

CHAPTER 3

THE SOUTH AFRICAN LAW OF CONTRACT:

A CRITICAL EVALUATION

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‘our legal categories are contingent and fluid, and...they can be reconstructed if found to rely on untenable and outdated conceptions of human nature, reason, and truth’¹

I INTRODUCTION:

In his analysis of form and substance in the South African law of contract, Cockrell (relying heavily on Kennedy’s analysis of American private law adjudication² and a critique of that analysis by Kelman³) shows that critical approaches to contract law occurs predominantly on two levels, namely one of form and one of substance.⁴ It is particularly useful to engage with the duality on both the levels of form and substance, since an exploration interrogating an idea of the correct form can never escape the question ‘Form of what?’⁵

The critical evaluation on the substance level, deals with the political morality underpinning the law of contract. It involves a juxtaposition of the extreme forms of individualism on the one side and altruism on the other. Kelman indicates that these are the ‘two vital competing political

¹ D Litowitz ‘Postmodernism without the Pomobabble’ (2000) 2(1) *Florida Coastal LJ* (available at <http://www.fcsl.edu/academics/journal/volumethree/Litow.htm>).

² D Kennedy ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard LR* 1685.

³ M Kelman *A Guide to Critical Legal Studies* (1987).

⁴ A Cockrell ‘Substance and Form in the South African Law of Contract’ (1992) 109 *SALJ* 40.

⁵ C Dalton ‘An Essay in the Deconstruction of Contract Doctrine’ 94 (5) *Yale LJ* 997, 1002.

paradigms that are at war both among and within us.⁶ The formal analysis points out that doctrine is and will always be expressed in one of two mostly inseparable but distinguishable forms, namely either a rule form or a standard form.

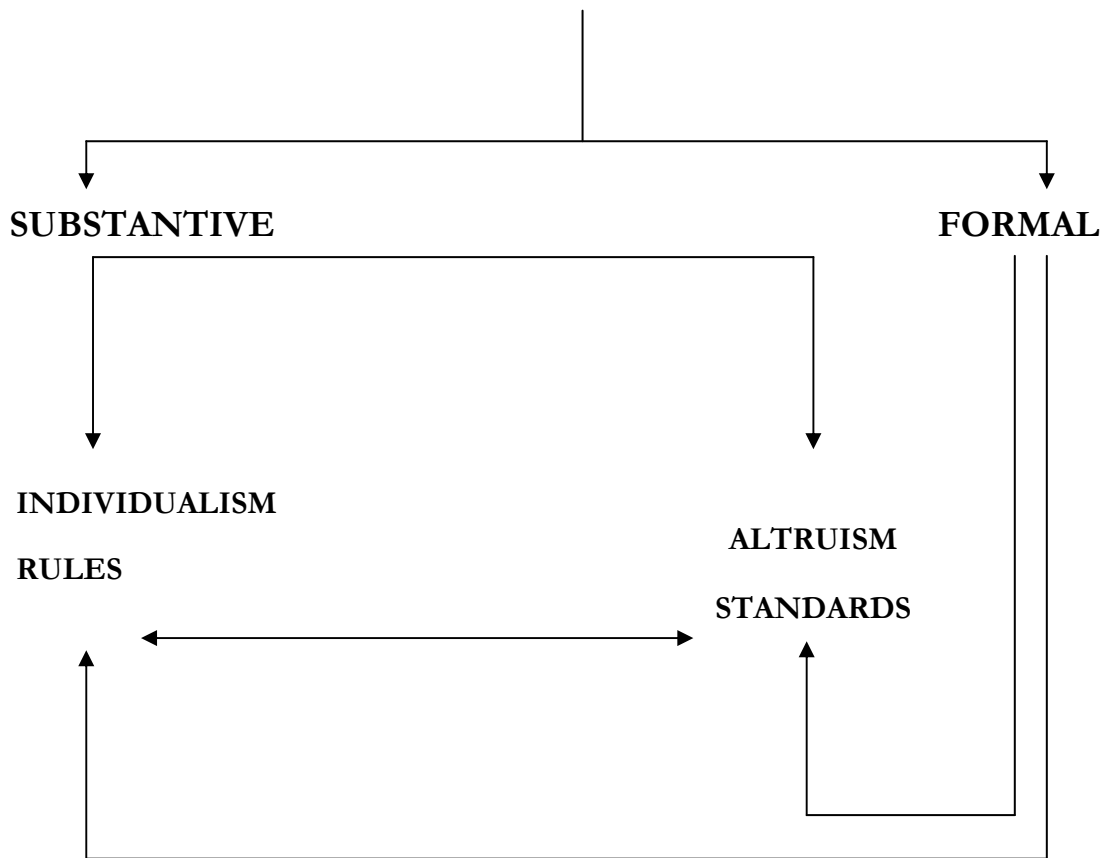
Kennedy's critical analysis further claims that the adherence to individualism and the adherence to rules, on the one hand, and a belief in altruism and a belief in the expression of doctrine in the form of standards, on the other, link up with each other on opposing sides of the duality. Kennedy claims that '[t]he substantive and formal dimensions are related because the same moral, economic and political arguments appear in each.'⁷ The opposites are placed as opposing ideological positions and so make up and contain the duality of form and substance.⁸ The diagram below attempts to visually set out Kennedy's approach. One has to be mindful of course of the fact that the diagram is overly simplified in the sense that it does not account the plethora of intermediary positions between the extreme poles of the duality.

⁶ M Kelman (note 3 above) 54.

⁷ Kennedy (note 2 above) 1685.

⁸ On the one side we will then find the pole of individualism and rules and on the other, altruism and standards.

CRITICAL EVALUATION OF CONTRACT LAW



In England, Adams and Brownsword have similarly argued that both (market-)individualism and consumer-welfarism (what Kennedy calls altruism and Cockrell collectivism) underpins the English law of contract.⁹ The authors claim that judges in the system are forever ‘caught within the ideological tensions’¹⁰ between these positions in the law. Those who follow a formalistic, market-individualist approach will uncritically apply the relevant rules from the rule-book, because they are concerned with following the rule-book and the rulebook itself tends to favour market-individualism.¹¹ Judges following a realist consumer-welfarist approach will be less concerned with the rule-book than with generating a desired result.¹² There is also the possibility

⁹ JN Adams & R Brownsword ‘The ideologies of of contract’ (1987) 7 *Legal Studies* 205.

¹⁰ *Ibid* 218.

¹¹ *Ibid* 221.

¹² *Ibid* 210, 222.

of a formalist consumer welfarist outcome, because realist decisions feed into the rule-book and lead to the generation of new rules.¹³ This contention links up with Kennedy's argument that rules (or the rule-book) can have an essentially standard-like appearance, which will lead to an obliteration of the distinction between rules and standards as a form.¹⁴ The indeterminacy and false sense of certainty that the rule-book generates, then lies open for exposure.

The juxtaposition of opposing poles of a duality as a framework for critical analysis is not new. Dalton explains the value of such an interrogation suggesting that each pole of a duality is best understood and defined in relation to its opposite.¹⁵ This understanding requires an (unavailable) prior understanding of the opposite of the pole which is being discussed or argued for. Although such an understanding may be unavailable as Dalton claims, the interrogation of the aspects of the pole which renders it opposite, can guide us in the search for such an understanding – not only of the opposite but also of the total duality in its complexity.

The approach that I will follow in Chapter 3 is based on the approach set out above. Dalton, referring to American contract law, has suggested that contract doctrine consistently favours one pole of each duality: 'Contract law describes itself as more private than public, interpretation as more objective than subjective, consideration as more about form than about substance.'¹⁶ This chapter will attempt to show that South African contract doctrine is no different. The doctrine (positive law) sets up and contain a duality which favours one pole over another, namely, in Kennedy's terms, a pole which accommodates a preference for individualism over altruism and rules over standards. This is but one useful way to express the dualities Dalton refers to above.

¹³ Ibid 220.

¹⁴ Kennedy (note 2 above) 1701.

¹⁵ Dalton (note 5 above) 1000 note 5.

¹⁶ Ibid 1000.

In the second part of the chapter I wish to explore the ‘under-privileged’ positions of altruism and the standard form in the South African law of contract. These values became and remain under-privileged precisely because of South African contract law’s preference for and commitment to liberal politics cast in formal rules. This exploration will be conducted also in the context of whether at all and to what extent, if any, South African courts truly apply altruist values and fluid standards in their decisions on contract. I conclude the discussion of pre-1994 case law in contract by suggesting that our law of contract reflects a clear commitment to privileging liberal ideology at the cost of altruistic values and the standard form.

II INDIVIDUALISM, THE SUBJECTIVITY OF VALUE AND THE WILL THEORY OF CONTRACT

The centrality of the project to continue privileging individualist politics in contract law is exposed by a substantive critical analysis of the field. Kennedy goes as far as to claim that individualism provides the law of contract with its justification.¹⁷ This individualist vision of the law of contract developed, as I have indicated in Chapter 2, out of a worldview in the late eighteenth century, which emphasised the relationship between the individual and society.¹⁸ This worldview was profoundly influenced by the escalation in commercial development at the time. People derived their positions of power within a society from their place in the social hierarchy as well as from their own efforts to assume and maintain the specific place within that hierarchy.¹⁹

¹⁷ Kennedy (note 2 above) 1715.

¹⁸ JM Feinman ‘Critical Approaches to Contract Law’ (1983) 30 *UCLA LR* 829, 831.

¹⁹ *Ibid.*

Individualism accepts as given a world of independent individuals who are encouraged to prefer the perusal of self-interest rigorously. A consideration or sensitivity for the interests of others fall outside of the aims of this way of life, although one should be prepared to obey the rules that make it possible to co-exist with other self-interested individuals.²⁰ The individual is entirely self-reliant. His conduct conforms to the belief that other individuals in the community are themselves motivated only by pure self-interest.²¹ The individualist morality is concerned with a respect for the rights of others but endorses the reluctance not to engage in communal activity. In addition, individualists are opposed to the use of private and public power to achieve social ends.²² Individualists believe that everyone should determine and achieve their aims without the help of, or in liaison with others.

Concerning the role of law in life, individualists believe that the law cannot impose upon legal subjects as a group the liability of shared profits or loss.²³ The law merely fixes the boundaries of individual freedom by defining and enforcing rights. In the context of the law of contract, the parties create their own law through the agreement. Mensch refers to this phenomenon as a ‘magic moment of formation, when individual wills created a right whose enforcement was necessary for the protection of free will itself.’²⁴ Contractual liability is thus only determined by the agreement (consensus) of the parties. The law of contract in an individualistic world, to borrow from Macaulay, provides the glue that binds individuals to their agreements.²⁵

²⁰ Ibid 839; Kennedy (note 2 above) 1713.

²¹ Kennedy points out that the individualist ethic should be distinguished from the egotistical ethic in the sense that the individualist ethic has a strong positive moral content whereas the egotist believes that it is entirely impossible and undesirable to place any limits on the perusal of self-interest. See Kennedy (note 2 above) 1714 – 1715.

²² Kennedy (note 2 above) 1715.

²³ Ibid 1713.

²⁴ E Mensch ‘Freedom of Contract as Ideology’ (1981) 33 *Stanford LR* 753, 760.

²⁵ S Macaulay ‘An Empirical View of Contract’ (1985) *Wisconsin LR* 465, 466.

Unger points out that this political position which experienced its heyday in the nineteenth century was driven by the idea that only a system of clearly delineated rules and rights could define a free political and economic order.²⁶ This order was maintained by a strict adherence to a system of predetermined rules and attempts to prevent that it is contaminated by policy considerations. In the contractual context, Kelman summarises the situation as follows: ‘...the rulelike position is privileged..., experienced as the starting-point ‘free contract regime position’ from which other positions represent *departures*’.²⁷

Feinman indicates that the central economic and philosophical principle of the individualist ideology is the belief in the subjectivity of value - the concept of value understood as being entirely dependent on individual perceptions.²⁸ In the previous chapter I emphasised that the subjectivist theory of value bears close relation with the development of the market economy.²⁹ It can therefore be said that individualism both serves as the justification for the market economy and that its politics was primarily responsible for its escalation.³⁰ Kennedy explains the relationship as follows:

The individualistic ethic is reflected in a perennial strain of economic theorizing that emphasizes the natural and beneficial character of economic conflict and competition.

According to this view, social welfare, *over the long run*, will be maximised only if we preserve a powerful set of incentives to individual activity. The argument is that the

²⁶ R Unger ‘Legal analysis as institutional imagination’ 1996 *The Modern LR* 1, 1-2.

²⁷ Kelman (note 3 above) 20.

²⁸ Feinman (note 18 above) 839.

²⁹ See the discussion of this topic in Chapter 2.

³⁰ Kennedy (note 2 above) 1714 n74, however, points out that economic individualism, as he uses the term, is not exclusively synonymous with the nineteenth century laissez-faire approach, but rather that economic individualism ‘appeals to the beneficial effects of competition and self-reliance within whatever structure of rights and regulations the state may have set up.’

wealth and happiness of a people depend less on natural advantages or the wisdom of rulers than on the moral fibre of the citizenry, that is, on their self-reliance. If they are self-reliant they will generate progress through the continual quest for personal advantage within the existing structure of rights.³¹

In the individualist world, the role of courts in contractual disputes is believed to be merely a non-interventionist one. Individualists believe that courts should enforce the self-created law in contracts and that they should prevent that obligations and duties are imposed on parties which they have not agreed to.³² The main argument in favour of a non-interventionist and marginalised role of the courts in contract is that such an approach will enhance freedom and security, which is necessary to sustain and guarantee the expansion of the market system. Individualists legitimise their position by claiming that their separate private benefits are transformed into a public benefit by the magic work of an invisible hand. This public benefit is then referred to in economic terms as the maximisation of wealth.³³

According to the individualist approach the utmost freedom of contract, as a manifestation of the parties' freedom of choice, will generate these ends. The doctrine of freedom of contract entails, amongst other meanings,³⁴ that parties should be free to choose one another as contractual partners and secondly, they should be free to contract on those terms chosen by

³¹ Ibid.

³² Feinman (note 18 above) 832; JN Adams & R Brownsword (note 10 above) 208.

³³ This belief in an invisible hand is the neoclassical interpretation of a concept originally employed by Adam Smith in his classic work A Smith, RH Campbell & AS Skinner (eds) *An inquiry into the nature and causes of the wealth of nations* (1976).

³⁴ For additional interpretations of the freedom of contract concept see L Hawthorne 'The Principles of Equality in the Law of Contract' (1995) *THRHR* 157, 163.

them.³⁵ Adams and Brownsword indicate that the latter concept has two limbs to it: Firstly, it entails that the ‘free area’³⁶ in which parties are allowed to set their own terms, should be maximised and secondly, parties should be held to the terms they had agreed upon in the free area.³⁷

A doctrine of unconscionability (contractual justice) in the law of contract is not seen as conducive to the maximisation of wealth, because it would mean that the ‘free area’ is minimised and that parties may potentially escape the terms they had agreed upon in the free area.³⁸ This would in turn limit term-freedom and because partner-freedom has already undergone substantial restrictions,³⁹ such an erosion of term-freedom would result in an unacceptable marginalisation of freedom of contract and the sanctity of contract. Furthermore it implies an interventionist role of the courts which, to the individualist, is an unacceptable one.

However, Feinman shows that a marginalised law of contract, based on an individualist way of exercising choice entails at least two problematic issues.⁴⁰ Firstly, the individualist image is an

³⁵ Adams & Brownsword (note 9 above) 208 refers to these concepts as partner-freedom and term-freedom respectively.

³⁶ Ibid 209.

³⁷ Ibid indicating that this concept is none other than the principle of sanctity of contract.

³⁸ Ibid. The authors show that the principle of sanctity of contract has a double emphasis: Firstly if parties should be held to *their* bargains, courts should not intervene to strike down terms which to them appear unreasonable. Secondly, if parties should be *held* to their bargains, courts should not ‘lightly relieve’ them from their bargains.

³⁹ See for instance the anti-discrimination provisions of the Constitution (section 9(3)) and generally the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (as amended), specifically the Schedule to the Act containing an illustrative list of unfair discrimination in certain sectors. These provisions have (commendably) limited partner-freedom substantially in the South African law of contract.

⁴⁰ Feinman (note 18 above) 840.

incomplete one as individualist characterisation of individual and social welfare neither portrays the aspirations of people nor that of the law completely. Secondly, Feinman points out that individualism does not generate a single, consistent set of doctrines for the entire law of contract. Instead, it generates a plethora of rhetorical questions and contradictions. In addition, the individualist definition of value and the ultimate purpose of maximisation of wealth, reveals a preference for values which can easily be reproduced on the open market. He shows that it is improbable that the social values of togetherness, solidarity and love⁴¹ will be realised through exchange in the market. Wealth in the individualistic sense is thus not equal to personal welfare or human well-being, in the wide sense.⁴²

If one is to bear in mind the two most important ideals of individualism, namely the enforcement of defined rights on the one hand and the maximisation of wealth, on the other, the following tautology presents itself in the individualistic discourse: a strict enforcement of contracts (rights) limits individual freedom thereby marginalizing, as opposed to furthering, individual welfare. Strict enforcement of agreements in accordance with the principle of freedom of contract is not the only possible way in which human well-being can be achieved.⁴³ One of the consequences of this assertion is that the legitimacy of the argument in favour of a marginalised law of contract is and remains questionable.

⁴¹ For an account of how (South African) law generally cannot contain love see K van Marle 'Love, law and South African community: Critical reflections on 'suspect intimacies' and 'immanent subjectivity' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 231.

⁴² Feinman (note 18 above) 840-841.

⁴³ Ibid 842.

III FORMALISM: THE SHAPE OF INDIVIDUALISM

(a) Introduction

Formalism, understood as a preference to express substantive legal doctrine in the form of rules and to apply these rules mechanically, reveals an intimacy with individualism on the substance level of Kennedy's portrayal of the contract law duality. This relationship exists due to the fact that the proponents of the individualist ethic seem to believe that the law should take the form of abstract and formal rules, which defines the elements of a contractual right. It will be seen that formalists believe in the substance of individualism and accordingly are ready to apply the rule that contracts will be enforced because the parties willed it.⁴⁴

The mechanical application of these rules will, according to the individualists, protect the parties' autonomy from judicial contamination. Because the outcome of the application of the rule is predictable, individuals can anticipate the legal consequences of their conduct, which creates certainty. It also allegedly allows the parties to calculate almost exactly to what extent the conclusion of a specific contract will legally serve their self-interest.⁴⁵ This invention and mechanical application of so-called 'value neutral' rules to further the individualist ideal is the project of legal formalism. In the next section I will set out the most important elements of formalism and apply these to a relatively recent South African judgment.

⁴⁴ Kelman (note 3 above) 20.

⁴⁵ Feinman (note 18 above) 832.

(b) General characteristics of formalism

The formalist approach to the law of contract is fundamentally rule-orientated.⁴⁶ It advocates faith in a system of value-neutral rules which are applied within a moral vacuum and without reference to policy considerations in circumstances calling for its application. This according to formalist believers will provide clear and predictable answers in all cases, thus enhancing legal certainty.

The formalist agenda in the law of contract has been summarised by Adams and Brownsword in the manner I describe below:⁴⁷

First and foremost, the rule-book rules the law: ‘The world may change, but the traditional rules, like ‘Ol’ Man River’, ‘jus’ keep rollin’ along.’⁴⁸

Secondly, the rule-book is (almost mathematically) comprehended of as a closed logical system. Just like one plus one must equal two, the contractual concepts embodied in the rules have a logic of their own.⁴⁹

Thirdly, the ‘conceptual purity and integrity’⁵⁰ of the rule-book should be maintained. This means that there will inevitably be a commitment to ‘clean-up’ the law where ill-fitting or non-rulelike doctrines are encountered.

⁴⁶ Adams & Brownsword (note 9 above) 214.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid. As a single example Adams and Brownsword refers to the offer/acceptance model according to which it is determined whether a contract has come into being. If acceptance of the offer occurred, a contract *has* to have come into being according to the formalist rule.

⁵⁰ Ibid 214.

Fourthly, formalism reveals a preference for conservatism. Formalists encourages judges to base their decisions on well-established rather than less well-established or dubious doctrine.

Fifthly, sympathy and politics are not regarded as material considerations of formalist judges, unless of course the rule-book elevates these considerations to a status of materiality. If the rule is against a party it is just too bad for him. No time is afforded to interpretation of the rule with reference to considerations of fairness or justice or some other moral or social purpose. Subjective judicial opinions (politics) about the fairness or not of a particular rule should not influence the decision and can never serve as an excuse to deviate from the rule-book.⁵¹

In the sixth instance, formalists always apply the rule anti-critically and mechanically, precisely because politics are not allowed to play a role. ‘Shibboleths such as “freedom of contract” and phrases such as “sanctity of contract” are cited without considering the social context or the social outcomes of their application. The rule-book, like Iustitia, is blind to any and all considerations of merit, purpose of the rule or context of the dispute.’⁵²

In the seventh place the formalist belief is that the routine application of rules will only be optimal where the rule itself is clear and certain and does not allow for any measure of judicial discretion. Formalists would, for instance, prefer a rule which unequivocally, prohibit the inclusion of exemption clauses in contracts, than a rule stating that the inclusion of an exemption clause is prohibited where the clause is (clearly) ‘unreasonable in the circumstances’.⁵³

Finally, Adams and Brownsword point out that an approach to shy away from legal reform as well as a strict interpretation of appeal court jurisdiction, may be classified as by-products of

⁵¹ Ibid 214 - 215.

⁵² Ibid 215.

⁵³ Ibid.

formalism. The reluctance to effect legal reform accords with the formalist conception that judges should apply rules, not make them.⁵⁴ The second by-product refers to the tendency of appeal courts to rather enquire into whether the correct rule was applied than to enquire into whether the correct legal question was asked or whether the decision was correct on substantive legal grounds.

(c) A South African example

A striking illustration of the formalist approach in the South African law of contract can be found by revisiting the majority judgment of the Supreme Court of Appeal in *Brisley v Drotzky*.⁵⁵ By endorsing the *Shifren* principle⁵⁶ the Court revealed its commitment that first and foremost, the rule-book governs the law. Simultaneously it revealed its belief that the *Shifren* rule has a logic of its own (it is logical not to enforce oral amendments to written contracts).⁵⁷ The third characteristic of formalism referred to above, namely the commitment to rid the law of non-rulelike or ill-fitting doctrine, is revealed in the majority's sharp attack on a minority judgment of Olivier, JA⁵⁸ where he argued for increased consideration of the *bona fides* in the law of contract⁵⁹ – an approach which clearly does not 'fit' into the formalist program.

The formalist commitment to conservatism and well established doctrine, is clearly articulated where the court asks: '[T]he *Shifren* principle is trite and the question is why, after almost forty

⁵⁴ This approach could also be termed positivism.

⁵⁵ 2002(4) SA 1 (SCA).

⁵⁶ *Brisley v Drotzky* 2002(4) SA 1 (SCA) 10H – 12F.

⁵⁷ *Ibid* 11B-E.

⁵⁸ *Ibid* 13B-15D.

⁵⁹ See the judgment of Olivier, JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) discussed in Chapter 4.

years, it should be overthrown?⁶⁰ Sympathy for the effect of the application of the *Shifren* principle on the life of Ms Brisley and her family, did not influence the court's decision on the application of the rule (the court unequivocally held that personal circumstances are not legally relevant circumstances⁶¹) neither did the court consider the social context or social outcome of its cry that the sanctity of contract prevails. In addition, it is submitted that the clarity of the *Shifren* rule and the fact that it does not allow for any measure of judicial discretion (oral amendments to a written contract are invalid unless also reduced to writing) persuaded the court to endorse it.

Even the 'corollaries' of formalism, namely to shy away from major law-reform and a narrow interpretation of jurisdiction is clear in the majority's decision. It is clear that the court was not prepared to come to the aid of Ms Brisley and thereby affect a major law-reform in contract. It justified its decision not to effect this reform on a clear *narrow* interpretation⁶² of its jurisdiction to develop the common law in accordance with 'the spirit, purport and objects of the Bill of Rights'⁶³ and its inherent jurisdiction in terms of section 173 of the Constitution to develop the common law. I will return to a detailed discussion of this decision in the next chapter.

⁶⁰ *Brisley v Drotzky* (note 56 above) 11F.

⁶¹ *Ibid* 21B.

⁶² *Ibid* 21B – 22D where the court holds that it has no discretion in terms of section 26(1) of the Constitution to allow or disallow an eviction order where the legally relevant circumstances are present, namely that the defendant is in possession and the plaintiff is owner. The Court did not consider whether the non-variation clause was contrary to the spirit, purport and objects of the Bill of Rights – an omission which in itself reflects a narrow interpretation of its jurisdiction to develop the common law.

⁶³ Section 39 of the Constitution.

(d) Why is formalism bad?

Feinman points out that the critique of a rule-based adjudication contains two basic elements:⁶⁴ First is the problem of formalism's attempt to create certainty. A rule system may convey an image of certainty, but because of the limitations of language and the complexity of social reality, this image is false.⁶⁵ Rules may be overlapping, vague and contradictory and do not necessarily reduce legal uncertainty or increase predictability. Furthermore, as Feinman points out, the decisions regarding application, choice and interpretation of rules inevitably involves judicial discretion which is and remains subjective.⁶⁶ There is thus no more inherent objectivity in the set of rules than the subjective (or perceived) objectivity the rule system brings about. Kennedy and Kelman refer to this by pointing out that rules are necessarily both under- and over-inclusive as to their purpose: 'Rules are bad because they enable a person to 'walk the line,' to use the rules to his own advantage, counterpurposively.'⁶⁷

Feinman's second point of critique of formalism is that it blindly assumes that people will respond to the threat of the rules.⁶⁸ Macaulay has shown that often the rules of contract law in the text-books take a back seat to business relationships, customs and interests at stake.⁶⁹ In addition, people may not know what the rule says or even that there exists a rule governing a particular situation, because, after all, not every person to whom a contract applies is a lawyer or possesses the necessary legal education required to know about the rule - especially in South Africa.

⁶⁴ Feinman (note 18 above) 844.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Kelman (note 3 above) 40 – 41.

⁶⁸ Feinman (note 18 above) 844.

⁶⁹ S Macauley 'Non-contractual relations in business

But some of us have one, or two or even a whole team of lawyers, which brings me to Feinman's third point of critique namely the fact that knowledge of the law normally resides with those who also are in the stronger bargaining positions. This greater legal sophistication suggests that those in weaker bargaining positions and their ignorance of the law might be exploited, which makes contract law just another 'vehicle for magnifying patterns of inequality in society.'⁷⁰

IV INDIVIDUALISM'S AND FORMALISM'S 'NATURAL AFFINITY'⁷¹

The existence of the relational link between a commitment to rules and a commitment to the individualist ethic, may be explained with reference to the nineteenth century view that consistency, stability and certainty were believed to be the values which will promote and enhance individual freedom and equal opportunity.⁷² Kennedy himself is of the opinion that individualism and an advocacy of rules formed part of a larger intellectual entity, namely the *laissez-faire* theory,⁷³ but he did not attempt to explain why the link exists and expressly avoids an interpretation that the connection is either necessary or logical.⁷⁴ Kelman describes the relationship between substance and form as 'aesthetic' in the sense that there is 'little way to prove the connection other than by laying it out and directly assessing its plausibility.'⁷⁵

⁷⁰ Feinman (note 18 above) 845.

⁷¹ Adams & Brownsword (note 9 above) 221.

⁷² D van der Merwe 'The Roman-Dutch law: from virtual reality to constitutional resource' 1998 1 *TSAR* 1, 6.

⁷³ Kennedy (note 2 above) 1746. Also see D Kennedy 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities' (1985) 34 *American Univ LR* 939 in which Kennedy discusses the role of law in economic thought of the nineteenth century and elaborates upon the 'kinship' between classical legal thought (formalism) and the economic ideas of the nineteenth century.

⁷⁴ *Ibid* 1738, 1746, 1748-1749.

⁷⁵ Kelman (note 3 above) 59.

In his discussion of Kennedy's *Form and Substance* article, Kelman shows that an explanation for the connection may be found in the fact that the normative case of both the ideologies rests on the assumption that value is subjective and that the two ideologies share 'nearly identical value-sceptical arguments.'⁷⁶

Kennedy shows that there is a connection between the legal arguments lawyers will employ when they defend the strict interpretation of a rule and those employed when they ask a judge to make a substantive, individualistic rule.⁷⁷ Individualists believe that people should be prepared to accept the detrimental consequences of their actions, without looking to support from others. Similarly, formalists believe that the ones who are detrimentally affected by application of the rule, have no-one to blame but themselves.⁷⁸ Kelman puts it as follows: '...the rule *form* may always tend to appeal to the *substantive* individualist because its formal virtues match up aesthetically with the virtues he is inclined to admire.'⁷⁹

The connection between individualism and rules form what we might refer to as the privileged pole of the duality that is contract doctrine. In the South African law of contract the connection between individualist politics cast in a rule form is particularly evident. It's privileging in adjudication even more so. Gabel & Feinman have suggested that a legal case comes into being where the system breaks down and conflicts arise, which they have equated to 'the "moment" of legal ideology'.⁸⁰ This is the moment at which specific beliefs, political commitments and economic interests seek to justify the conflict by looking at it through an idealized lens.⁸¹

⁷⁶ Ibid 61.

⁷⁷ Kennedy (note 2 above) 1738.

⁷⁸ Ibid 1739.

⁷⁹ Kelman (note 3 above) 59.

⁸⁰ P Gabel & JM Feinman 'Contract Law as Ideology' in D Kairys (ed) *The Politics of Law* (3ed) (1998) 508

⁸¹ Ibid.

In the following section I aim to show how the politics of the law of contract in South Africa consistently favour protection of the individualist/rule position. I focus primarily on the protection of the freedom of contract/sanctity of contract slogans by pausing at critical moments of legal ideology in its history and try to point out that these critical decisions contain the politics of individualism in a distinct rule form preference, which in itself can be applied formalistically (mechanically) to effectively mask the political commitment behind a claim of value neutrality.

V ‘FREEDOM OF CONTRACT’ AS A POLITICAL SLOGAN IN SOUTH AFRICA

(a) Early days

One of the most frequently quoted passages justifying the privileging of freedom of contract as the basis of contractual obligation in the South African law of contract, is to be found in a late nineteenth century case from the English law, called *Printing and Numerical Registering Co v Sampson*.⁸²

If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.

⁸² 1875 LR 19 Eq 462 per Jessel MR. The mood is also expressed in more general terms by Kotze, CJ in *Brown v Leyds* (1897) 4 OR 17, 31 who held that ‘no Court of Justice is competent to inquire into the internal value, in the sense of the policy, of the law, but only in the sense of the meaning or matter of the law’.

South African jurist's protection of individualism in freedom of contract terms can also be traced back to the late nineteenth century.⁸³ In *Burger v Central South African Railways*⁸⁴ Innes, CJ held in no uncertain terms that the South African law of contract does not recognise the right of a court to release a party to a contract from his obligations on considerations of fairness.⁸⁵ In passing it should be noted that this decision seems to have ignored the fact that it was not yet at the time an unassailable fact that the *exceptio doli generalis* was not part of the South African law of contract.⁸⁶

In 1939 the decision in *Jajbhay v Cassim*,⁸⁷ purported to challenge the freedom of contract doctrine and made its reign subject to the qualification that 'simple justice between man and man' is something which public policy also requires. This decision was however heavily criticised by the doyennes of contract at the time, De Wet and Van Wyk, who took it upon themselves to appeal for the restoration of freedom of contract to its unqualified position as the central value and primary determinant of public policy in the law of contract:

This decision of the Appellate Division throws this matter into a boundless morass of uncertainty, and that on the grounds of unconvincing considerations. [...] It is in any event undesirable to make the issue of whether one can reclaim or not dependent on

⁸³ See also V Terblanche (2002) *The Constitution and General Equitable Jurisdiction in South African Contract Law* Unpublished LLD thesis, UP 153 who refers to the 'privileged position of 19th century contract law theory in South Africa.'

⁸⁴ 1903 TS 571.

⁸⁵ *Burger v Central South African Railways* 1903 TS 571, 576.

⁸⁶ The decision which annihilated the *exceptio doli generalis* only came in 1989 in the *Bank of Lisbon* case discussed later in this chapter.

⁸⁷ 1939 AD 537.

such an uncertain test such as *simple justice between man and man* and the conviction of the court whether the one or the other should be relieved.⁸⁸

This privileging of freedom of contract echoes in the court rooms of this country like a hollow warning to those who dare to claim that their contract might be unfair. Below follows only a *capita selecta* of examples in support of this contention. These examples represent critical moments in the battle between freedom of contract and equitable considerations in which freedom of contract consistently emerged carrying the victory torch.

(b) The abolishment of the *laesio enormis* doctrine

In 1949 the tension between freedom of contract and possible intrusions on its terrain presented itself in the law of sale when the validity of the *laesio enormis* doctrine was considered in the case of *Tjollo Ateljees (Eins) Bpk v Small*.⁸⁹ In Roman law the sellers of land were allowed to cancel the contract, on the grounds of *laesio enormis*, where the price paid for the land was less than half of the market value of the land at the time of conclusion of the contract.⁹⁰ The doctrine of *laesio enormis* was further developed in the Roman-Dutch law and made applicable to contracts for the sale of immovable as well as movable things where one of the parties suffered a disproportional loss due to the operation of the contract.⁹¹ The operation of *laesio enormis* constituted a drastic relaxation of the freedom of contract doctrine seeing that either seller or buyer could cancel the contract where it proved to be operating unfairly against one of them.⁹²

⁸⁸ JC De Wet & AH Van Wyk (eds) *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 83. (Author's translation, emphasis added.)

⁸⁹ 1949 (1) SA 856 (A).

⁹⁰ Ph J Thomas *Essentialia van die Romeinse Reg* (1980) 119.

⁹¹ *Tjollo Ateljees* (note 89 above) 868.

⁹² DD Tladi 'Breathing equality into the law of contract: Freedom of contract and the new constitution' (2002) *De Jure* 306.

In the above mentioned decision the court found that the *laesio enormis* doctrine was not applicable to the dispute between the parties, because the respondents were not able to prove that what they received was actually worth less than half of what they paid.⁹³ In addition, the doctrine was abolished as not being received into the South African law of contract, according to Cockrell clearly on the basis that it constituted an altruist intrusion on the terrain of individualism.⁹⁴

The defensibility of Cockrell's statement above is clearly illustrated in the judgment of Van den Heever, JA who held that the doctrine of *laesio enormis* placed an unreasonable limitation on the freedom of contract of the parties and caused the law to intervene and transform the contract into something neither of the parties intended it to be.⁹⁵ In addition, the court rejects *laesio enormis* on the basis that it is 'open-ended' and affords a too wide judicial discretion.⁹⁶

In the light of what has been said about the connection between individualism and rules, it is therefore not surprising that Van den Heever, JA goes as far as to admit that the problem with *laesio enormis* is that it cannot be expressed in the form of a clear rule of law: 'I am satisfied that despite all the learning relating to the rescission of contracts on the ground of *laesio enormis* nothing has evolved out of it which could be dignified by the name of a rule of positive law.'⁹⁷ The court also held that the doctrine had no right of existence in a modern world with a highly complex and sophisticated commercial organisation.⁹⁸ Consequently, the burial rites over *laesio enormis* are again administered in the language of the protection of the freedom of contract:

⁹³ *Tjollo Ateljees* (note 89 above) 876.

⁹⁴ Cockrell (note 4 above) 44.

⁹⁵ *Tjollo Ateljees* (note 89 above) 875.

⁹⁶ *Ibid* 865 and Cockrell (note 4 above) 45.

⁹⁷ *Tjollo Ateljees* (note 89 above) 875.

⁹⁸ *Ibid* 860.

In my opinion the doctrine that persons of full legal capacity can resile from contracts into which they have solemnly entered in the absence of fraud, duress or excusable mistake, was never part of the law of South Africa and in the few cases in which it was applied, it was done so by mistake⁹⁹....

In *laesio enormis* a person of full legal capacity, whose free exercise of volition was in no way impaired or restricted, seeks relief not against a wrong, but against his own lack of judgment, ineptitude or folly. Since the alleged rule encourages a party to divest himself of obligations *which he has freely and solemnly undertaken*, I do not consider it in harmony either with immanent reasons or public policy¹⁰⁰

It took the legislature a mere three years to follow suit. In 1952 *laesio enormis* suffered a certain death by statute.¹⁰¹ Consequently, another important common law tool which could have contributed to the furtherance of fairness in the law of contract perished at the feet of freedom of contract.¹⁰²

⁹⁹ Ibid 871.

¹⁰⁰ Ibid 873. (Emphasis added.)

¹⁰¹ Section 25 of the General Law Amendment Act 32 of 1952 provides as follows: ‘Doctrine of *laesio enormis* abolished in Republic - No contract shall be void or voidable by reason merely of *laesio enormis* sustained by either of the parties to such contract.’

¹⁰² Tladi (note 92 above) 311.

(c) The recognition of undue influence as a ground for restitution

In 1956 the recognition of undue influence as a ground on which a contract could be set aside or declared void, came to the fore in the case of *Preller v Jordaan*.¹⁰³ Jordaan, a medical doctor, had treated Preller as a patient of his for a number of years. Preller was an elderly, ill, emotionally and physically weakened farmer who was most worried about the fate of his four farms after his death.¹⁰⁴ Because there were no living children left, Preller feared that should he not recover from his sick bed (a possibility of which Dr Jordaan constantly reminded him) his life's work will be lost and his widow left penniless.¹⁰⁵

Dr Jordaan, despite Preller's initial doubt, constantly advised and attempted to persuade Preller to transfer ownership in his four farms to Jordaan, supposedly, so that Jordaan could see to the farming activities in the interest of Preller's spouse in the event of Preller's death.¹⁰⁶ Transfer was subsequently effected into Jordaan's name.¹⁰⁷ Hereafter Jordaan transferred ownership in three of the farms to his children.¹⁰⁸ Preller 'miraculously' recovered from his sick-bed only to find that he had been swindled out of his four farms.¹⁰⁹ Preller subsequently instituted action to have the agreement, in terms of which he transferred the farms to Jordaan, set aside on the grounds of undue influence and to claim restitution of the four farms.¹¹⁰

¹⁰³ 1956 (1) SA 483 (A).

¹⁰⁴ Ibid 488B-C.

¹⁰⁵ Ibid 488D-E.

¹⁰⁶ Ibid 488E-G.

¹⁰⁷ Ibid 488F.

¹⁰⁸ Ibid 488G-H.

¹⁰⁹ Ibid 488H – 489A.

¹¹⁰ Ibid 489A-C.

The recognition of this ground for restitution originates from the English concept of ‘undue influence’.¹¹¹ It is not surprising to find that undue influence developed in England as a concept of equity. The doctrine justified restitution in circumstances where the strict principles of the common law did not allow an attack on the validity of the contract.¹¹²

The doctrine of undue influence was recognised in *Preller v Jordaan*¹¹³ by the majority of the court - but not on the ground of equitable considerations but on the basis that it could in appropriate circumstances negate *consensus*. The court focused on the Roman-Dutch interpretation of undue influence and concluded that where one party influences the other to such an extent that his *will* becomes weak and pliable and the party exercising the influence then brings his *will* to bear in an unprincipled manner on the other so that the influenced party concludes a transaction with the influencing party which he will not have concluded otherwise of his own free *will*, then the influence is undue and the influenced party has a right of restitution.¹¹⁴ In addition, the court stated that the test to determine whether the contract was void or voidable in these circumstances is whether the party seeking to have the contract set aside concluded it *willfully* and *knowingly* with the intention to have legal consequences flow from it.¹¹⁵ The minority judgment of Van den Heever, JA similarly reveals a devotion to the will theory of contract and outwardly rejects the recognition of undue influence as a ground of restitution.¹¹⁶

The effect of the court’s acceptance of undue influence as a ground on which restitution could be claimed and indeed its finding that Dr Jordaan unduly influenced Mr Preller, did not,

¹¹¹ Van der Merwe *et al Kontraktereg Algemene Beginsels* (1994) 92.

¹¹² *Ibid.*

¹¹³ *Preller and Others v Jordaan* (note 103 above) 493H.

¹¹⁴ *Ibid* 492H.

¹¹⁵ *Ibid* 496E.

¹¹⁶ *Ibid* 506D.

however, generate a result which could be called ‘equitable’. The Court held that Mr Preller did indeed *knowingly and willingly* intend to transfer ownership in the farms to Dr Jordaan, albeit that his willingness was brought about by undue influence.¹¹⁷ The court thus held that the ownership in the farms indeed did pass to Dr Jordaan and from him to his family members to whom he transferred three of the farms.¹¹⁸

The practical outcome of the court’s decision was thus that Mr Preller could only claim back one of his four farms on the ground of undue influence, namely the one still registered in the name of Dr Jordaan. The court held that Mr Preller did not accuse the new owners of the farms of being party to or having had knowledge of the undue influence¹¹⁹ and therefore their position was different from Dr Jordaan’s in that it was not affected by the voidability of the agreement between Preller and Jordaan.

The decision of the majority was showered with individualistic criticism, the strongest of which was again enunciated by De Wet and Van Wyk who are of the opinion that the majority judgment amounts to “n ondermyning van die onskendbaarheid van afsprake”¹²⁰ (an undermining of the sanctity of agreements). According to the authors the minority judgment is the correct one because it outwardly denies the existence of undue influence in our law of contract.¹²¹

The tyranny which I aim to expose exists in the following: Had the court (as De Wet and Van Wyk recommends) not recognised undue influence at all as a ground for restitution, an elderly and ill person, who had been exploited by his sly and cunning doctor, would not have any

¹¹⁷ Ibid 496G.

¹¹⁸ Ibid.

¹¹⁹ Ibid 494A.

¹²⁰ De Wet & Van Wyk (note 88 above) 49.

¹²¹ Ibid.

remedy with which to attack the contract and claim back his life's work. De Wet and Van Wyk are of the opinion that the law of contract should not even have given Mr Preller the opportunity to claim back one of his farms, because the 'onskendbaarheid van afsprake' (the idol that is freedom of contract) has to prevail and be protected at all costs. So on the one hand we can say that luckily the court did not opt to protect the idol and at least Mr Preller could claim back one of his farms and that in that respect, the court's decision has to be commended.

But what would the result have been had the court opted for the direct application of fairness by concluding that the remedy existed in equity and not as one of the doctrines affecting the consensus? What if the court held that the contract had not been entered into in good faith by Dr Jordaan? It seems to me that the agreement between Mr Preller and Dr Jordaan would then have been held to be so exploitative in the circumstances, contrary to the bona fides and inequitable so as to be void *ab initio* but at the very least unenforceable. Whatever the case may be, had the contract been declared void *ab initio* or unenforceable on equitable grounds or because it was contrary to good faith, Dr Jordaan would not have acquired ownership and therefore could not transfer ownership. This would mean that Mr Preller would be able to claim back all four of his farms. It appears therefore, that by following the indirect approach and accepting undue influence as a doctrine imposing on the consensus of the parties, the court indeed did worship the idol and soothed its conscience about the impact of this on Mr Preller's life by at least allowing him to get back one of the farms.

Individualists, formalists and positivists (such as the like of De Wet and Van Wyk) will probably remark that Preller had to accept responsibility for the consequences of his wilful and knowing actions. The outcome of this decision clearly illustrates the commitment to the individualist/rule ideals I refer to above and the non-commitment to considerations of how the court's decision impacts on the lives of people in real situations. It also emphasises one of my general points,

namely that on a substance level, the individualist pole of the contract duality is continuously favoured politically above the altruist pole.

(d) The *exceptio doli generalis* is dead.¹²² Long live the *exceptio doli generalis*.¹²³

(i) The *exceptio doli generalis* is dead

One of the most striking (South African) illustrations of the link between a preference for rules and a preference for individualism as well as of the political preference for these preferences, is to be found in the judgment of Joubert, JA in *Bank of Lisbon and South Africa v De Ornelas & Others*.¹²⁴

This decision is generally regarded as the decision in which the Appellate Division (currently, the Supreme Court of Appeal) did away with the judicial perception that a contract could be declared unenforceable by a court on the basis of considerations of unfairness. The Appellate Division held that the *exceptio doli generalis* as a technical remedy founded in equity does not form part of the South African law.¹²⁵

The question which the court primarily concerned itself with was whether the *exceptio* survived the reception of Roman Law into Roman-Dutch Law and of Roman-Dutch Law into the South African law. The court held unqualifiedly that the *exceptio doli generalis* never formed part of

¹²² *Bank of Lisbon and South Africa v De Ornelas & Others* 1988 (3) SA 580 (A).

¹²³ *Van der Merwe v Meades* 1991 (2) SA 1 (A) read with AJ Kerr 'The *replicatio doli* reaffirmed. The *exceptio doli* available in our law' (1991) 106 *SALJ* 583.

¹²⁴ Note 122 above.

¹²⁵ *Van der Merwe et al* (note 111 above) 234. The operation of this remedy in Roman Law was discussed in Chapter 2.

the Roman-Dutch law,¹²⁶ could therefore not have been received into the South African law¹²⁷ and that its occasional appearances on the scene of the South African law¹²⁸ should finally be prohibited by burying it ‘as a superfluous, defunct anachronism.’¹²⁹

In this case, certain securities had been provided by the De Ornelas Fishing Company to the Bank of Lisbon as security for obligations under an overdraft facility.¹³⁰ The securities consisted of a suretyship and a special mortgage of immovable property.¹³¹ Although the securities had been provided to secure obligations in terms of the overdraft facility, the relevant security agreements provided that the securities also covered obligations from ‘whatsoever cause or causes arising’.¹³²

The De Ornelas Fishing Company cancelled its overdraft facility after the bank refused to increase it.¹³³ It discharged its entire debt under the overdraft and accordingly wanted to cancel

¹²⁶ *Bank of Lisbon* (note 122 above) 605H.

¹²⁷ *Ibid* 607A.

¹²⁸ For a discussion of the various interpretations of the *exceptio doli generalis* see SWJ Van der Merwe, GF Lubbe & LF Van Huyssteen ‘The *exceptio doli generalis*: Requiescat in pace – vivat aequitas’ (1989) 106 *SALJ* 235. From these discussions I deduce that where the court accepted that the *exceptio* was part of the South African law, it restricted its application ie resisted an interpretation that it is an all-encompassing equity defence in contract, which is another way of saying that it tried to make the *exceptio* a pliable servant of freedom of contract. See *Paddock Motors (Pty) Ltd v Ingesund* 1976 (3) SA 16 (A) and *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A).

¹²⁹ *Bank of Lisbon* (note 122 above) 607B. Also see GF Lubbe ‘*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg’ (1990) 1 *Stell LR* 9.

¹³⁰ *Bank of Lisbon* (note 122 above) 607E.

¹³¹ *Ibid* 607F.

¹³² *Ibid* 609A.

¹³³ *Ibid* 607I.

the security agreements accessory to the overdraft.¹³⁴ The bank refused to accept cancellation of the security on the basis that the securities also secured obligations of the De Ornelas Fishing Company due to the bank in terms of a transaction which was entirely independent from the overdraft facility, namely a contract for the forward purchase of dollars.¹³⁵ De Ornelas Fishing subsequently raised the *exceptio doli generalis* during the course of its attempts to escape the security agreements, which of course, were unsuccessful as the court ruled that the *exceptio* was not part of the South African law.¹³⁶

Van der Merwe, Lubbe and Van Huyssteen have characterised the approach of the majority in this case as ‘positivist-historical’.¹³⁷ The authors point out that the court approached the historical sources in such a formalistic and clinical manner that it got lost in a historical methodology which does not appear to be sensitive to problems of our times and which leaves policy considerations undealt with.¹³⁸ Lewis points out that the majority decision appears to be ‘fixated’ on the *exceptio* itself rather than to focus on the principle which underlies it.¹³⁹

Typically positivistic, a long lesson in Roman Law follows which concludes that the *exceptio* is a ‘superfluous, defunct anachronism’¹⁴⁰ and that equity cannot override a ‘clear rule of law’.¹⁴¹ To this Van der Merwe, Lubbe and Van Huyssteen replies that it appears then that equity has an ‘interstitial (sic) operation’ limited to areas where existing rules are unclear or incomplete. The authors also consider the question whether the Appellate Division regards its role as comparable

¹³⁴ Ibid 607J-608A.

¹³⁵ Ibid 608A-B, E.

¹³⁶ Ibid 607B, 608F.

¹³⁷ Van der Merwe, Lubbe & Van Huyssteen (note 128 above) 238.

¹³⁸ Ibid 239.

¹³⁹ J Lewis ‘Fairness in South African Contract Law’ (2003) 104 *SALJ* 330, 334.

¹⁴⁰ *Bank of Lisbon* (note 122 above) 607B.

¹⁴¹ Ibid 606A-B.

to that of the *index* in Roman Law who was only a finder of facts and, if this was the case, opine that it would certainly be ‘as untenable to our modern law as it seems to have been to Roman law’.¹⁴²

In his discussion of the majority decision, from what we may call a critical legal perspective, Cockrell shows that the decision that the *exceptio doli* constitutes ‘a superfluous, defunct anachronism’,¹⁴³ is founded upon an extreme form of individualism which denies that the law may ‘legitimately superimpose an overriding duty to act in good faith’¹⁴⁴ on the voluntary agreements of legal subjects with full capacity.¹⁴⁵ Again, as Cockrell points out, the judge’s problem with accepting the *exceptio*, like in the *Tjollo Ateljees* case, was that it enjoins a judge to employ a standard which cannot be cast in ‘a clear rule of law’.

Cockrell’s view accords to that of Van der Merwe, Lubbe and Van Huyssteen who point out that the majority expresses no belief in the responsibility of a court to ensure justice – a responsibility which would necessarily entertain commitments to standards. In accordance with its preference for rules and individualist politics, the majority positivistically quotes *Van der Linden*’s account of *Voet* 1.1.16 with approval: ‘...[j]udges and jurists ought to look to nothing more carefully than this, that they do not forsake the written law for some headstrong equity...’¹⁴⁶ Joubert, JA’s rejection of the *exceptio doli* is thus clearly linked to his disapproval of the discretion which will be afforded to judges by its acceptance. The majority decision clearly does not take account of the subjectivity/discretion which is at play in considering whether ‘a clear rule of law’ is

¹⁴² Van der Merwe, Lubbe & Van Huyssteen (note 128 above) 237-238.

¹⁴³ *Bank of Lisbon* (note 122 above) 607B.

¹⁴⁴ Cockrell (note 4 above) 44.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Bank of Lisbon* (note 122 above) 610D-E.

applicable or not, neither does it account for the subjectivity in the interpretation of that ‘clear rule’.

Lewis confirms the above where she opines that the rejection of an equitable jurisdiction in the law of contract by the majority of the Appellate Division calls for an explanation other than one rooted in history and the old authorities and considers ‘the inherent conservatism of lawyers’ and ‘the safety of the authorities of yesteryear’¹⁴⁷ as possible reasons for the insistence upon formalism and the application of clear rules. On a policy level there seems to exist therefore, a clear link between historic positivistic accounts of the law, formalism and individualism.

The minority judgment of Jansen, JA appears to be very different from that of the majority and confirms the above statements about the majority judgment from the perspective of an argument for the *retention* of the *exceptio doli*. Jansen, JA holds that substantive principles of individualism and the certainty principle of formalism, are not absolute:

It is said that the recognition of the *exceptio doli* in this sense would be an infringement of the freedom of contract and of the principle that *pacta servanda sunt* – that it would lead to legal uncertainty. Freedom of contract, the principles of *pacta servanda sunt* and certainty are not however absolute values.¹⁴⁸

Even from the beginning of the judgment it appears that Jansen, JA was at least willing to consider that the *exceptio* still has a role to fulfil in our modern law.¹⁴⁹ Jansen, JA, like the majority, also investigates Roman Law, but his judgment, as opposed to that of the majority,

¹⁴⁷ C Lewis ‘Towards an equitable theory of contract: The contribution of Mr Justice EL Jansen to the South African law of contract’ (1991) 108 *SALJ* 249, 263.

¹⁴⁸ *Bank of Lisbon* (note 122 above) 613A-C.

¹⁴⁹ *Ibid* 611H.

reveals a clear consciousness of the change in values and convictions of equity which is part and parcel of the development of a society over time.¹⁵⁰

In addition, Jansen, JA shows how the so-called ‘absolute’ twin principles of *pacta servanda sunt* and freedom of contract, have come under attack¹⁵¹ and also how it can be limited in the South African law by standards embodying notions of fairness and reasonableness in the public interest. According to Jansen, JA investigations into the ‘prevailing *mores* and the sense of justice of the community as a norm’¹⁵² will determine the limitations on freedom of contract. Concerning the *exceptio* there is, according to the judge, then no real objection to the determination of a standard of *aequitas* in a similar way.¹⁵³

After continuing to undermine the authorities on which the majority relied and pointing out that ‘[i]n our law the requisite of good faith has not as yet absorbed the principles of the *exceptio doli* nor has the concept of *contra bonos mores* as yet been specifically applied in this field’, Jansen, JA concludes that ‘[t]o deny the *exceptio* right of place would leave a vacuum’.¹⁵⁴ The minority judgment concludes as follows: ‘In my view it would offend the sense of justice of the community to allow the Bank to use the strict wording of the documents to retain the securities after payment of the overdraft.’¹⁵⁵

¹⁵⁰ Ibid 612F-613A.

¹⁵¹ Ibid 613B-614A.

¹⁵² Ibid 615D.

¹⁵³ Ibid.

¹⁵⁴ Ibid 616C.

¹⁵⁵ Ibid 617J-618A.

(ii) Long live the exceptio doli generalis

Let us pause for a moment at one of the aims of this study which is to show that our stories about the law of contract are and will be organised along dualities reflecting the basic tension between self and other. Pursuant to these terms, we can say that the decision in *Bank of Lisbon* was a decision choosing ‘self’ and that the exceptio doli generalis involves a decision to involve / be concerned with the other, which the court resisted by abolishing the exceptio.

The above being said, let us consider the facts of another Appellate Division decision reported three years after the Appellate Division had ruled in the *Bank of Lisbon* case, namely the case of *Van der Merwe v Meades*.¹⁵⁶ In this case Van der Merwe sold a house to Meades in terms of a deed of sale containing a voetstootsclause. Some time after transfer had taken place Meades sued Van der Merwe for the cost of the repair of a latent defect of which he alleged he was unaware at the time of the sale. Van der Merwe denied also that he knew about the defect at the time of the sale and relied on the voetstootsclause.¹⁵⁷

The court summarised the position in Roman law which was basically, that the seller of a merx with a latent defect could rely on a voetstootsclause but that that was not the end of it. The buyer could reply to this by using the replicatio doli which had the effect that he had to prove that the seller knew about the latent defects at the time of the sale and wilfully withheld the fact of their existence to the buyer to mislead him. If the seller succeeds with the replicatio doli the seller could no longer rely on the voetstootsclause.¹⁵⁸

¹⁵⁶ 1991 (2) SA 1 (A).

¹⁵⁷ *Van der Merwe v Meades* 1991 (2) SA 1 (A) 2F-3A.

¹⁵⁸ *Ibid* 4H-5A.

The court proceeded to consider the Roman-Dutch reception of this position and held that it was indeed the same in Roman Dutch law and furthermore, that the position was received unchanged into the South African law.¹⁵⁹

The effect of this decision is that the *replicatio doli* forms part of the South African law of contract.¹⁶⁰ Now, the same court had previously held in *Bank of Lisbon* that the conclusions about the non-reception of the *exceptio doli generalis* ‘equally hold for the *replicatio doli generalis*’.¹⁶¹ Kerr submits that the linking was correct.¹⁶² If, as Kerr points out, the *replicatio doli*, on the *later* decision of the court, survived the reception, and the same court linked the *replicatio* with the *exceptio* and has not departed from that position, then the only conclusion that can follow is that the *exceptio doli generalis* must also have survived the reception.¹⁶³ It appears that the court in *Van der Merwe v Meades*¹⁶⁴ unintentionally resurrected the *exceptio doli generalis*. (Incidentally, as Kerr points out, the *Van der Merwe* case does not refer to the *Bank of Lisbon* case.¹⁶⁵)

Where, as Kerr points out, a later court with the same status holds contrary to its own prior decision, then the later position should be followed, that is, then the *Van der Merwe* decision should be followed which (unintentionally) reaffirms the existence of the *exceptio doli generalis* in South African law.¹⁶⁶ This seems to me to be a correct exposition of the consequences of the *stare decisis* principle.

¹⁵⁹ Ibid 8B-H.

¹⁶⁰ AJ Kerr (note 123 above) 584.

¹⁶¹ *Bank of Lisbon* (note 122 above) 608F-G.

¹⁶² Kerr (note 123 above) 584.

¹⁶³ Ibid 585.

¹⁶⁴ 1991 (2) SA 1 (A).

¹⁶⁵ Kerr (note 123 above) 585.

¹⁶⁶ Ibid 586.

The question is whether this position was *in fact* followed – that is, did the *Van der Merwe* case in fact resurrect the *exceptio doli generalis*? It appears not. In the majority judgment in *Brisley v Drotosky*¹⁶⁷ the SCA clearly stated its position: It criticised the judgment of Oliver, JA in the *Saayman* case for attempting to breath new life into the *exceptio doli generalis* and then concluded that the question whether the *exceptio* deserves reconsideration does not arise currently.¹⁶⁸ It therefore accepted that the *exceptio doli generalis* is not part of the South African law. In the separate judgment Olivier, JA seems to affirm that ‘this court did not hesitate to pronounce the funeral rites over the *exceptio doli generalis*’.¹⁶⁹ In the subsequent unanimous decision in *Afrox Healthcare v Strydom*¹⁷⁰ the Supreme Court of Appeal confirmed (quoting *dicta* from the *Brisley* case with approval) that good faith, reasonableness, fairness and justice are abstract considerations subjacent to our law of contract which may shape and transform rules of law, but that they are not independent or ‘free-floating’ bases for the non-enforcement of contracts. The Court held that it has no discretion and does not act on the basis of abstract ideas, but precisely on the basis of crystallised and established rules of law, when it decides the enforceability of a contractual provision.¹⁷¹

This confirms that the Supreme Court of Appeal does not consider the *exceptio doli* part of the law of contract; although it has itself held that it still is a part of our law. The fact that the defence was never raised again after the *exceptio doli*’s ‘burial’ in *Bank of Lisbon* confirms that legal practice have accepted that the *Bank of Lisbon* decision is ‘the (final) law’.

¹⁶⁷ 2002 (4) SA 1 (SCA) 29C-D.

¹⁶⁸ *Brisley v Drotosky* 2002 (4) SA 1 (SCA) 14A-B.

¹⁶⁹ Ibid 29B (Author’s translation from the original Afrikaans).

¹⁷⁰ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹⁷¹ Ibid 40H-41A.

Returning to my suggestion that the existence of the *exceptio doli generalis* in contract law is an attempt to ensure and enhance ethical concern with the other in contractual relations, I suggest that the decision in *Van der Merwe v Meades* is a decision to open up a space *for* ‘the other’ of the law of contract whilst the decision to exclude it closed that space. The fact that the decision in favour of ‘the self’ is the privileged one, is a matter of politics, which brings me back to my general point that the individualism/rules intimacy (tyranny) of liberal legal ideology is the politically favoured ideal of the law of contract. However, the existence of an underprivileged decision choosing ‘the other’, by the same court, suggests that there is an other side to this (story of the law of contract). This confirms that Dalton’s point, namely that liberalism’s inability to resolve the tension between self and other suggests that our stories (about the law of contract) will be organised along dualities which reflect this basic tension, also holds true in the South African law of contract.

VI DEDUCTIONS

The affinity or intimacy between the substantive ideal of individualism and the form ideal of rules seem to me to form a strong coalition which successfully resists critical moments where the opportunity arises to challenge freedom of contract on equitable grounds. If I describe it as a *strong* coalition the description begs the question why it is strong. The answer is unavoidably an issue of power. An issue of who is where, which is another way of saying that it is an issue of politics.

My story of the law of contract in South Africa attempts to reveal that falsity and contradiction are rampant in the law of contract. In other countries this realisation has resulted in a critical focus on the inescapable presence of politics in the law of contract. In addition, the critics focus on the unrealisability of a formal system of rules and on the significant gap between idealised

world views and the real operation of the law of contract in a modern society.¹⁷² This approach generally resorts under what is referred to as a value orientated approach.

This approach is a controversial one, at least for those who consistently engage with the program of separation between contract law and contractual morality. It's controversy dangerous, because it poses a threat to and undermines the prevalence of the currently favoured / privileged position.¹⁷³

In what follows I shall attempt to reveal the suppressed supplement of the law of contract, which is not to be understood as my description of *the* other of the South African law of contract. I remain concerned with and am conscious of 'the message that we can neither know nor control the boundary between self and other'.¹⁷⁴

VII THE IDEAL OF ALTRUISM

The substantive ideal (or counter-ethic) which opposes the ideal of individualism in the law is referred to as altruism¹⁷⁵ or collectivism.¹⁷⁶ The values of altruism are normally expressed as opposites of individualist values. This normally causes collectivist values to be described as 'less well-defined'¹⁷⁷ and vague.¹⁷⁸ Feinman is of the opinion that altruism contains two elements.

¹⁷² Feinman (note 18 above) 833.

¹⁷³ Dalton (note 5 above) 1007.

¹⁷⁴ Ibid 1113.

¹⁷⁵ Kennedy (note 2 above) 1717.

¹⁷⁶ Feinman (note 18 above) 842; Cockrell (note 4 above) 42.

¹⁷⁷ Kelman (note 3 above) 54-55: '..., we believe in the (less well defined) politics of altruism,...'

¹⁷⁸ P Selznick 'The Idea of a Communitarian Morality' (1987) 75 *California LR* 445, 445: 'Yet the communitarian idea is vague; in contemporary writing it is more often alluded to and hinted at than explicated.'

Firstly, there is within this ideology a pervasive communitarian vision. The second element of the altruist discourse emphasises the interdependence of the modern commercial community rather than the communitarian ideal.¹⁷⁹ What does Feinman mean when he says this? This is the question I shall interrogate in the remainder of this section.

(a) The commitments of the altruist ideal

Individuals with an altruist vision do not see the world as a place where freedom-seeking isolates operate with a will only to promote self-interest.¹⁸⁰ They believe that humans are, to a far greater extent, social creatures, inundated with the responsibilities and benefits which crystallise out of one's existence in a community.¹⁸¹ Accordingly, they are not and believe they should not be concerned with the realisation of self-interest only. Altruist individuals consider the interests of others and how their actions impact on the well-being of those others. Kennedy summarises it as follows: '[t]he essence of altruism is the belief that one ought not to indulge a sharp preference for one's own interest over those of others.'¹⁸² 'Altruism enjoins us to make sacrifices, to share and to be merciful.'¹⁸³

From the above-mentioned, Kennedy deduces that there are two important concepts at play in the altruist vision, namely sharing and sacrifice.¹⁸⁴ Kennedy describes sharing as a static concept in that it presupposes an existing distribution of wealth, which is redistributed by sharing.¹⁸⁵ Sacrifice on the other hand is dynamic in the sense that people take positive action to influence

¹⁷⁹ Feinman (note 18 above) 842 – 843.

¹⁸⁰ Kennedy (note 2 above) 1717; Feinman (note 18 above) 842.

¹⁸¹ Ibid.

¹⁸² Kennedy (note 2 above) 1717.

¹⁸³ Ibid.

¹⁸⁴ Ibid 1718.

¹⁸⁵ Ibid 1717.

the causal chain of events in order to limit another's loss or to assist that other in the maximising of benefits. No prior distribution of wealth is therefore assumed.¹⁸⁶ Kennedy places sharing and sacrifice as the 'polar opposite' of the liberal notion of exchange.¹⁸⁷

Lubbe and Murray are of the view that it is the good faith principle in our law of contract which forms the theoretical basis for the judicial activism that is required to further the altruist ideal.¹⁸⁸ The authors argue that it is only by recognising this role of the judiciary that South African contract doctrine can move away from 'a rigidly individualistic stance to one which takes account of the structural inequalities within society'.¹⁸⁹

A further important theme in altruist discourse is that obligations are from a public interest (as opposed to an individual character) perspective not regarded to be in direct correlation with rights, which shows that obligations carry heavier weight in an altruist world.¹⁹⁰ Thus, although altruists do not concern themselves with the denial of rights, they do not value individual rights above communal norms and responsibilities in the normative hierarchy when they are faced with problematic questions of morality and justice.¹⁹¹

Altruism believes that the liberal focus on rights contributes to the individual's alienation from the community in which she finds herself. Altruists also question and deny the neutral stance of

¹⁸⁶ Ibid.

¹⁸⁷ Ibid 1718.

¹⁸⁸ GF Lubbe & CM Murray *Farlam and Hathaway Contract: Cases Materials and Commentary*(3ed) (1988) 469

¹⁸⁹ Ibid.

¹⁹⁰ Selznick (note 178 above) 454 shows that the importance of obligations lies in that it defines roles. Selznick uses the example of a person who starts a new job and generally wants to know firstly what her obligations / duties are and not what her rights are.

¹⁹¹ CA Ball 'Communitarianism and Gay Rights' (2000) 85 *Cornell LR* 443, 443-444.

liberalism and the view that the State is a neutral moral arbitrator which does not endorse any specific form of ‘the good life’.¹⁹² Altruists argue that this state neutrality is problematic, because it masks the fact that a liberal state itself endorses a specific moral hierarchy in which freedom and autonomy have the highest ranking.¹⁹³ It is obvious that this emphasis on individual freedom and autonomy will be filtered down to the regulation mechanisms of private relationships between individuals, of which the law of contract is the most important. In accordance with this political agenda the mere blind enforcement of a contract in accordance with the principle of freedom of contract, will be regarded as a manifestation of the autonomy principle in the private law context.

In *Form and Substance* Kennedy addresses the liberal objection that it is nonsense to force someone to behave altruistically. To this objection he responds as follows:

True, the notion requires the *experience* of solidarity and the voluntary undertaking of vulnerability in consequence. It therefore implies duties that transcend those imposed by the legal order. It is precisely the refusal to take all the advantage to which one is legally, but not morally entitled that is most often offered as an example of altruism. It follows that when the law “enforces” such conduct, it can do no more than make people behave "as if" they had really experienced altruistic motives.¹⁹⁴

Courts following an altruist approach therefore acknowledge that blind enforcement of contracts is an ineffective method of achieving social ends. This approach flows from the notion of the

¹⁹² Ibid.

¹⁹³ Ibid 445.

¹⁹⁴ Kennedy (note 2 above) 1722.

‘implicated self’.¹⁹⁵ The morality of the implicated self expands on the idea that one’s most important obligations do not flow from consent or consensus, but rather from identity and relatedness. Consent implies agreement, negotiation, reciprocity and determinacy. Altruism acknowledge the non-contractual element of contract and believe that contractual obligation refers to something far more fundamental and less voluntary than consensus. Accordingly, the blind enforcement of contract is seen as an unsatisfying method to achieve social ends.¹⁹⁶

Courts committed to an altruist ethic in contractual adjudication investigate aspects such as the procedures followed when the contract was concluded as well as the terms of the contract. Above all, the approach engages with the socio-economic and social context of the agreement so as to ensure that its enforcement or not is in accordance with the furthering of social values.¹⁹⁷

Selznick justifies the necessity of this approach as follows: ‘As we move in a more complex direction we enter a world of open-ended obligations that depend less on specific agreements and more on understanding the nature of the relationship and the values at stake’.¹⁹⁸ Van der Merwe (referring to Unger) offers the following as a reason for the importance of a value orientated, altruist discourse: ‘The conceptual unity, doctrinal fixity and policy neutrality this idea [the liberal idea] implied could not,..., be sustained against the diversity of social conflict and the intractability of ideological differences’.¹⁹⁹

Where individualists postulate an ideal world of freedom and equality, altruist vision sees the gap between this world and the real world of limitation and inequality which we live in.²⁰⁰ This gap is,

¹⁹⁵ Selznick (note 178 above) 451.

¹⁹⁶ Ibid 452.

¹⁹⁷ Feinman (note 18 above) 843.

¹⁹⁸ Selznick (note 178 above) 452.

¹⁹⁹ D Van der Merwe ‘The Roman-Dutch law: from virtual reality to constitutional resource’ (1998) 1 *TSAR* 1, 10.

²⁰⁰ Feinman (note 18 above) 842

as communitarians point out, responsible for the fact that the market does not manage to maximise social welfare.²⁰¹ Selznick points out that Rawls in describing his ‘difference principle’ pointed out that social and economic inequalities are sometimes desirable and necessary, but that their moral worth should be judged by reference to the contribution they make to the maximisation of wealth of the individual who is least privileged.²⁰²

Doctrinal manifestations of altruism in the law of contract include the doctrine of unenforceability of agreements on the grounds of public policy.²⁰³ Feinman appears to interpret considerations of public interest and fairness as altruistic ideals in the law of contract. In the South African law of contract this public intrusion on the law of contract is often successfully blocked by the political slogan that generally, the utmost freedom of contract is in the public interest.

(b) The interdependent nature of modern commercial society

Feinman explains that the second element of the altruist (what he calls collectivist) discourse focuses on an economic perspective.²⁰⁴ The perspective in this focus is that the system of exchange in a developed capitalist economy functions at its best, not when it relies entirely on the accumulation of individual choices, but rather when it understands exchange as a relation and regulates individual choices through intervention of the law.

²⁰¹ Ibid.

²⁰² J Rawls *A Theory of Justice* (1971) 13-15 as discussed in Selznick (note 178 above) 446.

²⁰³ Feinman (note 18 above) 842 n54.

²⁰⁴ Ibid 843.

MacNeil's work on relational contract theory is probably the most important in this regard.²⁰⁵ His theory shifts the focus in contract from the things contracted for, to the relationship between the parties.²⁰⁶ Thredy expresses the hope that once we come to conceive contract in this way, we could see contract doctrine becoming more responsive to different kinds of contracts and the differences between the parties to a contract.²⁰⁷ Similarly, Mulcahy argues that relational contract theory can help us to develop a more sophisticated understanding of underprivileged contractual concepts such as good faith and unconscionability.²⁰⁸

MacNeil's relational contract theory is grounded in a pluralistic, context-sensitive model of contractual relations, which emphasises that in the real world, many contracts are based on medium to long term relationships.²⁰⁹ Throughout these relationships parties rely on good faith, forbearance and sharing. MacNeil places crucial importance on a broad conception of exchange as opposed to its narrow utilitarian conception. This broad concept of exchange MacNeil calls 'relational exchange.'²¹⁰ Relational exchange understands that exchange is the inevitable product of specialisation of labour, wherever such labour occurs, 'between discrete entities in markets, or within a family.'²¹¹ In addition, relational exchange understands that discrete exchange can never be the only economic function to accomplish the actual tasks of physical production, distribution and final consumption. Instead, relational exchange theory argues that discrete exchange occurs

²⁰⁵ IR MacNeil *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980); IR MacNeil 'Relational Contract Theory: What We Do and Do Not Know' (1985) *Wis LR* 483.

²⁰⁶ DL Thredy 'Feminists in Contract Doctrine' (1999) 32 *Indiana LR* 1247, 1264.

²⁰⁷ *Ibid.*

²⁰⁸ L Mulcahy 'The limitations of Love and Altruism – Feminist Perspectives on Contract Law' in L Mulcahy & S Wheeler (eds) *Feminist Perspectives on Contract Law* (2005) 5.

²⁰⁹ Thredy (note 206 above).

²¹⁰ IR MacNeil 'Relational Contract Theory: What We Do and Do Not Know' (note 205 above) 485 – 486.

²¹¹ *Ibid* 485.

only in the interstices between ‘quasi-independent entities’²¹² and is thus ‘not in itself physically productive.’²¹³ Only relational exchange – a collective working together to produce a good or service with exchange value – can be physically productive.²¹⁴

Based on this theory of relational exchange, relational contract theory conceives of a contract as a relationship, ‘an on-going, complex, multifaceted and constantly renegotiated relationship.’²¹⁵ The relational theorists are concerned with addressing the gap between theory and practice by showing that ‘the world of traditional contract doctrine is already no longer the world we live in.’²¹⁶ Generally, relational contract theorists advocate an equitable approach to contracts which exposes and emphasises the tyranny which often results from situations where rules are imposed on the parties which have little, if anything to do with what they actually intended.²¹⁷ As Hillman points out, relational contract pursues fairness at the cost of certainty²¹⁸ in offering a conception of ‘open contracts’ where the exact terms are negotiated beyond the moment that the responsibility arises.

²¹² Ibid 487.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Threedy (note 206 above) 1258.

²¹⁶ Dalton (note 5 above).

²¹⁷ MJ Frug ‘Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law’ (1992) 140 *U Pa L Rev* 1029, 1037.

²¹⁸ Ibid 1036.

Because the theory understands contract as a relationship, it is able to associate values with contract which have traditionally not formed part of contract theory, such as mutuality and solidarity.²¹⁹

This is not to say that relational contract theory defies the idea of power. But it does offer a wholly different understanding of the idea of power. Birden reminds us that Sharon Welch's work points us to the power of relational living.²²⁰ Welch maintains that ethical living can only reside in what she calls 'the beloved community' where members find healing and resilience in the power of relatedness. 'The beloved community is based not on shared moral grounds, but on a celebration of difference and a resistance against all that destroys the dignity and complexity of life.'²²¹ Welch's theory, read with relational contract theory, contributes significantly to an understanding of contract that does not translate into reductive tendencies and insistence on sameness.

According to this approach, courts are entitled to add to or amend parties' contracts in order to facilitate proper functioning of the integrated social economy.²²² The individual benefit is the feeling of co-operation and interdependence which provides for proper participation in the economic sphere. The social benefit exists in the furtherance of social interaction and economic exchange. Judicial intervention becomes a safety-net with which a court can correct market failures (of which unequal bargaining power due to social or socio-economic inequality is just one example).

²¹⁹ MacNeil has added to these role integrity, reciprocity, planning, consent, flexibility, procedural justice, creation and restraint of power, propriety of means and harmonisation with the social matrix. (See Mulcahy (note 206 above) 9 n 24.)

²²⁰ S Birden 'Re-thinking resistance: On Welch and Foucault' (2002) *Philosophy of Education* 110, 112 and the authority cited there.

²²¹ Ibid.

²²² Feinman (note 18 above) 843.

The two elements of the altruist ideal emphasize the importance of cooperative contract which is believed to guarantee the highest individual and social benefits from the altruist perspective.²²³ The general perceptions that altruist values are vague and can be defined only in relation to their opposite should not obscure the fact that these values do exist in the (South African) law of contract. The perception that the values are vague and undefined exist only because of the belief that the values of individualism are clear and can be defined coupled with an almost intentional avoidance of attempts to expand, articulate and deliberate the development of the altruist argument.

VIII THE NATURAL AFFINITY OF ALTRUISM FOR STANDARDS

The arguments opposing a rule based approach on the form side of the form/substance duality advocate a standard orientated approach.²²⁴ Standards are said to simply be open-ended restatements of purpose or ‘the substantive objectives of a legal order’.²²⁵ Kelman warns however, that they may be applied in a way that does not meet the purpose.²²⁶ The connection between altruism and a preference for standards exists in the argument that reciprocal ties of social obligations existent between individuals in a relational world, give rise to the definition of standards of acceptable behaviour.²²⁷ These standards entail the expression of normative considerations at a high level of abstraction and with reference to vague criteria such as fairness. Kelman expresses the connection as follows: ‘It seems to be the case that most of the formally

²²³ Ibid.

²²⁴ Cockrell (note 4 above) 43.

²²⁵ Kennedy (note 2 above) 1688.

²²⁶ Kelman (note 3 above) 41.

²²⁷ Feinman (note 18 above) 831.

vaguer positions are associated with exacting greater degrees of solicitude from one contracting party for the other than the stricter rules demand'.²²⁸

The altruist approach to the law of contract peaks at the point where jurists come to the conclusion that the theoretical rule-based approach to contract neither takes proper account of nor reflect the complexities of social reality; especially concerning the unequal distribution of economic benefit in the community and the uninvolved, can't-be-bothered stance of private individuals in relation to the law of contract.²²⁹

The realisation of the inability of language (as expressive medium of the law) to convey meaning, caused the possibility of defining a system of rules, to become impossible. Critics showed that rules cannot be precise and comprehensive and by implication it indicated that judges and not rules were judging cases. In accordance with this realisation, the altruist approach is in favour of purposive adjudication of contractual disputes so as to give judges the opportunity to consider how to best give effect to the underlying principles and policies in every case.²³⁰ The commitment is to find the best decision on the grounds of the facts of each case, even if that should mean that a measure of (what is perceived to be) legal uncertainty, creeps into the system.²³¹ The standard orientated approach insists that it should be the role of the judge to decide every case in an essentially prognostic way, which will serve the interests of the community best.

The purposive adjudication advocated within the altruist approach, entails that law should be individualised on a case by case basis by having a committed appreciation for the unique facts of

²²⁸ Kelman (note 3 above) 55.

²²⁹ Feinman (note 18 above) 836.

²³⁰ Ibid.

²³¹ Ibid 842–843.

every incidence.²³² Supplemental to this, actual commercial behaviour is investigated in order to identify quasi-objective standards on which judges can base their decisions.²³³ Feinman states that this ‘experience of commercial reality is supposed to embody norms of behaviour with a moral as well as an empirical character that can be restated as legal principles to direct the courts in the resolution of disputes.’²³⁴ Accordingly the role of the judiciary in contractual disputes is no longer a mere dogmatic enforcement of contracts as it is viewed in the individualist image. To a far greater extent, the altruist argument holds that the courts’ role is interventionist and pragmatic. In South Africa authors on contract are of the opinion that the interventionist role of the courts in contract can be based on the principle/standard of good faith.²³⁵

Kennedy claims that the substantive values of altruism reveal a strong affinity for their expression in a standard orientated form.²³⁶ Kelman shows that Kennedy deduced this ‘close connection’ from a well thought through analysis of contract. A few examples are identified from contract law which indicates this connection:

- 1) The standard that a party cannot enforce an *unfair* contract, places an obligation on each of us not to exploit the position of an underprivileged counter-party, which is of course a altruist obligation;²³⁷

²³² Ibid 845.

²³³ Ibid 836.

²³⁴ Ibid 837.

²³⁵ Lubbe & Murray (note 189 above) 469.

²³⁶ Kennedy (note 2 above).

²³⁷ I have to re-emphasise here that the South African law does not recognise this standard expressly.

- 2) The standard that a party should contract *in good faith* requires that parties should take into account each others interests to ensure that one of them does not cause himself damage to conclude the agreement;²³⁸

Collins refers to the ‘harm-to-interests’ theory which is employed to justify the *enforcement* of contracts in an altruist world.²³⁹ In the South African law of contract this theory is referred to as the reliance theory.²⁴⁰ Liability in terms of the reliance theory is founded in standards which fall outside of subjective will and which are in essence altruist. Cockrell shows further that contractual liability on the grounds of relational principles is cast in a distinctively standard based form:

A promise which the promisor should *reasonably* expect to induce action or forbearance on the part of the promisee or a third party and which does induce such action or *forbearance* is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.²⁴¹

This shift of emphasis opens the door for the consideration of community standards of reasonableness in the contractual set-up. The fusion between altruism and standards has the

²³⁸ Kelman (note 3 above) 55.

²³⁹ H Collins ‘Contract and Legal Theory’ in W Twining (ed) *Legal Theory and Common Law* (1986) 136 as quoted in Cockrell (note 4 above) 48 n33.

²⁴⁰ In *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) the court held in favour of the will theory, but conceded that where there is no consensus, the reliance theory will give rise to an enforceable contract. Also see *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) where the defendant was held liable in terms of the contract even though its administrative error had caused subjective consensus to be nullified.

²⁴¹ Article 90 of the *Restatement of the Law Second Contracts* (1981). (Emphasis added.)

potential to trump the uncontrolled enforcement of contract in accordance with the autonomy principle. Lubbe strikingly summarises this position:

The claim of the autonomy principle that liability depends in principle on the voluntary decision of a contracting party, is qualified in cases of contractual *dissensus* by the corrective operation of estoppel or some other manifestation of the *reliance theory*.²⁴²

IX THE PICTURE EMERGING

Feinman summarises the image as it appears up to this point, as follows:

The individualist pattern is consistent with a formal system that rewards those who conform their behaviour to legal rules and penalizes those who do not. Both collectivist principles and purposive adjudication contemplate particularized adjustments by judges to take care of gaps or inconsistencies. Individualism and formal adjudication both adopt an indirect strategy of legal non-intervention relying on private actions to achieve social goals, while both collectivism and purposive adjudication are result-orientated, favouring direct use of state authority to further the policies underlying the legal system.²⁴³

But Kennedy points out that the situation in respect of form as I have set it out above, is far more complex than first meets the eye. Kennedy claims that the linkage between individualism /

²⁴² GF Lubbe 'Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreë.' 1991 *TSAR* 1, 15 as quoted in Cockrell (note 4 above) 50. (Translated from the original Afrikaans).

²⁴³ Feinman (note 18 above) 847.

rules and altruism / standards is not a delineated one that holds true in all occasions.²⁴⁴ The fact of the matter is that what often looks like a rule is a masked standard: '[t]he legal order, in this view, was shot through with discretion masquerading as the rule of law.'²⁴⁵ Again, this interchangeability operates not as a matter of logic but as an empirical reality. Kennedy is of the view that one of the reasons for the obliteration of the rule/standards distinction exists partly in the fact that judges were simply not all willing to subscribe entirely, or wholly buy into, a formal rule system.²⁴⁶

This leads to an inevitable conclusion that the law of contract is simply not black and white; instead, it is shot-through with discretion and indeterminacy. The obliteration of the line between rule and standard again emphasises two points I have made in the beginning, namely that the law of contract is not value-neutral, but rather predominantly liberal ideology masking in the form of rules *claiming* to be neutral. Secondly, this 'sameness' of rule and standard illustrates that the claim of certainty can be no more than a claim of subjective certainty generated by a particular application of or belief about rules. There simply is no such thing as the objective certainty of rules.

But the situation becomes even more complex, because Kennedy claims that rules are almost all representative of some sort of altruism if viewed from the perspective that even a minimalist legal regime is more altruistic than a complete state of nature.²⁴⁷ In this sense the division between altruism and rules is not a fixed one either.

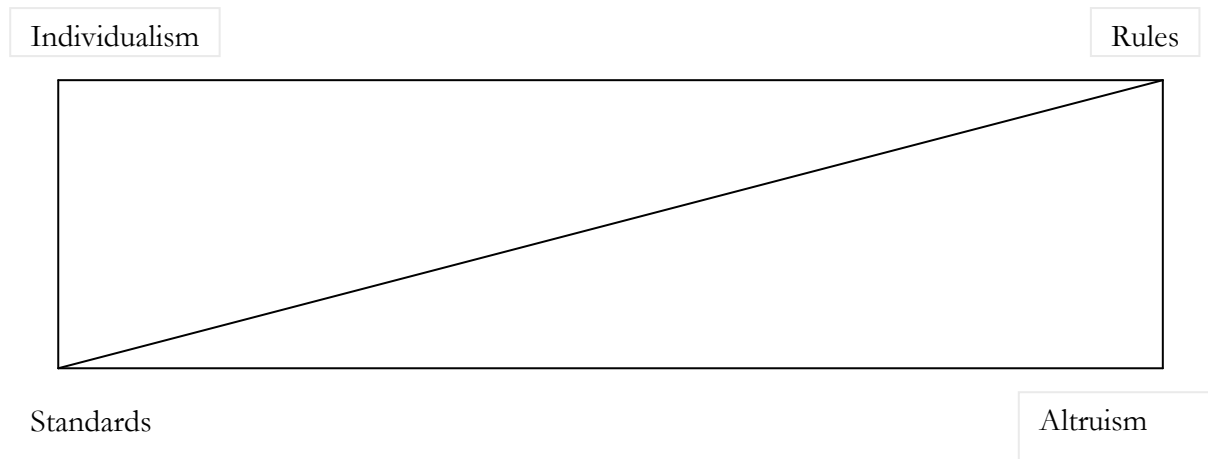
²⁴⁴ Kennedy (note 2 above) 1701.

²⁴⁵ Ibid 1701.

²⁴⁶ Ibid.

²⁴⁷ Ibid 1721.

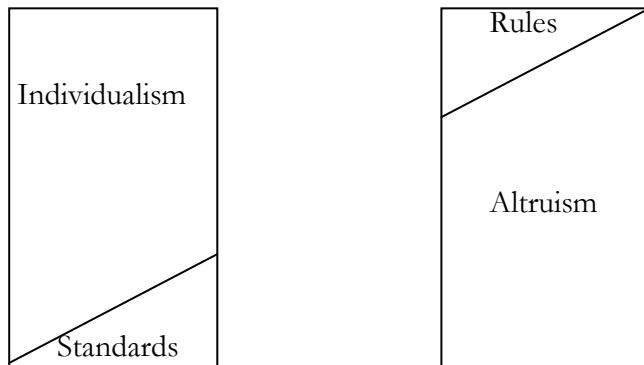
It is important to note that Kennedy never suggested that the division between altruism and rules is a fixed one. He continuously refers to these positions as positions on a continuum²⁴⁸ and that the lines may be blurred and the divisions contradicted as we move away from the extremes of the continuum. My view of what Kennedy has in mind appears in the diagram below:



The above diagram can be viewed as a scale/continuum mirror. The outer lines that create the form can be viewed as an indication of the limits of a legal system. The dividing line in the middle should be seen as a line on which standards and rules ‘slide’ within the system from an extreme distinguishable between the two into the standard-like rule or the rule-like standard which Kennedy refers to and which will be situated closer towards the middle of the dividing line. The vertical lines to the left and right may be viewed as uncalibrated value scales. So viewed, the more individualistic the substance, the fewer the standards in the form of the law and the clearer the rules. The reverse holds true for the line between collectivism and rules. The model can also be viewed upside-down or the positions on each vertical line switched to reveal the links.

²⁴⁸ Ibid 1720.

Below follows two examples which are just ‘snapshots’ of the above and serve to visually illustrate the argument further. In the first image below, it will be seen that where a system is individualistically biased, the standard form will be underprivileged. The same is true for the relation between rules and altruism.



As I have pointed out in the beginning, this study attempts to show that the individualism/rules side of the continuum was and still is politically favoured in South African contract law. With the above picture in mind, I would like to explore yet some more moments of ideology in the South African law of contract. However, as opposed to the moments discussed before, these moments represent instances where the freedom of contract doctrine *appears* to have given way to considerations of equity in contract. However, towards the end of this chapter I will argue that although this seems to have been the case, these moments in my view operated to further the false consciousness in the legitimacy of the existing liberal status quo.

X JUDICIAL CHALLENGES OF THE STRICT ENFORCEMENT OF CONTRACTS
IN SOUTH AFRICAN CASE LAW

(a) BK Tooling (Edms) Bpk v Scope Engineering (Edms) Bpk²⁴⁹

Lewis points out that the aforementioned decision is one of the few Appellate Division judgments of Jansen JA, which have been followed without reservation by the courts.²⁵⁰ What makes the decision even more important is that it is one of few decisions by the Appellate Division in which equitable considerations carried the victory torch and a strict enforcement of the black-letter law had to bow to equity.

The decision deals with the legal principles pertaining to the *exceptio non adimpleti contractus* – a contractual defence theoretically available to a party from whom performance is sought to be obtained by a party who has herself not yet (fully) performed in terms of the contract. Where the defence succeeds, it amounts to a relaxation of the principle of reciprocity.

In this decision Jansen, JA adopted a formulation of the principle as enunciated by Innes, JA in *Hauman v Nortje*²⁵¹ namely that the court, where the *exceptio* is raised as a defence against a claim for performance in terms of a contract, has a discretion to relax the principle of reciprocity.²⁵² The exercise of the court's discretion is dependent upon the utilisation of the plaintiff's

²⁴⁹ 1979 (1) SA 391 (A).

²⁵⁰ Lewis (note 147 above) 258.

²⁵¹ 1914 AD 293.

²⁵² Lewis (note 147 above) 257.

performance by the defendant and the extent of the performance is a factor to be considered as one of the circumstances affecting the equities involved in the exercise of the discretion.²⁵³

Where the court then, in accordance with this principle, exercises its discretion, it will award to the plaintiff a reduced contract price, unless the malperformance is of such a serious nature that it justifies rescission of the contract, in which circumstances any claim of the defendant would be based on unjustified enrichment.²⁵⁴ To persuade the court therefore to exercise the discretion in her favour, the plaintiff has to prove that the defendant is utilising the incomplete performance, that there are circumstances which make it equitable for the court to exercise the discretion, and what the reduced contract price should be.²⁵⁵

Lewis indicates that authors have generally approved of this decision. Lubbe and Murray however, warn that the discretion should remain ‘unfettered by rigid rules’.²⁵⁶ The decision in this case represents one of very few examples where considerations of contractual equity have been utilised successfully to thwart the judiciary’s preference for formalism. The decision illustrates practically, the need for judicial activism which has been described by altruist theorists. The altruist notions in the decision exist in the fact that the court, in considering the exercise of its discretion, will consider the position of both parties in an attempt to balance the interests at stake and does not rely solely on the question whether substantial performance have been rendered by the plaintiff which entitles him to counter performance according to the freedom of contract doctrine. Whereas this decision reflects a clear preference for an equitable approach, the decision in *Magna Alloys*²⁵⁷ on the other hand, proves to be no more than the wolf in sheep’s clothing.

²⁵³ Ibid 258.

²⁵⁴ Ibid. *BK Tooling* (note 249 above) 436 A-437G.

²⁵⁵ Ibid.

²⁵⁶ Lubbe & Murray (note 189 above) 571.

²⁵⁷ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

(b) *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*²⁵⁸: The ‘new position’

The tension between the strict enforcement of contracts and the consideration of equitable principles in contract is most evident in the law relating to restraint of trade clauses.²⁵⁹ In the above mentioned decision the South African law is said to have been purified from the impure influence of the English law in this area, where the position is that restraint of trade clauses are generally unenforceable.²⁶⁰

In this case the plaintiff undertook, in terms of clause 6(b) and 6(c) of the contract between him and the defendant not to offer for sale, for a period of two years after termination of the contract, within a 10 kilometre geographical area which was described in an annexure to the contract, stock similar to that of the appellant.²⁶¹

The court held that the legal position in our law is that restraint of trade clauses will be enforced unless their enforcement is contrary to public policy.²⁶² This means that restraint of trade clauses are generally enforceable in South African law and will only be declared unenforceable if it can be shown that they are contrary to public policy.²⁶³

The court held that there can be no *numerus clausus* of agreements contrary to public policy, because public policy is a dynamic concept, the content of which changes over time.²⁶⁴ According to Rabie, HR such a clause will be contrary to public policy where the circumstances of the

²⁵⁸ *Ibid.*

²⁵⁹ *Cockrell* (note 4 above) 61.

²⁶⁰ *Ibid.*

²⁶¹ *Magna Alloys* (note 257 above) 883D-E.

²⁶² *Ibid* 891.

²⁶³ *Van der Merwe et al* (note 111 above) 197.

²⁶⁴ *Ibid* 891H.

particular matter are such that the Court is convinced that the enforcement of the restraint of trade will do public policy an injustice.²⁶⁵ According to the court it would depend on the circumstances of every case whether it could be said that a restraint was contrary to public policy.²⁶⁶

The court held that two considerations will apply in deciding the question whether a particular restraint of a person's freedom to trade should be enforced or not. The first of these is the principle that in our law an agreement which is believed by one of the parties to be unfair, is generally not assailable on that ground.²⁶⁷ In other words (and the court states this explicitly) it is in the public interest that people should be kept to agreements they have concluded even if they are unfair.²⁶⁸

This brings us back to the traditional individualistic interpretation of the public interest in contract. Cockrell describes the decision as a 'doctrinal U-turn' which has the effect of casting certain rules of English law into the 'open-ended form of an overriding standard of public policy.'²⁶⁹ It is precisely for this reason that the *Magna Alloys* decision can be regarded as not only empirical proof of the obliteration of the rules/standards split but also as an attempt to legitimise freedom of contract in the restraint of trade area. In my view, the decision is a clear example of an individualistic attempt to sneak rules masked as standards into the altruistic areas of contract.

The court's moral / political decision is clear: Sanctity of contract should be protected. The only problem is how to legitimise it in the area of restraints of trade. This problem was skilfully solved

²⁶⁵ Ibid 891H-I.

²⁶⁶ Ibid 892A.

²⁶⁷ Ibid 893H.

²⁶⁸ Ibid 893I.

²⁶⁹ Cockrell (note 4 above) 61.

by *simultaneously* declaring that freedom of contract is in the public interest and that (in accordance with that same principle) restraint of trade agreements should stand. This clearly limited the possibility of potential attacks on restraint of trade clauses on the grounds of public policy, to a vast extent. The court effectively blocks an argument that the restraint of trade is contrary to public policy by holding that public policy favours freedom of contract.

The second consideration according to the court which will influence this ‘public policy’ decision is a focus on another meaning of freedom of contract, namely the freedom *to contract* meaning of freedom of contract. According to the court it is in the interest of the community that everyone should be allowed as far as possible to follow a trade, occupation or profession freely.²⁷⁰ This right has subsequently been embodied in the South African Constitution as a fundamental human right.²⁷¹ The court affirms that attention should be afforded to each of the principles in answering the question concerning the enforceability of the clause and that each case will be viewed in the light of its own particular set of circumstances.²⁷² These circumstances are held to be the circumstances existing at the moment the court is asked to enforce the restraint.²⁷³

The suspicion that the court’s political decision or inclination was preconceived is confirmed by the way in which great emphasis is placed on this ‘new position’ so as to draw attention away from the fact that the court still concluded that there was nothing in the contract, the evidence or the facts that indicated that the restraint of trade of the respondent was contrary to the public interest or unreasonable *inter partes*.²⁷⁴ This is not surprising in light of the fact that the court

²⁷⁰ *Magna Alloys* (note 257 above) 894B.

²⁷¹ See section 22 of the Constitution.

²⁷² *Magna Alloys* (note 257 above) 894C.

²⁷³ *Ibid* 894F.

²⁷⁴ *Ibid* 904C-D.

had held only a few pages before that freedom of contract (in the sanctity of contract sense) is favoured by public policy.

What the court seems not to have taken account of, again not only confirms its political view in this case, but also its views on the role of the law in general. When asked in cross examination why he did not keep to the restraint of trade the respondent replied ‘wie sal dan vir my vrou en kinders sorg’²⁷⁵ (‘who will then take care of my wife and children’). Also, the respondent testified that he had left the employment of *Magna Alloys* because it had experienced a shortage in stock which made it impossible for him to deliver to his clients and to sell the products,²⁷⁶ which in turn caused him to suffer a substantial loss of income.

These aspects of the matter could not persuade the Court in its decision to enforce the agreement and this in itself confirms a particular vision of law and morality of the Court (ie it is not immoral / illegal / against the public interest for an employer to enforce a restraint of trade against an employee in circumstances where the employer himself cannot provide the employee with sufficient means to conduct a sustainable operation). The only reason offered by the Court as to why this is not contrary to public policy is the familiar technical point that there was nothing in the evidence or the pleadings that suggested that the shortage of products was merely temporary.

²⁷⁵ Ibid 901D.

²⁷⁶ Ibid 901B.

The court does not regard itself inclined to allow an ‘ethic of care’²⁷⁷ to take account of the practical impact of its decision on Mr Ellis’ and his family’s life, but rather sees itself bound to enforce the agreement in accordance with its political view that contracts should be enforced. This is typical of a liberal approach. Although I also have my doubts as to whether the Court should have released Mr Ellis from the restraint of trade on the basis alone that he had a view of himself as provider, this, coupled with the fact that the appellant indeed did experience a shortage in stock which precluded Mr Ellis from doing proper business, should have been properly weighed against the public interest in enforcement of contracts.

From this I conclude that there was no apparent ideological difference or shift in this case from the formalistic and positivistic approach in the *Bank of Lisbon* case – the decision appears to have brought nothing new to what the courts understood to be in the public interest when it comes to contract.

(c) *Sasfin v Beukes*²⁷⁸: The altruist trump card?

In the above decision the court found that certain aspects of a complex factoring agreement was contrary to public policy. Primarily, the case centred around the validity or not of a deed of cession in which a customer of a bank (a doctor) ceded all his future debtors to the bank regardless of whether he owed the bank money or not.²⁷⁹ The cession effectively rendered the doctor the slave of the bank. The majority of the Court was of the opinion that these aspects of

²⁷⁷ K van Marle & D Brand ‘Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha* (2001) 12(3) *Stell LR* 408, 412 and the authority quoted there. Also see the decision in *Waltons Stationery Co (Edms) Bpk v Fourie* 1994 (4) SA 507 (O) 513 where the judge held that the respondent’s ‘emotional’ grounds that she was a divorced mother with a child to feed, could not release her from the restraint of trade in question.

²⁷⁸ 1989 (1) SA 1 (A).

²⁷⁹ *Sasfin v Beukes* (note 278 above) 6A-D.

the cession could not be severed from the rest of the agreement and held that the entire transaction was unenforceable.²⁸⁰

In this case the Appellate Division was willing to evaluate the substantive fairness of a disputed deed of cession to come to a conclusion that the cession was clearly unreasonable and irreconcilable with the public interest. Smalberger, JA held that unlawfulness comes into play where the public interest in the strict enforcement of contracts in accordance with the principle of freedom of contract, is trumped by other relevant factors.²⁸¹ These relevant factors are expressed by the Court to ensure that ‘public policy ... properly take into account the doing of simple justice between man and man.’²⁸²

Cockrell indicates that it is interesting to note that this judgment takes a completely different approach from the individualistic credo in *Bank of Lisbon* only six months before.²⁸³ Lubbe notes that the court brands the clauses of the agreement as unenforceable by reference only to considerations of equity.²⁸⁴ Lewis describes the decision as ‘the one decision which yields a ray of light in the field of contractual policy, where the court was both bold and innovative in escaping the shackles of formalism’.²⁸⁵

Although I do not disagree that the decision reflects a very different approach from that followed in *Bank of Lisbon*, the following famous *dicta* remain problematic:

²⁸⁰ Ibid 17-19.

²⁸¹ Ibid 9D-G.

²⁸² Ibid 13J.

²⁸³ Cockrell (note 4 above) 61.

²⁸⁴ Lubbe (note 129 above) 9.

²⁸⁵ Lewis (note 147 above) 264 n76.

No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should however be exercised *sparingly* and only in the *clearest* of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.²⁸⁶

The above dicta indicate the uneasiness with which the Appellate Division approaches the issue of unfair contracts as well as the difficulty it seems to experience with the reconciliation of individualism and altruism within contract doctrine. Hawthorne has remarked that the *dicta* above marginalise the so-called 'new' approach because it merely emphasises the South African judiciary's narrow interpretation of the relevance of equity considerations in the public interest.²⁸⁷ By holding that it is only in the '*clearest of cases*' that a court may use its power to refuse to enforce an unfair term, and that the power to do this must be used '*sparingly*', the court suggests that unconscionability in and of itself cannot (as was held in the *Bank of Lisbon* case) invalidate a contract.²⁸⁸ The promise that we can correct for *clear* cases only, simply suggests, to paraphrase Dalton, that the worst features of the system can be held in check, without tinkering with its regular operation.²⁸⁹

²⁸⁶ *Sasfin v Beukes* 1989 (1) SA (1) (A) 9A-B. (My emphasis).

²⁸⁷ L Hawthorne 'Public policy and micro lending – has the unruly horse died?' (2003) *SALJ* 66

²⁸⁸ These sentiments are also reflected in cases decided by the lower courts in the aftermath of *Sasfin*. See in this regard *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C), 825C-827A and *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W), 210G-214F. Also see the discussion of the *Donelley* case hereafter.

²⁸⁹ Dalton (note 5 above) 1037.

In 1990, Lubbe suggested that the *Sasfin* decision could rip apart the entire structure of the South African law of contract, if not handled carefully.²⁹⁰ Christie on the other hand has suggested that the courts are likely to find that the *Sasfin* principle (namely that a court will not enforce a contract if its enforcement would be contrary to public policy), is the most serviceable instrument for developing the common law of contract to give effect to a provision of the Bill of Rights.²⁹¹ If the latter is what we hope for in the South African law of contract, one can only hope that the Supreme Court of Appeal will in the future not feel itself confined by the heavy qualifications in exercising the *Sasfin* principle. It will be seen that it was precisely this consideration which the court used to justify its conservative (non-constitutional or constitution-avoiding approach both in *Brisley* and *Afrox* as well as decisions thereafter).

Although '[t]he principle of *pacta servanda sunt* is glossed by a caveat that a contract will not be enforced if this would be contrary to public policy'²⁹² we should not be so naïve to think that *Sasfin v Benkes* has solved all our problems with regard to the accommodation of equity in contract, for 'the utmost freedom of contract still remains in the public interest' and it is still the Court which will decide if and indeed when the *Sasfin* principle will be invoked in the manner Christie suggests. For the rest, the coercive machinery of the State can still be employed to enforce those unfair contracts which do not meet the Court's no doubt scrupulous eye for the 'clearest of cases'.

One of the first cases in which the Court interpreted the *Sasfin* principle and indeed the limited nature of its power in terms thereof to refuse enforcement of a contract on the ground of public policy was that of *Donnelly v Barclays International Bank*.²⁹³ A discussion of this case attempts to

²⁹⁰ Lubbe (note 129 above) 24.

²⁹¹ RH Christie *The Law of Contract* (4ed) (2001) 403.

²⁹² *Ibid.*

²⁹³ 1990 (1) SA 375 (W).

illuminate the Courts' understanding that their power in terms of the *Sasfin* principle is a very constrained one. As Jonathan Lewis notes: 'it was not long before the force of the public interest argument was [or is it had to be?] diminished'²⁹⁴

(d) *Donnelly v Barclays International Bank*:²⁹⁵ *Sasfin* interpreted

In this case the bank obtained judgment against the appellant on a deed of surety which secured the overdraft facility of a company. The appellant was a director and shareholder of the company, who, during the course of the appeal, approached the court for leave to submit additional grounds on which it purported to attack the decision of the court a quo.²⁹⁶ One of these grounds was the submission that the certificate of indebtedness clause in the deed of surety was unlawful and unenforceable as it was suggested that the clause was contrary to public policy on a reading of *Sasfin v Beukes* which was at the time not yet reported but had already been raised thrice in the Witwatersrand Local Division in 3 weeks.²⁹⁷

The wording of the clause was almost identical to that of one of the clauses held to be invalid in the *Sasfin* case. However, Kriegler, J ruled that the clause in this case was not invalid.²⁹⁸

This outcome appears to be problematic and on closer inspection reveals that the judgment rests upon an interpretation of *Sasfin* which is acutely (self)conscious of the possibility of unfettered judicial discretion which the *Sasfin* decision opens the door for. Kriegler, J holds that the decision of the Appellate Division in *Sasfin* is based on principle but that the principle should in every

²⁹⁴ J Lewis 'Fairness in South African Contract Law' (note 139 above) 334.

²⁹⁵ *Donnelly v Barclays International Bank* 1990 (1) SA 375 (W).

²⁹⁶ *Ibid* 379H.

²⁹⁷ *Ibid* 380A.

²⁹⁸ *Ibid* 384I-J.

case be applied to the specific contract before the court for adjudication.²⁹⁹ The court also places a great deal of emphasis on the fact that the *Sasfin* judgment should not be regarded ‘as a free pardon to recalcitrant and otherwise defenceless debtors’³⁰⁰ because it is ‘decidedly not that’.³⁰¹

Kriegler, J also does not let the opportunity pass him by to emphasise that ‘pacta servanda sunt is still a cornerstone of our law of contract’³⁰² and that ‘nothing said or implied’³⁰³ in the *Sasfin* principle can be said to derogate from this important fact.³⁰⁴ The implication is that the whole of the contractual context should be taken into account against the backdrop of this cornerstone when it comes to the determination of the enforceability of the agreement on the grounds of public policy. Kriegler, J holds that the court was similarly influenced by the surrounding circumstances in the *Sasfin* case.

The court proceeds to distinguish the facts of the *Donelly* case from the facts in *Sasfin*, by pointing out that the case before him was not the case of a lender of money who was effectively placed in control of the debts payable to a professional person (as was the case in *Sasfin*), but rather a case of a distinguished and respected bank in dispute with one of its clients who had received frequent and clear bank statements in a standard form and who was enabled to exercise appropriate control over the principal debt.³⁰⁵ Also the court holds that it was clear from the trial proceedings that there was never any substantial challenge to the validity of the certificate clause.³⁰⁶

²⁹⁹ Ibid 381I.

³⁰⁰ Ibid 381F.

³⁰¹ Ibid.

³⁰² Ibid 381H.

³⁰³ Ibid 381H.

³⁰⁴ Ibid.

³⁰⁵ Ibid 384E-F.

³⁰⁶ Ibid 384 H-I.

Although there is something to be said for the fact that this decision attempts to individualise the law on a case by case basis by heeding the facts of every case, it is nevertheless not in furtherance of a more balanced approach to freedom of contract and principles of fairness. Although appearing to be rather convinced early in the judgment that its power in terms of *Sasfin* is a very narrow one, the court itself seems to doubt the narrow scope of the *Sasfin* principle later in the judgment,³⁰⁷ but, having justified a conservative approach, proceeds to follow on it.

Kriegler, J holds that in the circumstances the clause with basically the same wording as the one in the *Sasfin* case is not against public policy and therefore enforceable. This approach seem to be very similar to the approach in *Magna Alloys* where the court also held that it depends on the circumstances of each case whether the restraint of trade will be enforced in accordance with the requirements of public policy but then held that in the circumstances freedom of contract remained in tact.

There is a series of decisions in which the courts have declined to exercise its *Sasfin* power to declare unfair contracts unenforceable on the grounds of public policy.³⁰⁸ The general approach is similar to that in *Donely*. In *Botha (now Griessel) v Finanscredit (Pty) Ltd*³⁰⁹ the court refused to declare a deed of suretyship void on the grounds of public policy, holding that, although ‘somewhat rigorous’, the surety was not left ‘helpless in the clutches of the plaintiff’. This prompts one to ask: must a defendant necessarily be helpless in the clutches of a plaintiff for the court to exercise its *Sasfin* power? And when will a defendant be regarded as sufficiently helpless in the clutches of a plaintiff for the court to exercise its power? This interpretation of the *Sasfin*

³⁰⁷ Ibid 385A.

³⁰⁸ *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *De Klerk v Old Mutual Insurance Co Ltd* 1990 3 SA 34 (E); *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA); *Juglal NO v Shoprite Checkers t/a OK Franchise Division* 2004(5) SA 248.

³⁰⁹ 1989 (3) SA 773 (A).

principle seems to be counter-intuitive and cannot provide an adequate basis for the infusement of the law of contract with considerations of equity.

Although there exist a handful of cases where the court elected to use the *Sasfin* principle to release the defendant from the clutches of the plaintiff it appears that these cases are indeed, as the court held in *Sasfin* it should be, the few exceptions to the rule.³¹⁰

XI CONCLUSION

‘Once upon a time we had a bad, old, classical law of contract which spoke in abstractions such as ‘freedom of contract,’ but now we have a good, new, modern law which combines principle and policy and has none of the fundamental defects of classical contract law. That assumption is false.’³¹¹

Feinman’s words above are not truer about the law he described (American contract law) than they are true of the South African law of contract. From the above it is clear that collectivist attempts to resolve the problems of liberal ideology in the law of contract are indeed trumped by liberal ideology itself. The interpretation of the *Sasfin* principle as a narrow power serves as a striking example of that. Although the court which formulated the principle did not hesitate to apply it to the circumstances under their consideration and experienced no predicament of conscience to strike down the clauses under attack on the grounds of equity alone, a similar bold

³¹⁰ See for instance the decision in *Baart v Malan* 1990 (2) SA 862 (E) where the court considered itself empowered to release a woman from a divorce settlement obligation to pay her gross annual salary for 20 years as a contribution to maintenance for her children. It appears it is this sort of extreme situation which the court looks for, before it will consider exercising its *Sasfin* power.

³¹¹ Feinman (note 18 above) 830.

approach has not transpired out of the courts. Instead, the focus has been far more on the fact that it is a power which has to be exercised sparingly and only in the clearest of cases, rather than on the fact that it *is* a power to strike down unfair contracts.

The partial abandonment of the classical law by ‘enlightened’ jurists seems to have produced a body of law that is inconsistent and whose underlying theories are inadequate. It appears that, once South African jurists, no doubt under the influence of decisions in comparative jurisdictions, found that there are fundamental contradictions apparent in classical contract thought, it attempted to mend this rift by introducing policy considerations and principle, whilst at the same time attempting to still hold on to the foundation of classical contract law, namely utmost freedom of contract.³¹²

It is clear that tension between individualist and altruist notions concerning the public interest is evident as a result of this ameliorating attempt. Feinman shows that the undermining of the assumptions of classical contract law did place a question mark over the integrity of the classical approach, but it did not manage to mend the rift, according to Feinman, because the altruistic critique is haphazard and not systematic.³¹³ It is for this reason that the law of contract finds herself on a continuum of tension between the polar opposites, with a definitive privilege for the individualism/rules pole of the duality. There exists firstly, no attempt to abandon the one approach wholly in favour of the other³¹⁴ and secondly, there is also no real attempt in the courts to move towards a more nuanced approach.

³¹² Ibid 833.

³¹³ Ibid.

³¹⁴ Klare in Klare ‘Contracts Jurisprudence and the First-Year Casebook’ 54 *NYU LR* 876 at 880-881 refers to this situation as an aspect of social conceptualism. Social conceptualism primarily entails attempts to harmonise contradictory lines of thought as well as attempts to assimilate formalism and judicial instrumentalism, quoted in Feinman (note 18 above) 834 n17.

According to Feinman the reasons for this ‘schizophrenic’ or dualistic approach are threefold.³¹⁵ Firstly, critics find the power of freedom of contract to be so pervasive of our traditions and our customs that it is almost inescapable and at least in part, individualism is a description of human belief and behaviour. Secondly, were we to abandon the formality of and the belief in rights, the basis for contract law adjudication would fall away and everything in the law of contract will be engulfed by that ‘boundless morass of uncertainty’ against which De Wet and Van Wyk warned so often in the past. For the individualists, this is something which will happen of necessity once we do away with these rules. Thirdly, the ‘great leap’ from the common law to things unknown is just too foreign and daunting for the adherents of classical law to contemplate.³¹⁶

In South Africa the above reasons are closely related to the broad political situation prevalent at these crucial moments of ideology of contract law. A political approach of parliamentary sovereignty, an emphasis on the separation thesis as a result thereof, arbitrary decision making, positivism, strict adherence to rules and a suppression of difference. In short, all which it is not supposed to be today.

The question I would like to address in the next Chapter is whether the advent of a sovereign Constitution (as a product of South Africa’s collective human will) and the introduction of a new value system or ethos for the South African community, based on the values of freedom, equality and dignity is, or at least can be, what we need to challenge the individualism/rule bias of our law of contract in order to leave behind the limiting, reductive, alienating and, in my view, ultimately oppressive contract law that is our history.

³¹⁵ Feinman (note 18 above) 833.

³¹⁶ Ibid.