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The Constitutionalisation of Contract Law in Light of the Public and Private Dichotomy in South Africa: An Analysis of Selected Cases

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Abstract

The paper discusses the private–public law dichotomy in light of the constitutionalisation of contract law in South Africa. The common law of contract is concerned with private relationships and it provides a legal framework within which parties can safely transact and conduct business while the transformative Constitution falls within the ambit of public law which governs the relationship between legal subjects and the State. The Constitution embodies an objective normative value system and provides a backdrop against which contractual provisions are tested in order to ensure constitutional compatibility. The extent to which the public-private law divide may continue to exist is debatable. There has, over the years, been an increasing influence of the Constitution on private contractual relationships. This has the potential to dismantle the boundaries between public and private law or at least blurring of the lines. The practical value of the distinction between public and private law is also questionable which further necessitates the dismantling of the boundaries between public and private law. Therefore, it is argued that the constitutionalisation of the common law of contract, as evidenced by case law, is gradually narrowing the divide to

a potentially one system of law.

Keywords: transformative constitutionalism, private–public law dichotomy, sanctity of contract, constitutional rights, contract law

1 INTRODUCTION

The law of contract, which falls under the law of obligations, is traditionally regarded as part of private law.[1] It is concerned with individual autonomy, freedom and sanctity of a contract, and public policy, which are also central to the Constitution of South Africa. South African Law distinguishes between public and private law. Public law deals with the rules governing legal subjects in their relation with the State and it seeks to protect and promote collective interests. In contrast, private law is concerned with the legal relationships between private individuals, and its rules and principles, as well as values, seek to protect legitimate individual interests.[2] Of importance is the fact that the Constitution falls within the ambit of public law. The increasing influence of the Constitution and the Bill of Rights in relationships between private parties has the potential to either dismantle the boundaries between public and private law or blur the lines.

There is no single accepted definition for transformative constitutionalism. Currie and De Waal define constitutionalism as a body of theoretical prescriptions that prescribes what a Constitution and constitutional law should do.[3] It is nonetheless widely accepted that transformative constitutionalism is about changing "the society in the public and private sphere" and moving from past divisions and imbalances.[4] The Constitution is at the very heart of this change as it acts as a "bridge" between the past and the future. For the purposes of this article, constitutionalism means "to provide with or make subject to the Constitution".[5] Section 2 requires contract law, together with all the other laws, to comply with the provisions of the Constitution.[6] Therefore, all laws in South Africa are subjected to the Constitution and any law that is found inconsistent with it is invalid. The Constitution wields an enormous influence over the law of contract as it seeks to infuse it with the spirit of constitutional values.

The article seeks to analyse the private–public law dichotomy in light of the constitutionalisation of contract law in South Africa. The article has four parts. The next part discusses the constitutionalism of the common law of contract. It gives an overview of the interaction between the Constitution and contract law since there are many academic writings that have

1 Van Huyssteen, Lubbe, Reinecke and Du Plessis *Contract: General Principles* 6ed (2020) 3, Van Huyssteen and Maxwell *Contract Law in South Africa* 3ed (2014) 31.

2 Feldbrugge "Private Law and Public Law" in Brill (ed) *Private and Civil Law in the Russian Federation* (2009) 262. See also Rosenfield "Rethinking the Boundaries between Public and Private Law for the Twenty-first Century: An Introduction" 2013 *I-CON 11* 125. See also Van Huyssteen *et al. Contract: General Principles* 3.

3 Currie and De Waal *The Bill of Rights Handbook* 6ed (2015) 8.

4 The Constitution requires judges to change the law to bring it in line with the rights and values contained in the Constitution: Langa "Transformative Constitutionalism" 2006 *Stell LR* 352 and 357. See also Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" 2009 *Stell LR* 4.

5 See the definition for "Constitutionalise" https://www.thefreedictionary.com/constitutionalization (accessed 29-08-2022).

6 See s 2 of the Constitution of the Republic of South Africa, Act 108 of 1996.

already explored this issue.[7] More emphasis is placed on analysing the extent of the influence of the Constitution on South African contract law in light of the public and private law distinction, which is discussed in part three. Relevant case law is examined to provide evidence that courts consider relevant constitutional rights in private disputes. The last part of the article argues that the distinction between private and public law is superfluous and outdated as the Constitution and private law no longer exist in isolation. The Constitution continues to make inroads into areas that used to be the domain of contract law in order to ensure that fundamental rights are observed and protected. Whether the public–private divide should be maintained is debatable and, therefore, the conclusion reached is based on what is happening in practice as evidenced by some court decisions.

2 CONSTITUTIONALISATION OF THE COMMON LAW OF CONTRACT

2 1 Overview of the Interface Between the Constitution and the Law of Contract

Contract rules are common-law based and courts have a role to develop the rules to ensure that they are consistent with the Constitution. This is because the Constitution embodies an objective normative value system that underpins our law and provides a backdrop against which the law of contract should be tested and developed.[8] Contractual rules and principles are tested for constitutional compatibility and their application should take into consideration the constitutional norms regarding social justice. In *Carmichele v Minister of Safety and Security*,[9] the Constitutional Court emphatically explained the importance of the development of common law that does not deviate from the spirit, purport, and objects of the Bill of Rights.[10] It is commonly understood that the Constitution permits both a direct and indirect horizontal application to the common law of contract.[11] Section 8(2) of the Constitution deals with the applicability and binding status of the Bill of Rights to private parties.[12] It provides that the Bill of Rights applies to all forms of law and it binds private individuals in certain circumstances. The effect of the horizontal application of the Bill of Rights to private persons means that obligations arising from a private agreement cannot violate the rights incorporated in the Constitution and the values underlying it.[13]

In the landmark case of *Barkhuizen v Napier*,[14] the majority judgment led by Ngcobo J preferred an indirect application of the Constitution to private relationships or the common law of contract.[15] Again, the public policy route was favoured in *Beadica 231 CC v Trustees for the*

7 Bhana "Contract Law and the Constitution: *Bredenkamp v Standard Bank of South Africa Ltd* (SCA)" 2014 *SAPL* 508–521. Coleman "Reflecting on the Role and Impact of the Constitutional Value of *Ubuntu* on the Concept of Contractual Freedom and Autonomy in South Africa" 2021 *PELJ* 1–68; Lubbe "Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law" 2004 *SALJ* 395–423 and Ally and Linde "*Pridwin*: Private School Contracts, Bill of Rights and a Missed Opportunity" 2021 *Constitutional Court Review* 275–300.

8 See generally *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54.

9 2001 4 SA 938 (CC).

10 *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 33.

11 Sections 8(2), 8(3) and 39(2) of the Constitution. In *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 (CC) and *AB and Another v Pridwin Preparatory School* 2020 5 SA 327 (CC), it was made clear from the decisions that the Bill of Rights can find a direct and indirect horizontal application to private relations. See also Coleman 2021 *PELJ* 6 and the references quoted. See also Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 4ed (2022) 14 and 16.

12 Ally and Linde 2021 *Constitutional Court Review* 287.

13 Coleman 2021 *PELJ* 5, and Hutchison and Pretorius *The Law of Contract in South Africa* 14.

14 2007 5 SA 323 (CC).

15 *Barkhuizen v Napier* para 30.

Time Being of the Oregon Trust.[16] It is important to note that public policy, which is at the core of contract law, is rooted in the Constitution and the values that underlie it.[17] In determining the constitutionality of a contractual clause, the question is whether the term challenged is contrary to public policy as evidenced by constitutional values. The Constitutional Court concluded in *Barkhuizen v Napier* that this approach leaves room for *pacta sunt servanda* to operate, but at the same time allows courts to decline enforcing contractual terms that are in conflict with the constitutional values even though parties agreed to such terms.[18] Public policy as a common-law rule is regarded as the appropriate portal for the constitutionalisation of contract law.[19] It acts as an evaluating tool or yardstick through which the testing of the constitutionality of contractual terms is done. Therefore, any provision in a contract that is contrary to public policy will not be enforced.[20]

The Constitution shapes the ordinary law. Courts are obliged to develop common-law rules if found to be inconsistent with the provisions of the Constitution.[21] The idea of developing common law in this way is to ensure that courts develop an appropriately constitutionalised body of contract law. Section 39(2) of the Constitution thus infuses the common law of contract with constitutional values.[22] Again, section 8(3) permits courts to develop common-law rules where a right granted in section 8(2) is limited.[23] The gradual development of the common-law rules is necessary to ensure that contract law is abreast with the changing requirements of society in accordance with the normative framework of the Constitution. This is because individual contracts do not operate in a vacuum. They exist and function within the realm of the society of which the Constitution is an expression of the values held dear by that society. Van Huyssteen and Lubbe *et al* stress this point and state that contracting parties cannot require their contract "to function in a legal sphere of its own, outside the encompassing influence of the Constitution or incongruent with it."[24] Undoubtedly, contracts are assessed in terms of the Constitution and their validity is determined through the constitutional lens.

Transformative constitutionalism denotes the influence of the overarching constitutional values on the legal culture of interpretation to align it with the normative framework.[25] It enjoins courts to interpret contracts through the prism of the constitutional values and the Bill of Rights to ensure procedural and substantive fairness in contracts. By implication, courts must go deeper in their search for substantive justice which is to be inferred from the foundational values of the Constitution.[26] The interpretation of contractual terms is thus aimed at the progressive

16 2020 5 SA 247 (CC).

17 *Barkhuizen v Napier* 2020 5 SA 247 (CC) para 28.

18 *Barkhuizen v Napier* para 30.

19 Bhana *Constitutionalising Contract Law: Ideology, Judicial Method and Contractual Autonomy* (PhD-thesis, University of Witwatersrand, 2013) 4.

20 See generally *Botha v Rich NO and Others* 2014 (4) SA 124 (CC).

21 Van Huyssteen, *et al*. *Contract: General Principles* 15. Currie and De Waal *Bill of Rights Handbook* 7.

22 Hutchison and Pretorius *The Law of Contract in South Africa* 14.

23 Section 8(3) of the Constitution provides that: "When applying a provision of the Bill of Rights to a natural … person in terms of subsection 2, a court- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)." For a detailed explanation, see Ally and Linde 2021 *Constitutional Court Review* 289 and 291.

24 Van Huyssteen *et al. Contract: General Principles* 16.

25 Mupangavanhu "Impact of the Constitution's Normative Framework on the Interpretation of Provisions of the Companies Act 71 of 2008" 2019 *PELJ* 11.

26 The shift in the legal convictions of the society demands a greater concern for contractual justice: Du Plessis "Legal Pluralism, *Ubuntu* and the Use of Open Norms in the South African Common Law of Contract" 2019 *PELJ* 5. See also *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust* para 74.

realisation of transformative constitutionalism. A court is required to ensure that its application, development, and interpretation of common law is in line with the Constitution.[27] This is because one of the main goals of the Constitution is the transformation of both law and society as well as furthering social justice.[28]

2 1 The Extent of the Influence of the Constitution on Contract Law

The Constitution has a dominant influence on the law of contract. There are several instances when private disputes raise constitutional issues. In these instances, contracting parties are able to invoke constitutional rights in a contractual context.[29] By implication, contractual provisions should not fall short of the spirit, purport, and object of the Bill of Rights to be consonant with the Constitution. The case law discussed under this section contains examples of the far-reaching effect of fundamental rights on private parties.

The first impact of the Constitution is that it may render unenforceable the contract itself or some of the provisions. The case of *AB and Another v Pridwin Preparatory School and Others*[30] is instructive as it raised constitutional issues concerning the right to basic education as well as the paramountcy of the best interests of the child. The matter specifically concerned a term known as the "termination clause" that was contained in an admission contract (Parent Contract) signed between parents and Pridwin Preparatory School. The termination clause contained in clause 9.3 provided that:

> The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you.[31]

The question before the court was whether this clause was valid and, if so, whether its enforcement without affording the affected children an opportunity to be heard offended their right to basic education as well as the child's best interests principle.[32] In other words, the court was required to determine whether the children's constitutional rights to basic education had any relevance to the validity and enforcement of a private contract.[33] The school headmaster sought to terminate the Parent Contract with AB and his wife by invoking clause 9.3 following a tumultuous relationship with the school.[34]

The High Court upheld the school's right to cancel the Parent Contract on the basis of *pacta sunt servanda*. It held that section 29(1) of the Constitution did not include the right to attend a wholly independent school and thus not every learner was entitled to attend a private school. It further held that the school headmaster had given an appropriate degree of consideration to the best interests of both the two affected children and the other learners registered at the school.[35] On appeal to the Supreme Court of Appeal (SCA) by AB, the High Court decision was upheld unanimously. The majority of the SCA judges concluded that the termination of the Parent Contract was not against public policy and was not unconstitutional.[36] This is because independent schools have no positive duty to provide basic education and thus Pridwin School had no constitutional duty to admit or retain these children. It also found that it was not in the best interests of all concerned for AB's children to continue learning at Pridwin. This means the affected children could go to the State schools within their area that were obliged to admit them.

The matter was taken on appeal and the issues before the Constitutional Court involved the

30 2020 5 SA 327 (CC).

35 See *AB v Pridwin Preparatory School* paras 35–36.

36 *AB v Pridwin Preparatory School* para 42.

constitutional validity of the Parent Contract and its enforcement as well as the children's constitutional rights in the context of private education.[37]AB invoked section 8(2) of the Constitution which allows for a direct application of the Bill of Rights to the contract. Since the two affected children had left Pridwin and joined another school, AB sought in the Constitutional Court an order declaring the termination of the Parent Contract as unlawful and clause 9.3 as unconstitutional and contrary to public policy. This is based on the argument that Pridwin did not follow a fair procedure by affording the two children a hearing when it cancelled the contract.[38]

The Constitutional Court decided to only determine the constitutionality of clause 9.3 and its enforcement since it would have a practical effect in similar contractual relationships in the future. Its findings were that private schools like Pridwin are under a constitutional duty not to diminish the right to basic education of their learners and to act in the best interests of the child.[39] Therefore, when cancelling a contract the school is expected to inform the parents, provide reasons for the termination of the contract as well as afford a fair hearing to the affected parties including giving the learners an opportunity to express their views on the matter. The best interests of all the other children admitted to the school should also be taken into consideration. The majority judgment concluded that the requirement for both substantive and procedural fairness should be met before a child is excluded from school.[40] Therefore, clause 9.3 of the Parent Contract was regarded as against public policy, unconstitutional, and unenforceable to the extent that it purported to cancel the contract without following an appropriate and substantively fair procedure.

The decision in *AB v Pridwin Preparatory School* demonstrates two pertinent issues. First, it shows the direct application of the Constitution to private relationships. The Constitution may directly impact a contract between private parties by rendering it unenforceable. Second, it can render invalid the exercise of contractual power by one of the contracting parties. For example, Pridwin Preparatory School was wrong when it exercised its power to terminate the Parent Contract. By so doing, the boys' right to education was infringed as well as the best interests of the child principle found in section 28(2) of the Constitution. This shows that a private party may have a claim or defence that is directly based on a constitutional right and not necessarily on a private law rule. The court's finding, in this case, further underscores the importance of exercising contractual power in a way that does not undermine the basic rights enshrined in the Constitution. Moseneke notes that:

37 *AB v Pridwin Preparatory School* para 45.

38 *AB v Pridwin Preparatory School* para 49.

39 *AB v Pridwin Preparatory School* para 93.

40 *AB v Pridwin Preparatory School* para 94.

> The exercise of … private power in a manner that impinges on the entrenched rights or in a way that is inconsistent with the foundational democratic values of human dignity, equality and freedom may well attract constitutional consequences.[41]

The above statement reinforces the point that the transformative Constitution does not limit its reach to public power only. The exercise of all power (public and private) is subject to constitutional control.

The Constitution also impacts private parties by compelling a party to enter a contract with another. The relevant case is *The Labia Theatre CC v South African Human Rights Commission.*[42] The case concerned Labia, a small independent cinema, that was in the business of private screening of films. It would enter contracts to lease its theatre to individuals and even companies. Labia was approached by World Media Productions for a special screening booking of the film "Roadmap to Apartheid" which it regarded as controversial and political. Labia refused to lease the cinema on the grounds that it would not only offend its patrons but also harm its business.[43]

Following further negotiations with various parties, Labia agreed to screen the film on conditions that included the need for the Zionist Federation's participation in a panel discussion after the screening of the film.[44] This point was later disputed, and the parties never reached an agreement. This resulted in the film being screened at a different venue. The respondent argued that Labia's conduct had infringed its rights and freedoms guaranteed in the Constitution and that it should not be allowed to unlawfully discriminate when leasing its privately rented space. The Equality Court had to determine whether Labia's refusal to screen the film amounted to unfair discrimination.[45] Based on the evidence before it, the Equality Court concluded that the conduct of Labia amounted to unfair discrimination. It ordered Labia to screen the film "Roadmap to Apartheid" within 60 days from the date the order was made with no conditions having to be fulfilled.[46]

The matter in *The Labia Theatre CC v South African Human Rights Commission* was referred to the Equality Court because it is a specialised forum which is designated to hear matters relating to unfair discrimination, hate speech, and harassment. Based on the court's finding, it is clear that company policy and business considerations are subservient to the Constitution. It is unlawful and unconstitutional for a party to refuse to enter a contract with another if it amounts to unfair discrimination. Arguably, it is a well-established rule that private persons may be obliged to make contractual offers where a refusal to do so would be regarded as unfairly discriminatory.

Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park[47] further reinforces the point that the Constitution renders invalid the exercise of contractual power such as the power to terminate a contract.[48] It is significant to note that courts do not only look at the manner in which the power was exercised but also at the reasons for exercising the power. The matter in *Strydom* involved a temporary work contract. The complainant worked as an independent contractor for a church where he was responsible for teaching music to students. According to the complainant, the church terminated his contract of employment because he was involved in a homosexual relationship.[49] In other words, the contract worker had been unfairly discriminated against based on his sexual orientation. The respondent relied on freedom of religion entrenched in terms of section 15 of the Constitution.

The question before the Equality Court was whether the right to religious freedom supersedes the constitutional imperative that a party should not be discriminated against on the ground of sexual orientation.[50] It was held that there was no evidence that the complainant was required

49 *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 30 ILJ 868 (EqC) para 6–8.

50 *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* para 14.

to teach Christian doctrine but rather technical aspects of music. The complainant, therefore, was not a spiritual leader in the church and had no religious responsibilities. The court found that the respondent had unfairly discriminated against the complainant and ordered, *inter alia*, the payment of loss of earnings in the sum of R11970 and R75000 for the impairment of his dignity, and for emotional and psychological suffering. The court demonstrated its readiness to interfere in a private contract by subjecting it to the Constitution to ensure that it is compatible with constitutional rights.

There is a similar case involving a wedding venue that is pending before the Equality Court. In the matter instituted by the South African Humans Rights Commission against Coia and Andries de Villiers as the owners of Beloftebos before the Equality Court, the influence of the Constitution is also evident. It is alleged that the owners (De Villiers couple) of the wedding venue, Beloftebos, refused to host a same-sex marriage on their premises.[51] This resulted in the matter being referred to the Human Rights Commission and finally to the Equality Court. The owners of Beloftebos have argued that "the issue has always been about their sincere and deeply held convictions on the sacrament of marriage... [and] not about the sexual orientation of any person". They, therefore, do not believe that there was unfair discrimination in their decision since "they fully respect and recognise the constitutional rights of the LGBTIQ+ community".[52]

The outcome of this matter is still pending. However, the owners of Beloftebos have indicated that their farm is no longer available as a wedding venue to the general public.[53] Vettori argues that based on the evidence before the court this case amounts to discrimination on the basis of sexual orientation which might be regarded as unfair.[54] By forcing private individuals to host same-sex marriage ceremonies it means that they have to do something that is contrary to their beliefs. The question that arises is whether the right to freedom of religion, belief, and opinion justifies the refusal to host a same-sex marriage. Alternatively, the question is whether a private party can be forced to conclude a contract with another to prevent the infringement of the other's right to equality and dignity. The onus is on the owners of Beloftebos to prove that the discrimination is fair in the circumstances. The court will be required to balance the competing interests of the parties. In doing so, a court can no longer allow the exercise of private power in a manner that unjustifiably affects a constitutional right.[55] The Constitution demands that parties treat each other with respect and dignity. One cannot simply refuse to enter a contract with another, for example by refusing to cut a black person's hair since this will constitute unfair discrimination on the basis of race or ethnicity.[56] This adds weight to the contention that contracts that infringe constitutional provisions will not pass constitutional muster.

Section 9(4) of the Constitution states that: "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds…" which include among others race,

51 The same-sex marriage was between Megan Watling and Sasha-Lee Heekes; Petersen "Same Sex Couple Seek R2m in Damages from Beloftebos Wedding Venue which Turned Them Away" https://www.news24.com/news24/southafrica/news/same-sex-couple-seek-r2m-in-damages-from-beloftebos-wedding-venue-which-turned-them-away-20200917 (accessed 26-08-2022). See also Cloete "Beloftebos Wedding Venue Taken to Court for Refusing Same Sex Couple" https://www.iol.co.za/news/south-africa/western-cape/beloftebos-wedding-venue-taken-to-court-for-refusing-same-sex-couple-41331062 (accessed 26-08-2022).

52 As quoted by For SA for Faith & Freedom Press Release Statement "Beloftebos Seeks Amicable Resolution of Same Sex Marriage Case" https://forsa.org.za/press-release-beloftebos-seeks-amicable-resolution-of-same-sex-marriage-case/ (accessed 26-08-2022).

53 Shange "No More 'I Do' at Western Cape Venue that Rejected Same-sex Marriage Ceremonies" https://www.timeslive.co.za/news/south-africa/2022-02-09-no-more-i-do-at-western-cape-venue-that-rejected-same-sex-marriage-ceremonies/ (accessed 26-08-2022).

54 Vettori "Discrimination Based on Sexual Orientation towards Patrons in the Hospitality Industry in South Africa" 2020 *African Journal of Hospitality, Tourism and Leisure* 692.

55 See *Botha v Rich NO* 2014 4 SA 124 (CC) and *Kollapen v Du Preez* 2005 ZAEQC 1.

56 See *Kollapen v Du Preez* 2005 ZAEQC 1.

religion, culture, and sexual orientation. The founding value of equality in the Constitution also demands that contracting parties enjoy and advance the principle of equality.[57] This means that contracting parties are protected from unfair discriminatory contractual provisions or the exercise of contractual power in a discriminatory manner. Any contract that contains provisions that constitute unfair discrimination is bound to be struck off on the basis it does not fall within the bounds of the Constitution and will therefore be found to be unconstitutional.

The same position was laid down in the well-known case of *Hoffman v South African Airways* (SAA).[58] The appeal to the Constitutional Court in this matter concerned the constitutionality of the refusal of employment of the appellant, as a cabin attendant, who was living with Human Immunodeficiency Virus (HIV). The appellant's argument was that the refusal to offer him employment constituted unfair discrimination and violated his constitutional right to equality, dignity, and amounted to unfair labour practices. The respondent, in turn, posited that their employment practice was justified based on safety, medical and operational grounds.[59] This assertion was found to be inconsistent with the medical evidence that was adduced before the court. Ngcobo J concluded that the refusal by SAA to employ the appellant as a cabin attendant infringed his right to equality guaranteed in section 9 of the Constitution.[60] An order was made directing SAA to employ the appellant as a cabin attendant.[61] This case demonstrates the impact of the transformative Constitution on contracts in the employment context. It also shows that the Constitution protects the weak, marginalised, and the victims of prejudice or stereotyping. Unfair discriminatory employment practices and contractual terms that are not in the public interest cannot be permissible under the Constitution. The Constitution reigns supreme even in a private contractual context.[62] The Constitutional Court made an important remark in *Mahlangu v Minister of Labour*.[63] It stressed that:

> The Constitution serves a transformative purpose that is advanced through our equality and dignity jurisprudence. It recognises that the values of equality and human dignity, although linked, each serve as independent rights and constitutional values…[64]

Although the matter did not involve a contractual relationship, this does not detract from the significance of what the court said. At the heart of the transformative Constitution is the desire to ensure the achievement of substantive equality as well as dignity. These two constitutional values are interlinked since one's dignity is impaired when a person is unfairly discriminated against.

The rights of HIV-positive people in an employment contract were further reinforced in *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre*.[65] The plaintiff alleged automatic unfair dismissal on the grounds of his HIV status in terms of the Labour Relations Act 66 of 1995, and he sought relief arising from section 6(1) read with section 50(2)(b) of the Employment Equity Act 55 of 1998.[66] These statutes were enacted to give effect to the Constitution and

57 See s 1 of the Constitution.

58 2001 1 SA 1.

59 *Hoffman v South African Airways* 2001 1 SA 1 paras 6–7.

60 *Hoffman v South African Airways* para 41.

61 *Hoffman v South African Airways* para 61.

62 See generally Ngwena and Matela "*Hoffman v South African Airways* and HIV/AIDS in the Workplace: Subjecting Corporate iIdeology to the Majesty of the Constitution" 2003 *SAPL* 306–330.

63 2021 2 SA 54 (CC).

64 See *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) para 106. The case dealt with the exclusion of domestic workers from receiving compensation for injuries sustained in employment in terms of the Compensation for Occupational Injuries and Diseases Act (COIDA).

65 2011 2 SA 638 (LC).

66 *Allpass v Mooikloof Estates (Pty) Ltd* 2011 2 SA 638 (LC) para 1.

instead of relying on provisions in the Bill of Rights, an employee can frame the matter in terms of labour legislation. The applicant in this case was employed on a three-month temporary contract that was subject to review at the end of the period. The evidence before the court showed that the applicant had been denied employment on the grounds of his HIV status.

The Labour Court held that the termination of the employment contract or the dismissal of the appellant by Mooikloof Estates impaired his dignity and amounted to unfair discrimination under section 187(1)(f) of the Labour Relations Act.[67] The respondent was ordered to pay compensation that would reflect both restitution as well as a punitive element for unfair discrimination. Consequently, the court ordered the payment of a sum of twelve months' remuneration.[68] The findings show once again the significance of the constitutional right not to be unfairly discriminated against based on one's HIV status.

The cases above demonstrate that the Constitution is employed to strike a balance between the excesses or possible abuse of party autonomy, freedom of contract and the need to allow individuals to regulate their own affairs without State interference or restrictions with public policy considerations. Where constitutional rights are affected, the enforceability of the contractual clause will fail. Contractual terms that are, for example, unfairly discriminatory in nature will not pass constitutional muster as they violate the equality clause.[69] The fact that the outcome tends to be determined in terms of the Bill of Rights shows the constitutionalisation of contract law.

The termination of banking facilities remains controversial. The exercise of private power in a banking relationship may give rise to a clash between private law and the Constitution.[70] It may also have a public impact where a contracting party has employees. The appeal in *Bredenkamp v Standard Bank of South Africa*[71] was based on the right of a bank to close a client's account. The SCA concluded that the termination of the client's account did not offend any constitutional value and was thus not contrary to any other public policy consideration.[72] It emphasised the point that there was a contract between the two parties that gave the bank the right to cancel the contract and the decision to do so was based on the bank's reputational and business risk which was justified.[73] The appeal was accordingly dismissed.

The case involving *Surve (Sekunjalo Group) v Nedbank*[74] raises once again the question of whether a bank may be prevented from exercising its power to close the banking accounts of its clients. Central to the issue is that Nedbank wanted to terminate its relationship with the Sekunjalo Group by closing its bank accounts. The applicant averred that the termination notices that the bank issued amounted to discrimination based on race as well as harassment. Nedbank argued that their relationship was contractual in nature and the contract provided for the termination of the banking relationship. This could either be done by giving a reasonable

67 66 of 1995.

68 See *Allpass v Mooikloof Estates (Pty) Ltd* para 78.

69 Section 9(1)-(5) of the Constitution. Section 9(3) states that: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

70 A decision to terminate a bank–client relationship is governed by the ordinary rules of the contract. See *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 1 SA 562 (GP) paras 21–22, and *Bredenkamp v Standard South Africa* 2010 4 SA 468 (SCA).

71 2010 4 SA 468 (SCA).

72 *Bredenkamp v Standard South Africa* 2010 4 SA 468 (SCA) para 64.

73 *Bredenkamp v Standard South Africa* para 65.

74 Case No EC 02/2022.

notice but where fraud was suspected, no notice was required.[75] It further argued that adequate reasonable notice had been given regarding the termination of the accounts and it had engaged with Sekunjalo Group regarding the allegations of improper and unlawful conduct which posed a reputational risk to its business.[76] The issue before the court was whether Sekunjalo Group had *prima facie* established a case of unfair discrimination and assessment and, if so, whether it satisfied the requirements for a provisional interdict.[77]

The Equality Court concluded that the Sekunjalo Group had established a *prima facie* case that it had been unfairly discriminated against on one of the prohibited grounds. The differential treatment was *prima facie* proof of unfair discrimination.[78] Nedbank had not subjected other companies such as Steinhoff to the same treatment, such as the closure of their accounts, despite the reputational risk it posed to the bank. This is irrespective of the fact that Steinhoff had been embroiled in a series of litigation not only nationally but internationally as well.[79] The Equality Court granted an interim order and ordered Nedbank to reopen the closed bank accounts.[80] It also prohibited Nedbank from closing any bank accounts belonging to the applicant. The common-law requirements for an interim interdict were thus satisfied.[81]

It is evident from this discussion that the private law of contract may collide with the transformative Constitution and the values it embodies. A bank is entitled to terminate or close the accounts of clients with a bad reputation except where it will be unfair and contrary to public policy. It is well accepted that fairness or good faith is not a self-standing rule on which a contract can be set aside.[82] The fact that a party will be left "unbanked" does not justify imposing an obligation on the bank to retain a client. However, the power to terminate the bank relationship may infringe on constitutional rights such as the right to equality. Public policy considerations will, therefore, not favour the termination of the bank–client relationship in such circumstances.

3 PRIVATE–PUBLIC DICHOTOMY

The question of whether the distinction between private and public law is necessary has been debated over a long period, particularly in those systems where the distinction exists.[83] Feldbrugge argues that while the distinction is considered the most fundamental by some lawyers, the same is not true for everyone.[84] In South African law, the division between public and private law is still generally applied though some doubt has been cast on it. The question that arises then is to what extent does the public–private law divide exist in South Africa in light of, for example, the constitutionalisation of the law? Second, can the strict traditional divide between public law and private law still hold and does it have practical value? Van Huyssteen, Lubbe *et al* argue that:

> This system or division of the rules of the law is by no means logically compelling or

75 *Surve v Nedbank* Case No EC 02/2022 para 26.

76 *Surve v Nedbank* paras 42–44.

77 *Surve v Nedbank* para 31.

78 *Surve v Nedbank* para 52 and 54.

79 See generally Styan *Steinhoff Inside SA's Biggest Corporate Crash* (2018) ch 5, see also "PwC Investigation Finds $7,4 billion Accounting fFraud at Steinhoff, Company Say" https://www.reuters.com/article/us-steinhoff-intln-accounts-idUSKCN1QW2C2 (accessed on 3-03-2023).

80 *Surve v Nedbank* para 68.

81 Nedbank has been granted leave to appeal against the interim interdict by the SCA and the matter is yet to be heard. It is hoped that this case will bring clarity after the decision in *Bredenkamp* to the question of whether banks are exercising their contractual power in a way that is compatible with the Constitution.

82 See *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 22. See also *Bredenkamp v Standard South Africa* para 65.

83 Rosenfield 2013 *I-CON 11* 125.

84 Feldbrugge *Private and Civil Law in the Russian Federation* 261.

> jurisprudentially indefeasible, other distinctions exist. Any emphasis on the law of contract as an aspect of private law cannot deny the increasing degree to which certain traditional areas of private and public law have come to overlap.[85]

The overlap between some areas in private and public law is inevitable. This is because contract law is being redeveloped by courts beyond the classical notions of autonomy and freedom to a system that requires constitutional imperatives to be taken into consideration. The notion of autonomy and sanctity of contract is thus not applied absolutely which means that it must be balanced with justice, reasonableness, and fairness.[86] In the context of English law, Harlow cogently argues that the public–private law classification is irrelevant and devoid of intrinsic merit.[87] The same holds true for South Africa. With the increasing influence of the Constitution on contract law, the distinction is losing its relevance and it is unlikely to contribute anything meaningful to the development of the law.

The Constitutional Court has pronounced that: "There is only one system of law. It is shaped by the Constitution which is the supreme law."[88] The rationale is that the Constitution creates one law as it regulates the exercise of both public and private power. The effect of the progressive and transformative Constitution is to dismantle the boundaries between private and public law. Put differently, the incremental constitutionalisation of contract law over time means that the latter should be infused with constitutional principles. It is submitted that the influence of the Constitution on private parties shows that party autonomy and freedom of contract are not absolute.

Contracts are becoming human rights focussed with the cognisance of the rights contained in the Bill of Rights. The re-aligning of the law of contract with the Constitution blurs the public–private law divide. Bhana rightly contends that the significant consequence of the horizontal application of the Bill of Rights to common law is that "… the strict traditional divide between public law and private law can no longer hold — the impenetrable brick wall between the public and the private must be torn down."[89] With the increasing influence of the Constitution on contract law, it can be conceded that Bhana's submission or claim is not far from the truth. The divide between public and private law can no longer hold with the application of the Bill of Rights to all law including contract law.

The practical value of the public and private law divide is also questionable. Van Huyssteen and Maxwell aver that there is little practical value in the distinction between public and private law.[90] Furthermore, there are no legal consequences that flow from the distinction, and the classifications of main branches of law are also not often precise and exclusive.[91] At most, the distinction between private and public law is regarded as beneficial for the purposes of teaching law.[92] Be that as it may, the distinction seems to influence law students to treat the law with a silo approach. They tend to compartmentalise knowledge and fail to appreciate synergies between the different areas of law. This becomes very evident in the final years of LLB. This is a negative result of the division of public and private law because the law does not operate

85 Van Huyssteen *et al.Contract: General Principles* 3.

86 See generally Van Huyssteen *et al. Contract: General Principles* 13.

87 Harlow "Public and 'Private' Law: Definition without Distinction" 1980 *Modern Law Review* 250.

88 *Pharmaceutical Manufacturers Association of South Africa; In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 para 44. See generally *Barkhuizen v Napier* para 15.

89 Bhana *Constitutionalising Contract Law* 32.

90 Van Huyssteen and Maxwell *Contract Law in South Africa* 71.

91 Harlow 1980 *The Modern LR* 241.

92 Van Huyssteen and Maxwell *Contract Law in South Africa* 71. See also Micklitz "Rethinking the Public/ Private Divide" in Maduro, Tuori and Sankari (eds) *Transnational Law Rethinking European Law and Legal Thinking* (2014) 271.

in isolation since, in actual fact, the law is intertwined and interrelated, with the Constitution being at the centre.

Van Huyssteen and Maxwell rightly opine that the boundaries between private and public law regarding the law of contract become more blurred in cases involving contracts with the State or its organs.[93] This is especially when a contract is categorised as an "administrative-law agreement".[94] Government institutions across the world do business with private persons and companies. The same is true for South Africa. In such instances, there are specific rules that regulate the contracts concluded with the State. Section 217 of the Constitution states that:

> When an organ of state in the national, provincial or local sphere of government, or any other institutions identified in national legislation, contracts for goods or services, it must do so in accordance with a system which fair, equitable, transparent, competitive and cost-effective.[95]

There is a separate list of requirements that "administrative-law agreements" have to satisfy to be valid, for example, tender rules. Rather than falling under the ambit of private law, such contracts form part of public law. This is because the decision to award a tender constitutes administrative action to which the provisions of the Promotion of Administrative Justice Act (PAJA) apply. [96] Contracts entered with an organ of the State are a matter of public law and they are governed by the Constitution. Consequently, contract rules play a less important role with regard to administrative law agreements.

In summary, it seems the distinction between public and private law was useful at one point in the South African context, but it has become increasingly less so. The Bill of Rights enjoins the "tearing down of the impenetrable wall between the public and the private".[97] This is for the constitutionalisation process of private law to be possible. The constitutional order effectively means less emphasis on the public–private distinction as there is a shift towards constitutionalising contract law. The application of the constitutional or public law values and the applicable substantive rights to the private common law is gradually changing the *status quo* to one system of law with no boundaries. There is without doubt a decline in the public–private law distinction.

Kennedy makes two compelling arguments regarding the success of a legal distinction.[98] First, he argues that it must be possible to make the distinction which means it must be sensible to divide things. Second, the distinction must make a difference. Arguably, the public–private law divide no longer seems to make a difference. This explains why other writers find the distinction as "useless" for a general systematisation of law. [99]

4 CONCLUSION

Over the years, private organs and private actors have developed significant power that can negatively affect the fundamental rights of individuals and society as a whole. Private power cannot be regarded as immune from constitutional scrutiny. The exercise of private power,

93 Van Huyssteen and Maxwell *Contract Law in South Africa* 32.

94 These are contracts where one of the parties is a public body or a person exercising public power. See generally Hoexter "Contracts in Administrative Law: Life after Formalism" 2004 *SALJ* 595–618.

95 Section 217(1) of the Constitution of South Africa.

96 Promotion of Administrative Justice Act No 3 of 2000. See *Millennium Waste Management v Chairperson Tender Board* 2008 2 SA 481 para 4.

97 Bhana *Constitutionalising Contract Law* 32.

98 Kennedy "The Stages of the Decline of the Public/Private Distinction" 1982 *University of Pennsylvania LR* 1349.

99 See the quote by Rosenfield *Rethinking the Boundaries Between Public and Private Law for the Twenty-First Century: An Introduction* 125.

therefore, attracts constitutional consequences and if there is a violation of the entrenched rights or the foundational values of the Constitution, the contract may be set aside. This underscores the point that the exercise of contractual power is subjected to and trammelled by the Constitution without which human rights violations would occur unabated. The extension of the protection of fundamental rights to private transactions results in the blurring of the divide as constitutional rights and private law have started to converge. Private parties must also further the ideals of the Constitution which include equality, dignity, and freedom. As such, there is a huge overlap between public and private law due to the increasing influence of fundamental rights on private relationships.

Arguably, the legal distinction between private and public law no longer seems to make a difference. The fact that the distinction only serves a pedagogical purpose in training undergraduate law students highlights that it is insignificant, lacks practical value, and to some extent is outdated. The extent of the influence of the Constitution on contract law, as evidenced in case law, demonstrates that the boundaries are gradually being dismantled and the distinction does not hold anymore. The constitutionalism of contract law, therefore, signals the end of the public–private divide in South Africa to one system of law in the near future.