ubuntu was entrenched in our Interim Constitution; however it was not expressly included in the final Constitution. On its own ubuntu is not easily defined but has been identified as an elusive African world view.<sup>169</sup> In an attempt to define it, it has been observed that ubuntu refers to the values of life such as humaneness, humanity, personhood and morality, with the metaphor of *umuntu ngumuntu ngabantu* being used (you are who you are because of others).<sup>170</sup> When talking of the concept, group solidarity, compassion, respect, and collective unity have been described as informing it.<sup>171</sup> Although not included in our final Constitution, it is still considered a founding constitutional value as was held by Sachs J in *Port Elizabeth Municipality v Various Occupiers*<sup>172</sup> wherein he held that ubuntu suffuses our entire constitutional order.<sup>173</sup>

Ubuntu plays an important role in public law which is supported by its inclusion in the Interim Constitution.<sup>174</sup> It first came before the Constitutional court in the case of *S v Makwanyane*,<sup>175</sup> where the court had to pronounce on the constitutionality of the death penalty.<sup>176</sup> In delivering the judgement, justice Mokgoro stated that not only does ubuntu find meaning in *umuntu ngumuntu ngabantu* but ‘in its fundamental sense it denotes humanity and

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<sup>168</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at par.339.

<sup>169</sup> Mokgoro Y ‘Ubuntu and the South African Law’ (1998) 1(1) *PELJ* 2.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at par.37.

<sup>173</sup> 2005 (1) SA 217 (CC) 37. The court was confronted with an eviction by the municipality of unlawful occupiers from land it owned. Sachs went on to say that it combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

<sup>174</sup> Bennet TW ‘Ubuntu: An African Unity’ 2011 *PELJ* Vol 14 No.4 p32.

<sup>175</sup> *S v Makwanyane* 1995 3 SA 671 (CC).

<sup>176</sup> *Ibid.*

morality with its spirit emphasising respect for human dignity making a shift from confrontation to conciliation'.<sup>177</sup> Further to this Justice Langa said that ubuntu,

.. recognises a person's status as a human being entitling him to unconditional respect, dignity, value and acceptance from members of the community that he's part of, while on the other hand giving him the duty to give the same respect, dignity, value and acceptance on each member of that community. It regulates the exercise of rights by the emphasis it gives on sharing and co-responsibility and the mutual enjoyment of rights by all.<sup>178</sup>

Moegeng Moegeng recently held in a defamation matter that,

...ubuntu gives expression to, among others, a biblical injunction that one should do unto others as he or she would have them do unto him or her. The law, order, generosity, peace and common decency that previously characterised many communities in South Africa were attributed to an unwavering commitment to the philosophy of ubuntu. No wonder the drafters of our interim Constitution deemed it meet to cite ubuntu as one of the ingredients essential to the healing of our country.<sup>179</sup>

### Ubuntu before the courts in South Africa

In the context of public law, the judgement of *S v Makwanyane* was one of the first cases in which ubuntu was considered before the courts, and where it was used to promote a finding of the death penalty being unconstitutional.<sup>180</sup> Similarly in *Masetlha v President of the RSA and Another*<sup>181</sup> the court used ubuntu as being inseparable from civility. The court held that,

[c]ivility is more than just courtesy or good manners.... It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute. In this sense, civility was connected to ubuntu, and was said to be "deeply rooted in traditional culture", and "widely supported as a precondition for the good functioning of contemporary democratic societies".<sup>182</sup>

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<sup>177</sup> *S v Makwanyane* at par.308.

<sup>178</sup> *S v Makwanyane* at par.224.

<sup>179</sup> *The Citizen 1978 (Pty) Ltd & Others v McBride (Jonhstone & others , Amici Curiae)* 2011 (4) SA 191 (CC) A 257 at par. 218.

<sup>180</sup> See *S v Makwanyane* 1995 (3) SA 391 (CC) at par. 308 of judgment for the courts examination of ubuntu.

<sup>181</sup> *Masetlha v President of the RSA* 2008 1 SA 566 (CC).

<sup>182</sup> *Masetlha* at par.238.

In private law, ubuntu does not seem to have been as welcomed as it has been in public law. In *Bhe and Others v Magistrate, Khayelitsha and others*<sup>183</sup> ubuntu was considered only in an obiter statement where the court held that the valued features of customary law are the nurturing of communitarian traditions such as ubuntu. From this case, it appears that ubuntu does not play a significant role in influencing the decision of the court, giving the impression that it is not a source that can be strongly relied on in Constitutional challenges.

In *Dikoko v Mokhatla*<sup>184</sup>, Mokgoro J who handed down judgment held that our constitutional democracy is dependent on the constitutional value of human dignity which is influenced by the concept of ubuntu. He held that the purpose of compensation is to restore the dignity of the defamed party, not to punish the perpetrator. A remedy based on ubuntu would go further than monetary compensation in restoring the human dignity of a person since it could sensitise the Defendant and give him or her a better appreciation of the hurtful impact of his or her unlawful actions - similar to the emerging idea of restorative justice in our sentencing laws.<sup>185</sup> Mokgoro held that a remedy based on monetary compensation detracts from the basis of defamation, as restoration should be to your dignity; honour not your pocket, and courts should try to restore dignified relationships where it is possible to do so. It appears from this judgment that ubuntu played a pivotal role in the defamation claim with the court reviving the old remedy of apology informed by ubuntu as appropriate compensation to the aggrieved party.

In the contractual law perspective, ubuntu came before the courts in *Everfresh v Shoprite*<sup>186</sup>. In this case the court dealt with the concept of ubuntu where a lease contract required parties to negotiate in good faith. Deputy Chief Justice Moseneke, who delivered the majority judgement, dealt with the concept of ubuntu and held (as Mokgoro J had done earlier in *Makwanyana*) that ubuntu 'emphasises the communal nature of society and carries with it ideas of humaneness, social justice and fairness while enveloping the values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective

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<sup>183</sup> *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC). In this case the court had to deal with primogeniture in the African community where in terms of intestate succession the males inherited from a deceased estate. The question was raised of discrimination when the deceased died leaving 2 minor children that were not allowed to inherit the immovable property but rather the deceased father as there were no male heirs born of the deceased.

<sup>184</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC). A delictual judgment where immunity was claimed by a municipal counselor for defamatory statements made at council and committee meetings.

<sup>185</sup> Ibid 68

<sup>186</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC). Contract of lease between Everfresh and Shoprite. A clause in the lease required the parties to negotiate in good faith for a renewal of the said lease. Shoprite showed no intention of doing so in refusing to renew the lease. Everfresh held such failure went against ubuntu.



unity.<sup>187</sup> He continued that a court entertaining the argument of *Everfresh* had to consider the underlying notion of good faith in contracting, the doctrine of agreements seriously and voluntarily being entered into and enforced, as well as ubuntu, which inspires our Constitutional compact. Such factors would have the effect of tilting the judgement in favour of the persons wishing to rely on it.<sup>188</sup> Despite this Moseneke J did not find for *Everfresh* as they had not raised this argument before the lower courts, and the argument was being brought before the Constitutional Court *de novo*.<sup>189</sup>

In delivering the minority judgement Yacoob J stated that the values embraced in ubuntu are also relevant in determining the spirit, purport, and objects of the Constitution.<sup>190</sup> He stated that there should be a shift in the development of our law to take into account the values of the vast majority of people who can now take part without hindrance, in trade and commerce. Yacoob J stated that a contract of lease cannot be said to not implicate ubuntu as this will be too narrow an approach, and contract law cannot be restricted to colonial legal traditions only. Therefore a proposition that contractants will undertake to negotiate and not do so (as the case was here) will certainly implicate ubuntu.<sup>191</sup> On this reasoning the judge was of the view that leave to appeal should be granted and the eviction order be set aside.<sup>192</sup>

### Ubuntu as a constitutional value

In *Masetlha* the court held that ubuntu informs the concept of civility; likewise in *Dikoko* the court said that ubuntu influences the constitutional value of human dignity. In reading this it would appear that ubuntu in itself is not a constitutional value which contracts can be challenges against. However ubuntu is a constitutional value, because the constitutional court has said that it is in judgments after *Masetlha* and *Dikoko*. In the *Joseph and Others v City of Johannesburg and Others* case the court in deciding on the meaning of ubuntu holding that Batho Pele gives practical expression to the constitutional value of ubuntu, which embraces

<sup>187</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) at p.277. Also at *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995; [2001] ZACC 22).

<sup>188</sup> *Ibid*.

<sup>189</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at p. 278.

<sup>190</sup> *Ibid* at p.264.

<sup>191</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at p. 265.

<sup>192</sup> *Ibid* at p.269.

the relational nature of rights.<sup>193</sup> In the McBride judgment Moengeng held that ‘our rich values like ubuntu are consistent with the Constitution’.<sup>194</sup> In *Van Vuuren v Minister of Correctional Services & Others*<sup>195</sup> the court held that ubuntu is a foundational value that restorative justice can be linked to. In *Everfresh* the court held that it is necessary to infuse contract law, with constitutional values especially those of ubuntu (which inspires our Constitutional framework).<sup>196</sup>

### Ubuntu as a device for unequal bargaining power

Parallels can be drawn between ubuntu and unequal bargaining power in that unequal bargaining power is the examination of a person’s conduct; while ubuntu considers the interests of the community that a person is a part of. For inequality of bargaining power to be developed as a defence, ubuntu needs to be used. A balancing approach needs to be adopted in terms of which the rights and interests of the individual are weighed against the rights and interests of the community (the core of ubuntu).

Ubuntu will play a role in the determination of a defence based on unequal bargaining power, the reason being that abuse of a weaker bargaining party’s position would appear to run contrary to respect, compassion, and humaneness which are all entrenched in ubuntu.<sup>197</sup> This finds expression in inequality of bargaining power which is aimed to provide a defence against the abuse of private power by a party in a stronger position to the detriment of another. The constitutional value of ubuntu is aimed at putting the interests of the group over the interests of the individual. On this basis alone it appears that ubuntu will trump the interests of an individual if they are exercised in a manner that infringes on those of the community. It appears that ubuntu discards abuses of private power since the pursuit of

<sup>193</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) footnote 39. This was an administrative law case, where City Power ‘cut’ the electricity in a block of flats due to the bill not being paid. The tenants of the flats brought about court action for not being told of this decision (as they had paid rent to the landlord that included money for electricity, who chose not to pay it to City Power). Court said City Power was required to tell not only the landlord of its decision to cut the electricity, but also the tenants who were to be affected by it.

<sup>194</sup> *The Citizen 1978 (Pty) Ltd & Others v McBride (Jonhstone and Others , Amici Curiae)* 2011 (4) SA 191 (CC) A (supra note 168) at par.264.

<sup>195</sup> *Van Vuuren v Minister of Correctional Services & Others* 2012 (1) SACR 103 (CC) at p. 103.

<sup>196</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at p.276.

<sup>197</sup> Mokgoro Y ‘Ubuntu and the South African Law’ (1998) 1(1) *PELJ* 2 and the supporting comment of Sachs J in *Port Elizabeth Municipality v Various occupiers* 2005 (1) SA 217 (CC) at para37 where he said that ‘it combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.’

selfish desires of an individual would be inimical to the interests of the community. Although the mere existence of inequality is not sufficient for a finding of invalidity and unenforceability, should inequality amount to an abuse of private power, and thereby be adverse to the values of our Constitution (ubuntu), then a contract created in the midst of this inequality will be invalid and unenforceable because when tested against the content and meaning of ubuntu it would fall foul of our constitutional order.

This finds support in that in *Brisley*, Harms JA stated that in terms of our Constitution, public policy is now rooted in our Constitution and the fundamental values that enshrine it. He stated that contractual clauses which are offensive will be struck down, not because public policy requires it but because our Constitution and the values in it, which include ubuntu, require this.

In *Barkhuizen*, in the Supreme Court of Appeal,<sup>198</sup> it was held that constitutional values such as human dignity and freedom provide no all-embracing touchstone for invalidating a contract.<sup>199</sup> Further to this a contract that operates unfairly or harshly towards one party does not support a determination that it will offend constitutional principles.<sup>200</sup> When the matter went before the Constitutional Court it was held that a term that is inimical to the values of the Constitution (ubuntu) offends against public policy and is invalid and unenforceable.<sup>201</sup> Therefore unlike what the court said in *Geromolou*, not only will abusive conduct emanating from an unequal bargaining scenario implicate on the values of freedom and human dignity, it will also implicate on the constitutional value of ubuntu.

Louw, in his unpublished article, submits that the legal convictions of the community are informed by ubuntu.<sup>202</sup> Based on this one would submit that ubuntu needs to be strengthened as a constitutional value to challenge public policy (unequal bargaining power). Louw proposes the development of a test for good faith, and states that there can be “an ethical standard of fair dealing between parties which encompasses the notions of trust, a moral basis for the enforcement of promises, reciprocity, a duty to act fairly, having regard for the

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<sup>198</sup> *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

<sup>199</sup> *Napier* at par.11.

<sup>200</sup> *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at par. 12.

<sup>201</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at par. 29.

<sup>202</sup> Louw A “ 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?” Unpublished at p.40.

legitimate interests of the other party and to refrain from conduct that is commercially unacceptable to reasonable and honest people”<sup>203</sup> used as the basis of this test.

I submit that this test can be used as a cornerstone to strengthen the constitutional value of ubuntu as a device for unequal bargaining power, or as a test to determine the infringement of this constitutional value. The premises that Louw submits as encompassing this “good faith test” all have their basis in ubuntu. If parties conduct their contractual undertakings in a manner that takes cognisance of these ethical standards, “parties to a contract would be entitled to expect a certain measure of respect from the other party, of being treated fairly and within a contractual environment free from attempts at selfish over-reaching.”<sup>204</sup> Should parties engage in contractual dealings that run counter to upholding respect of the other party, by refusing to negotiate a renewal of a commercial lease,<sup>205</sup> such contractual dealings would operate in violation of the constitutional value of ubuntu and therefore be struck down.

It can therefore be submitted that ubuntu can be a device used to develop an inequality defence to challenge the validity and enforceability of contracts concluded contrary to public policy. If the inequality results in abuse of private power courts will engage in balancing the interests of the individual against the interests of the community. The constitutional value of ubuntu will trump that of the individual in a stronger bargaining power, if when acting lawfully his conduct is abusive and impedes on the constitutional value of the contracting party.

### 3.3 CONSUMER PROTECTION ACT

#### **The basis of the Consumer Protection Act**

The Consumer Protection Act<sup>206</sup> (hereafter referred to as the CPA) was promulgated to protect the interests of all consumers, improve access and quality of necessary information for consumers to be able to make informed choices according to their individual wishes and needs, and to promote and protect the economic interests of consumers. It can therefore be

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<sup>203</sup> Ibid at p.44.

<sup>204</sup> Louw at p.46.

<sup>205</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

<sup>206</sup> Act 68 of 2008.

submitted that the CPA aims to prevent situations of unequal bargaining power and provides protection to consumers as it aims to fulfil the rights of historically disadvantaged persons by promoting their full participation as consumers. It also provides for consumer education as well as the promotion of consumer participation in decision-making processes.<sup>207</sup>

The CPA applies to unequal bargaining power in contractual settings as the CPA is promulgated to govern relations between a supplier (offeror) and a consumer (offeree). A consumer is anyone to whom goods or services are marketed, who *transacts* (my emphasis) or benefits from the goods or services supplied by the supplier.<sup>208</sup> This means that by transacting with a supplier you become a consumer and the CPA applies to your transaction. The CPA governs transactions where one party supplies goods or services, so inequality is not confined to the transaction of goods only; it also applies to contracts where a service is provided (examples: getting banking facilities, hospital admission, and care).

#### **Section 40 of the Consumer Protection Act**

Instances of unequal bargaining power are dealt with in the Act in section 40 which provides for unconscionable conduct by a supplier. The section provides that:

( 1) A supplier or an agent of the supplier must not use physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or *any other similar conduct* against a consumer in connection with any-

- (a) Marketing of any goods or services;
- (b) Supply of goods or services to a consumer;
- (c) Negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
- (d) Demand for, or collection of, payment for goods or services by a consumer; or
- (e) Recovery of goods from a consumer.

(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy,

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<sup>207</sup> Preamble of the Consumer Protection Act.

<sup>208</sup> Section 1 of the Consumer Protection Act 68 of 2008.

ignorance, inability to understand the language of an agreement, or *any other similar factor*.<sup>209</sup>

The first subsection provides for the types of conduct that a supplier is prohibited from engaging in when marketing,<sup>210</sup> supplying,<sup>211</sup> negotiating<sup>212</sup> demanding<sup>213</sup> and recovering goods or services.<sup>214</sup> The section clearly states the types of conduct which are prohibited however it is important to note that the list is not exhaustive.<sup>215</sup> The section provides that 'any other similar conduct' will also be prohibited.<sup>216</sup> No precise definition is given as to what conduct or behaviour will amount to 'any other similar conduct' thereby broadening the net of included conduct. This can be interpreted to include situations where the supplier abuses his stronger power to coerce the consumer to submit to terms of the supplier's choosing (ceding all income to the supplier,<sup>217</sup> not receiving medical treatment unless signing admission documents that exclude supplier liability,<sup>218</sup> giving the supplier the right to evict).<sup>219</sup>

To support that unequal bargaining power can amount to prohibited conduct, subsection two provides that it will be unconscionable for a supplier to take advantage of a consumer in a position of being unable to support his interests due to reasons of disability, illiteracy, ignorance, inability to understand the language of the agreement, or any other similar factor.<sup>220</sup> 'Any other similar factor' remains undefined in the act.

When it is alleged that a supplier's conduct falls foul of the fair and honest dealings required of him in terms of part F of the Act, the courts are given power in some instances to pronounce on a matter in which contravention of section 40 is alleged.<sup>221</sup> The court is required to look at several factors in the supplier/consumer transaction to determine if the

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<sup>209</sup> Section 40 (2) of the Consumer Protection Act 68 of 2008.

<sup>210</sup> Section 40 (1) (a).

<sup>211</sup> Section 40 (1) (b).

<sup>212</sup> Section 40 (1) (c).

<sup>213</sup> Section 40 (1) (d).

<sup>214</sup> Section 40 (1) (e).

<sup>215</sup> Section 40 (1).

<sup>216</sup> Ibid.

<sup>217</sup> *Sasfin(Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

<sup>218</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

<sup>219</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

<sup>220</sup> Section 40 (2).

<sup>221</sup> Section 50 (1) (b).

transaction was unconscionable, unjust, unreasonable, or unfair.<sup>222</sup> Factors include the 'nature of the transaction or agreement between the parties, the relationship between them and their relative capacity, education, experience, sophistication and the *bargaining position* (my emphasis).'<sup>223</sup> Once the court is satisfied that there is a contravention they can make *any order* that is just and reasonable in the circumstances such as the restoration of money or property to the consumer,<sup>224</sup> and compensation to the consumer for losses or expenses relating to the transaction or agreement and court proceedings.<sup>225</sup>

In saying any order, the court is not confined and restricted to the orders listed in the section but are empowered to declare the contract/ transaction between the parties invalid or unenforceable due to the bargaining position disparities between the parties which led to the transaction being unreasonable, unfair, or unjust. The court is empowered to declare a transaction wholly void<sup>226</sup>, or to sever and alter the transaction without the void portions.<sup>227</sup>

#### **Section 40 as a device to develop inequality of bargaining power**

It can be submitted that the CPA will play a role in developing inequality as a defence for challenging contractual validity and enforcement. When a contract/transaction requires one party to provide goods or service to another, the CPA will automatically apply to such a transaction.<sup>228</sup>

The CPA provides for fair and honest dealings between the provider of the service and consumer which can be seen as recognition of the constitutional value of ubuntu. The list in section 40 is not exhaustive with regards to what type of conduct of the supplier would be contrary to the Act. 'Any other similar conduct' and 'or other similar factor' contained in subsections 40 (1) and (2) of the section are not defined; in interpreting the section it appears that using a stronger position in an abusive manner against a consumer to get a result favouring your own interests and being adverse to those of the consumer, will fall under 'any other similar conduct' making it a prohibition on the supplier in marketing, supplying,

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<sup>222</sup> Ibid.

<sup>223</sup> Section 52 (2) (b).

<sup>224</sup> Section 52 (3) (b) (i).

<sup>225</sup> Section 52 (3) (b) (ii) (aa) and (bb).

<sup>226</sup> Section 52 (4) (a) (i) (bb).

<sup>227</sup> Section 52 (4) (a) (i) (aa).

<sup>228</sup> Section 5 of the Consumer Protection Act 68 of 2008.

demanding, negotiating and demanding his goods or services as it constitutes unfair, dishonest dealings.

Section 40(2) makes it unconscionable for a supplier to take advantage of a consumer in a position where the latter is unable to protect his interests for the reasons listed, or any other similar factors.<sup>229</sup> Again 'similar factor' is not defined, so it can be construed that it is unconscionable for a supplier to take advantage of a consumer who is in a weaker bargaining position which makes him unable to protect his interests.

The CPA also allows for the courts to declare a transaction between a supplier and consumer void if it is unjust, unreasonable, unfair, and unconscionable which is also in line with the current position in our contract law which provides situations when a contract will be declared void and invalid.

### **3.4 THE COMPETITION ACT<sup>230</sup>**

This act is designed to combat the abuse of monopolies by opening the markets and keeping them open. This act was promulgated in response to the realities of Apartheid that gave excessive control and ownership to the national economy, which disallowed some races from full and free participation in the economy.<sup>231</sup>

#### **Competition and the abuse of dominant position**

The Competition Act was promulgated to regulate the abuse of power given to persons in positions of power in business or otherwise. Section 8 of the act prohibits a dominant firm from charging excessive prices to the detriment of a consumer, refusing to give a consumer access to an essential facility, or engaging in an exclusionary act when it is not feasible to do so. Unterhalter submits that the Competition Act is about a firm that dominates a market and must not be allowed to abuse that dominance in an anti-competitive advantage to its competitor's detriment, discriminate between consumers in the prices it charges, or charge excessive prices for the goods it supplies.<sup>232</sup> This goes back to the classical theory of contract where the market was small and the parties could deal with each other equally. The

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<sup>229</sup> Consumer Protection Act 68 of 2008.

<sup>230</sup> Act 89 of 1998.

<sup>231</sup> Section 2, Act 89 of 1998.

<sup>232</sup> David Unterhalter in Brassey '*Competition Law*' (2003) at p.180.



Competition Act has recognized the bargaining power disparities and has adopted mechanisms to prevent parties in stronger bargaining positions from abusing their power. This can be seen as a need for contract law to also develop to recognize that unequal bargaining power needs to be better strengthened as a factor at contract formation.

This extension and limitation of abuse under the Competition Act affects other aspects private law like our intellectual property statutes. By way of example, intellectual property law gives inventors exclusive monopoly rights to their inventions for a limited period of time. The Competition Act on the other hand is there to prohibit the abuse of monopolies. Intellectual property owners have a limited monopoly for the duration of time their inventions are protected for, allowing them to regulate who has access to the property, and the costs they charge to persons wanting to use their property. This can result in them charging exorbitant prices due to the fact that people are dependent on them, especially regarding copyrighted work. For instance should a patent for a medical drug be needed in developing countries, rights holders can use their monopoly rights to charge prices in excess of costs needed to protect their inventions. Surely contracting with the monopoly rights holder in such circumstances cannot be seen as free, voluntary contracts concluded by persons equal in bargaining strength.

As such the Competition Act and a number of other statutes prevent the abuse of dominance. In regard to intellectual property rights, this is done through issuing compulsory licenses and having parallel importation. Compulsory licences are enforced by the recipient country of the patent where there is an involuntary contract between the recipient country and an unwilling seller (patent holder). Compulsory licenses are issued where a dependant patent is being blocked, or if there is a refusal to license, or if there are anti-competitive exercises being exhibited by patent holders. Parallel importation is allowed where goods are brought into a country without the authorisation of the intellectual property rights holder after they had been placed legitimately elsewhere.

### **Abuse of dominant position in terms of the Competition Act as a device of unequal bargaining power**

Dominant position and unequal bargaining power are both recognised in terms of our law. Essentially both refer to the same thing, namely when a person, in terms of competition law,

is in a dominant position of having at least 45% per cent of the market.<sup>233</sup> By holding 45 % they are able to exercise power and influence on the market. Unequal bargaining power essentially ties in with this as it considers the relations between the stronger party (in the context of competition law, the dominant party) and the weaker party (the competitor or consumer). The Competition Act is there to regulate the abuse of dominance; my submission is that abuse of stronger bargaining power (in contract) should be regulated by the Constitution as abusive conduct, in any area of law if it is oppressive, unreasonable, and unconscionable. Should bargaining strength be exercised in a manner that results in abuse, the two doctrines (competition and contract) will converge on the recognition of the development of inequality defence to take cognisance of abuses of power.

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<sup>233</sup> Section 7 (a) of the Competition Act.

## Chapter 4

### CONCLUSION AND RECOMMENDATION

#### *Conclusion*

Unequal bargaining power will never be an independent defence used to challenge the validity and enforceability of contracts. This finds support in the fact that as a defence it does not have the requisite elements in itself to develop as a specific defence because it is too broad. I submit that the position in *Afrox* is a correct exposition of inequality, which is that it is one factor in determining whether a contract offends against public policy, with the mere presence of inequality not rendering a contract invalid and unenforceable. This role of inequality is confirmed as it cannot be ascertained automatically that contracting out of inequality results in unfairness. Unequal bargaining power can be developed and strengthened as a factor to deal with public policy challenges if it occurs as a result of a party in a stronger bargaining power position using that power in an abusive manner that results in unreasonableness, unconscionability, and oppression of the weaker party. S8(2) of the Constitution provides that power in terms of the Bill of Rights is not limited to vertical application between public bodies and citizens, however it also applies to relations between private individuals to the extent that the Bill of Rights applies to their contracts. For the courts to interfere in the contracts of private persons, power must be exercised in an abusive manner that implicates on the constitutional values of the weaker party. When this happens the court will declare a contract invalid and unenforceable because it is concluded in a manner contrary to the Constitution.

In amplification of the above is the recent KwaZulu- Natal High Court decision of *Standard Bank v Dlamini*<sup>234</sup>, a case which did not deal directly with the issue of unequal bargaining power but the court had to pronounce on the enforcement of a credit agreement for the instalment sale of a motor vehicle. The court looked at the bargaining powers of Standard Bank and Dlamini and found that due to the disparities in their bargaining strengths, Dlamini was not in a position to fully understand the terms of the credit agreement. Furthermore the court held the Bank should have been more proactive in ensuring illiterate Dlamini was in a position to understand the terms of the agreement.<sup>235</sup>

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<sup>234</sup> *Standard Bank of South Africa v Dlamini* 2013 (1) SA 219 (KZD).

<sup>235</sup> *Ibid* at par. 49.

As such one can submit that the courts are beginning to take a proactive role if bargaining disparities implicate on constitutional values or rights of the parties to the bargain. In this matter Pillay J, balanced the credit agreement against Dlamini's rights to equality as enshrined in the Constitution holding there to be a clear violation of Dlamini's constitutional right to equality. This balancing test supports the proposition that should unequal bargaining strength implicate the constitutional values or rights of persons, courts should endeavour to take a positive role in ensuring the unequal bargaining disparities are actioned upon.

Economic duress can be used in addition to public policy as a device to strengthen unequal bargaining power. The court in *Medscheme* advanced that something more is needed for the court to declare a transaction between parties to be more than hard bargaining. I submit that this something more is the exercise of the stronger party's bargaining strength used in an abusive manner that results in improperly obtained consensus by the weaker party so as to gain an economic advantage. By this economic duress will be found where the conduct of the stronger party implicates on the weaker party's constitutional values.

Ubuntu was identified as being a constitutional value in the *Joseph's* and *Everfresh* judgments. In earlier cases, courts held that a contract will be invalid or unenforceable if it impacts on the constitutional values of human dignity and freedom. I submit that if a contract is concluded in a manner that implicates on the constitutional values of ubuntu, when the "ubuntu test" is applied, the contract will be struck down as it not only offends against public policy but against the Constitution as well.

In the context of the Consumer Protection Act, section 40 deals with the requirement for fair and honest dealings. Section 40(2) provides that if a party is hindered (by another party) by reason of bargaining power from acting in their best interests, the resultant goods or services flowing from the transaction will not be concluded fairly. The act makes provision for any other similar factor or conduct as being unfair, with no definition provided for when conduct will be considered unfair or unconscionable. I submit that conduct between a consumer and supplier that is abusive and subversive to constitutional values will be unfair and contrary to the act warranting court interference in terms of s52.

The Competition Act recognises that situations existed during the apartheid era that resulted in abuse and dominance in the market and it thereby prohibits the abuse of dominance. Although this act deals largely with markets that implicate our economy, nothing precludes it from being extended to our contract law to prohibit abuse. The act is in line with the

development of the inequality defence in terms of public policy; in *Afrox* it was held that mere inequality will not result in conduct being contrary to public policy. The act proscribes that there must be abuse of dominance, which is what is also needed for inequality to develop. There must be abuse of the stronger bargaining power emanating from inequality to warrant interference. In terms of competition this interference is provided in terms of the Act, with our common law of contract interference is in terms of the judicial systems which will weigh the conduct to determine if it is in keeping with the Constitution.

### ***Recommendation***

I recommend that unequal bargaining power be developed as a factor for public policy. I submit that inequality be developed in such a manner that 1) should unequal bargaining strength be exercised in an abusive manner it will be contrary to the Constitutional 2) if inequality is exercised in a manner that implicates on the constitutional values of the weaker party then the court must make a determination that the conduct of the stronger party is unconstitutional for offending against the constitutional values of human dignity, freedom, and ubuntu.

I submit that the development of inequality in this regard (essentially common law) is in line with the Constitution in terms of section 39(2) which requires the development of common law to take cognisance of the spirit, purport, and objectives of the Constitution. This development is in line with section 39 (2) and the constitutional values of ubuntu and human dignity. A development of inequality will promote the spirit of the Constitution in that it will take into account our societal inequality which will impact on *pacta sunt servanda* in its present form which assumes that contracting parties do so on equal footing.

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UNIVERSITY OF  
**KWAZULU-NATAL**  
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**YAKWAZULU-NATALI**

20 November 2012

Miss Nonstikelelo Pearl Lugomo 209517083  
School of Law  
Howard College Campus

Dear Miss Lugomo

Protocol reference number: HSS/1249/012M

Project title: Inequality of Bargaining Power: A look at its common law treatment by the courts and the devices that can be used to develop it as a ground to challenge contract validity

**EXPEDITED APPROVAL**

I wish to inform you that your application has been granted Full Approval through an expedited review process.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number. Please note: Research data should be securely stored in the school/department for a period of 5 years.

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

Yours faithfully

Professor Steven Collings (Chair)

/pm

cc Supervisor: Andre Louw  
cc School Admin.: Mr Pradeep Ramsewak

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