The Sub-Saharan ethic of Ubuntu and its impact on the South African labour dispensation[1]

SIPHO NKOSI
University of Johannesburg
Faculty of Law
Kingsway Road, Auckland Park, Johannesburg
2006
Republic of South Africa
E-mail: snkosi@uj.ac.za
Telephone: +027 011 559 5205
Mobile: +027 82 752 2313

The aim of this paper is to take a cursory look at the etymological, theoretical and philosophical foundations of ubuntu, and then demonstrate how it has become part of the South African jurisprudential lexicon and legal practice.[2] This is because the courts are beginning to rely more on the juridical, transformative and practical value of ubuntu in adjudicating upon disputes. It also involves explaining the meaning and denotation of some of the sub-Saharan maxims,[3] particularly Southern African ones, thereby indicating how the moral content of the concept can, and should, be used to: (a) revive remedies which, for policy or other extraneous considerations, were discarded under colonialism and apartheid;[4] (b) discard those that no longer serve any useful or legitimate purpose; (c) and, where

[1] I would like to thank Professor David Bilchitz of the Faculty of Law at the University of Johannesburg for his advice and guidance. However, I accept full responsibility for the views expressed in this paper.

[2] In this regard, see *Dikoko v Mokhatla* 2006 (6) 235 (CC) at para 113 where Sachs J said that ubuntu is "more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived". The Constitutional Court justice further emphasises the point that the concept "is intrinsic to and constitutive of our constitutional culture".

[3] They are not just meaningless calques "which sound like mere descriptive banalities", but evaluative, normative claims which call for recognition and protection – T Metz "African Values, Human Rights and Group Rights: A Philosophical for the Banjul Charter" in Onazi (ed) *African Legal Theory and Contemporary Problems: Critical Essays* 134.

[4] In this regard, see AB Edwards "Source of South African Law" in Hosten et al (eds) *Introduction to South African Law and Legal Theory* (1995) 501 where he says: "To many the very notion of Roman-Dutch law evokes horror and disgust. Put at its simplest, the prevailing law of the land is regarded as 'apartheid law', and, its Roman-Dutch law component, because of its foreign ancestry and colonial association, stands condemned as a *socius criminis* along with the Nationalist government." It should always be stressed that colonialism is equally culpable for the constitutional and legal problems that South Africa has experienced.

necessary, develop the nascent ones[5] that possess the potential to serve South Africa's constitutional project of promoting social justice, fairness and equity with particular reference to the law of contract and labour law. What will also become apparent is that the judges are beginning to clearly distinguish between the ubuntu theory and ubuntu *praxis* which is "the lived experience of certain humanistic values" among South Africans and giving it judicial content.[6] The principles of South African labour law will used as an example of how the maxims can, and should, be fused with these values of ubuntu in order to ensure a fair, just, equitable, compassionate and humane South African society. This approach will help to show how South Africa's legal and constitutional history,[7] which was characterised by racial discrimination, disparate standards of education, an exploitative and exclusionary labour system,[8] economic exclusion[9] and the resultant "enclave economy",[10] is being transformed[11] in order to create an ubuntu-influenced *lege lata* (the law of the country as it is), not just the *lege feranda* (the law as it ought to be).[12]

---

[5]For instance, the decision in *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) is but one example of this phenomenon. In that case, the Constitutional Court fashioned out a "new" right – to basic municipal services. For a thorough discussion of the principles enunciated therein, see D Bilchitz "Citizenship and Community: Exploring the right to receive basic municipal services" *CCR* (2010) 48.

[6] This is represents "the live expression of certain humanistic values" A V Prinsloo "Prolegomena to Ubuntu and any other South African Philosophy" (2013), an unpublished MA thesis submitted to Rhodes University.

[7] All the ameliorative aspects of the common law were rendered ineffectual by legislation. This was because the brand of Roman-Dutch common law that South Africa had under colonialism and apartheid was "not the Roman-Dutch law of the seventeenth and eighteenth-century Roman-Dutch jurists" - see J Dugard *Human Rights and the South African Legal Order* (1978) 9.

[8] For a comprehensive examination of the influence of colonialism and apartheid on the South African labour jurisprudence, see D Du Toit *et al The Labour Relations Act of 1995* (1998) 3-41.

[9] There was a set of statutes whose sole purpose it was to ensure there was differentiation in the workplace particularly on the basis of race or colour; and to keep the absorption of black people into the job market very minimal. Needless to say, the education system itself was structured in such a way as to conduce to the grand plan – As Sparks puts it: "The purpose of the (apartheid) policy was not only to protect white jobs but to attempt the Sisyphean task of reversing the relentless influx of rural black people to the cities…The result was that black people were deliberately given a separate and inferior education (most, in fact, got no education at all). They were barred from the major universities. They were prohibited by law from doing skilled work. A black man could carry a white craftsman's toolbox for him and hand him the tools. He could mix the paint and clean the paint brushes and set up the ladder, but could not paint the wall himself. Such work was reserved for whites under the Job Reservation Act (sic)." - see *Beyond the Miracle* (2003) 111; M Mbeki "Introduction" in M Mbeki (ed) *Advocates for Change: How to Overcome Africa's Challenges* 12. It is important to emphasise that there was no such an Act of Parliament as the "Job Reservation Act". It was a series of laws and regulations which kept black people on the periphery of the economic as a social underclass. An example of this is the Mines and Works Act of 1911, later re-enacted as Act 25 of 1926, and as Act 27 of 1956 and the Apprenticeship the Act 37 of 1944. It prohibited the granting of "certificates of competency" to black employees in the mining industry thereby prohibiting them from becoming managers. Also, before 1979, black people could not, by law, form themselves into a recognised labour union.

[10] Guy Mhone, a Malawian economist is credited as having originated the term. - Mbeki (n 8) 6.

[11] Keep & Midgley "Emerging Role of Ubuntu-botho in Developing a Consensual South African Legal Culture" in Bruinsma, B & Nelken, D (eds) *Recht der Werkelijkheid* (2007) 88.

[12] The mantra of the judges during colonial and apartheid times was "*ius dicere, non facere*": the function of the judge was not interpret the law not to make it. This flowed from the provisions of s 59 (1) of the Constitution of South Africa Act 32 of 1961 which gave sovereign legislative authority to Parliament. The arrangement

As already indicated above, ubuntu is by no means a post-democratic South African invention.[13] Like many aspects of "living customary law",[14] ubuntu was edited out of the formal version of customary laws which were themselves regarded as "inferior (to common law), scarcely deserving recognition as true laws".[15] This was done solely to promote the politico-ideological project of colonialism and apartheid.[16] Consequently, ubuntu never got any recognition, statutory or otherwise, and the knowledge around it was stifled and stunted.[17]

If one considers the etymology and ontology of ubuntu one realises that it shares the same root as *"umuntu"*, which means a "human being".[18] It is a verbal noun, a gerund.[19] In this context, ubuntu is used to mean both the individual person's state of being, and his or her willingness to advance the interests of others.[20] Despite scepticism in some quarters, ubuntu is inextricably tied to concepts such as "humanity, personhood or humaneness"[21] And, even though Bennett refers to these equivalents as "calques" or "loanwords",[22] they do serve the purpose of explaining the origin, content and purpose of ubuntu. Ubuntu presupposes that human beings are not perfect, and are prone evil deeds;[23] and that they need to be constantly reminded of such other innate values as compassion, concern, consideration, empathy,

---

persisted even under the Constitution Act 110 of 1983 which created a "tri-cameral" Parliament even though its authority was now shared with the executive arm of government – see G Cockram *The Interpretation of Statutes* (1983), Second Edition x; see also *Seluka v Suskin & Salkow* 1912 TPD 258 270.

[13] See GE Devenish GE *A Commentary on the South African Bill of Rights* (1999) 623.

[14] See Gumede (n 17) para 11 and 17.

[15] TW "Ubuntu: An African equity Bennett" *PER* (2011) 30/351.

[16] See *Gumede* (n 19) para 11, 12 and 17.

[17] See Bennett (n 14) 30/351.

[18] The root is "*ntu*"; and the plural *"abantu"*.

[19] It belongs to the Eighth Declension of Zulu nouns; and it connotes action and a state of being. However, cf TW Bennett (n 14) 30/351.

[20] While it is predominantly a relational Afro-communitarian ethic, it is not exclusively so. Like African Customary Law of which it is an integral part, ubuntu has always conduced to members of any community pursuing exclusively personal interests, and exercising personal rights – see Mokgoro JY "Ubuntu as a legal principle in an ever-changing world" in F Diedrich (ed) *Ubuntu, good faith & equity Flexible Legal Principle in Developing a Contemporary Jurisprudence* (2011) 1.

[21] See Bennett (n 14) 30/351-31/351.

[22] Id.

[23] Hence the scourge of slavery, feudalism, xenophobia, tribalism and ethnocentrism. In other words, the ethos that ubuntu represents "is not seeking to pretend that we are in a utopian community where conflict does not arise; rather, it can help to mend and repair social relationships" – Bilchitz (n 4) 68.

fairness, justice, mercy and social solidarity.[24] It is denotative of an effective, humane and caring constitutional order with concomitant legal remedies.[25]

Even though ubuntu is Sub-Saharan in its origin and orientation, and coterminous with many other philosophies, it is autochthonously Southern African in its etymology and ontology.[26] Its unique sell-off point seems to be its relational nature. And, despite being a very difficult concept to confine within rigid parameters, Mokgoro offers the following description:

> *"Ubuntu, a foundational value in traditional African society evades being defined with scientific precision, but that does not preclude it from having particular relevance as principle of legal interpretation. As a fundamental value of traditional African society, it connotes a worldview and an approach to human relationships in which humanness and the inherent humanity of the individual are central…Owing to its emphasis on the community, ubuntu runs the risk of being conflated with communalism. It is important to hasten to a nuance that lies between communalism and ubuntu; the latter is more concerned with the realisation of the uniqueness of each individual in the context of his or her community, while communalism's focus is less on the autonomy of the individual members of the community and more on the collective."*[27]

The passage clearly demonstrates that an individual is as a much a part of his community as it is a reflection of his individuality; that an individual does not just disappear into an undefinable infinity of humanity.[28] In the context of ubuntu, therefore, the term "community" signifies a "plurality of personalities corresponding to the multiplicity of relationships in which the individual in question stands"; and that the community is not just an "overbearing entity existing outside the individual

---

[24] JS Mbiti *African Philosophy and Religions* (1990) 108-108; see also JG Murphy "Mercy and legal justice" in J Coleman & EF Paul (eds) *Philosophy and Law* (1987) 2.

[25] See F Viljoen "The law of criminal procedure and the constitution" in C De Beer (ed) *Bill of rights compendium* (1999) para 55B1 where the author says: "A humane criminal justice system is a prerequisite for a rights-based democracy (which the pre-1994 South Africa was not)". See, also, in general AB Edwards in WJ Hosten et al *Introduction to the South African law and legal theory* (1995) 25 et seqq.

[26] For instance, in Rwanda, it is known as *umuganda*, which started as a form of friendly persuasion for member of the community to come together and help those who, because of age, ill-health, disability or poverty cannot do much to help themselves - see P Uwimbabazi 2-3; 55-58.

[27] JY Mokgoro "Ubuntu As A Legal Principle In An Ever-changing World" in F Diedrich (ed) *Ubuntu, Good faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 1-2.

[28] For different view on this point, see I Keevy: Ubuntu: Ethnophilosophy and Core Constitutional Value (s) in F Diedrich (ed) *Ubuntu, Good faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 24.

that seeks automatic priority over all individual interest".[29] The emphasis seems to be not just on the relationality of ubuntu, but also on what ubuntu engenders - compassion, sympathy, humaneness, empathy and considerateness. However, it is important to remember that the idea of exploring the nature and purport of ubuntu is not necessarily to romanticise it; or to tout it as an infrangible, incorruptible thought system. It is, by definition, intended to deal with human frailties and related vices. The world has witnessed how members of the white race, with the help of some "philanthropist" priests[30] decided, without any credible medical or other evidence, that members of the black population are below subhuman level and should be subjugated and oppressed? Nor should there be any trepidation with regard to what Keevy refers to as the "dark values of ubuntu": patriarchal hierarchies, male dominance, female subordination discrimination, homophobia etc".[31] However, it is important to note that ubuntu is not necessarily an innate part of the human being; it is a corrective which a person learns through training and induction by the elders in his family, and it is part of the culture, traditions and jurisprudence of his community. Ubuntu is not responsible for the parochial, exclusionary religious beliefs on which some of the communities are founded.[32] For instance, Keevy, queries the courts' "promotion of values of one religious worldview over the values of other religious worldviews, infringing upon the freedom of religion pursuant to section 15 of the Constitution".[33] She continues: "The fact that outsiders cannot join African religions affirms the fact that traditional African societies are closed societies…Outsiders are welcome and enjoy unconditional hospitality and respect for as long as they stay in these communities, but are regarded as 'a form of second-class citizen'"[34] These human vices and frailties cannot, with all honesty, be blamed on ubuntu. While it is true that "newcomers" may not, at the first time of asking, enjoy all the rights that the original group enjoys – as is the case with all the other communities and countries – that argument cannot be used to support the view that

[29] M Nkhata "Towards Constitutionalism and Democratic Governance: Ubuntu and Equity as a Basis for Regulating Public Functionaries in Common-Law Africa" in F Diedrich (ed) *Ubuntu, Good faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 91.
[30] John Phillips of the London Mission Society is a prime example of this kind of priest – see SD Girvin "Race and Race Classification" in A Rycroft (ed) *Race and the law in South Africa* (1987) 2-3.
[31] Keevy (n 27) 36.
[32] Keevy (n 27) 33 et seqq.
[33] Keevy (n 27) 33-45.
[34] Keevy (n 27) 34.

ubuntu is inimical to equality and interconnectedness of humanity.[35] This is because, as an integral part of African philosophy and jurisprudence, ubuntu actually overarches all African religious beliefs.

Although it is not mentioned by name in the South African Constitution, ubuntu is the *Grundnorm* that undergirds it and the accompanying vibrant version of constitutionalism. It is not stifled by any narrow nativist, religious dogmas.[36] Ubuntu is concisely encapsulated in the following sub-Saharan adage: "I am because we are, and since we are, therefore I am."[37] It means that empathy, communality, sympathy, mercy and social solidarity are the *piece de resistance* of ubuntu; and need to be remain the mainstay of the South African brand of constitutionalism. For any person who does not experience these protective features in his or her community feels vulnerable and exposed.[38] And as Mbiti puts it: "The essence of African (positive) morality is that it is more 'societary' than 'spiritual'; it is a morality of conduct rather than a morality of being."[39] It is about "dynamic ethics", not "static ethics".[40] It enjoins members of that particular community to venture into the world and engage in activities that enhance the condition and dignity of other human beings; and to ensure that justice is served in respect of those whose property and limb have been injured.[41]

In the context of South Africa, there are African maxims which have always served as the black population's moral code and still continue to give ubuntu ameliorative juridical content.[42] Even though these maxims may sound like mere "descriptive banalities to English-speakers unfamiliar with the context, they are in fact primarily

---

[35] Nkhata (n 28) 92.
[36] This fact is borne out by the preamble and the provisions of the Bill of Rights.
[37] Mbiti (n 23) 209. The Nguni translation of it is: *"umuntu ngumuntu ngabantu"*.
[38] Mbiti uses the term "naked" – (n 10) 209. This is exactly what happened under colonialism and apartheid. The legal system was used to protect one section of the community, a minority to the exclusion of another, the majority. The law was, in the words of Du Plessis, ideologised and abused to achieve this purpose – see (n 39) above.
[39] Mbiti (n 23) 209.
[40] Id.
[41] Mbiti (n 23) 208-209.
[42] See Metz (n 1) 134. Case law is beginning to demonstrate a positive development in this regard – see *S v Makwanyane* 1995 (3) 591 (CC). The sayings are gradually becoming an integral part of constitutional and forensic make up. Very soon, South Africa will witness full home-grown autochthonous remedies.

evaluative claims."[43] In other words, the maxims help to set normative standards for the communities in which they find application; and continue to be used in order to give meaning and content to the ubuntu *praxis* (concrete expression of ubuntu) which is the real foundational value of the South African Constitution and the resultant jurisprudence.[44] In public law, such as it was in pre-colonial times, the social contract between the monarch and his subjects was founded on this maxim *inkosi yinkosi ngabantu bayo*. This, in effect, meant that the monarch – including the great King Shaka Zulu himself – could only rule with the consent, express or implied, of his people. At a social and personal level, the relations were governed by the maxim *umuntu ngumuntu ngabantu*: I cannot be what I ought to be until you are what you ought to be.[45] This emphasised, and still continues to emphasise, the interconnectedness of humanity, empathy, sharing, mercy, compassion, considerateness and sympathy.[46] There are many other maxims which serve the same purpose.[47] For instance, the BaPedi say: *"Gofa ke go fega, ware go fa wafegolla*.[48] The Batswana also have an equivalent, which teaches that *"molomo otlhafunang oroga omongwe"*.[49]And, to that end, there were several customs and practices which concretised, and gave meaning, to these maxims. To illustrate this point, the (a) sisa (mafisa)-contract; [50] (b) letsema;[51] and (c) the stokvel[52] will be discussed. These maxims and practices demonstrate that ubuntu is more than just a relational ethic. For were to be the case, ubuntu would be different from all the other

[43] See Metz (n 1) 134.
[44] See Prinsloo *Prolegomena* (n 4) 7; see also Metz Ubuntu as A Moral Theory 536.
[45] Almost identical to the words of Martin Luther King Jr in a letter he wrote in a cell at the Birmingham Prison: "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects us all indirectly. I can never be what I ought to be until you are what you are ought to be, and you can never be what you ought to be until I am what I ought to be…." Martin Luther King Jr **Letter from a Birmingham jail** in JM Washington (ed) *Martin Luther King Jr I have a dream: writings and speeches that changed the world* (1992) 85.
[46] Ibid.
[47] With regard to the moral or legal force of these maxims, Metz say that although "they may sound like descriptive banalities to English-speakers unfamiliar with the context, they are primarily evaluative claims". In other words, they should be infused into the South African constitutional and legal systems in order to improve existing remedies or to do away with those that do not pass muster – see (n 1) 131 135.
[48] It means that "by giving and being charitable, one qualifies to receive from practically anyone in the world". And, this is the kernel of ubuntu: giving and sharing selflessly. And, there are many variations of it in other African languages.
[49] Literally, it means that a mouth that is chewing insults the one that is not chewing: the person who is eating shames the one who is not eating. But, at a formal level, it means that the rich and powerful cannot continue to enjoy the wealth and resources of the country continuously without considering the interests of the poor and downtrodden.
[50] Bekker *Seymour's customary law in Southern Africa* (1989) 338-341.
[51] Keevy (n 27) 26.
[52] WG Schulze (n 51) 601 605-606.

normative values which regulate relationships between persons and objects. Ubuntu is a corrective which seeks to induce in an individual a sense of empathy, compassion, sympathy, justice, equity and fairness.

a) The sisa-contract

The sisa (mafisa) contract is an agreement founded on good neighbourliness, social solidarity and communalism, in terms of which a well-off person lends his livestock or to a less fortunate neighbour for use and enjoyment during hard times.[53] This may include the enjoyment of milk, wool and eggs, or using the animals for ploughing or breeding.[54] Oftentimes, if the owner of the livestock is satisfied with the manner in which the use and enjoyment was carried out, and how the neighbour has accounted for each animal, he rewards him appropriately, out of the goodness of his heart. There is no obligation to do so.[55]

b) Letsema practice

This a practice that is founded on the generosity of spirit. It is intended to encourage members of the community to sacrifice their time and resources in order to help the sick, poor, aged and the disabled.[56] Although the custom gained prominence during Mr Thabo Mbeki's tenure as president of South Africa, he is certainly not its originator; the practice actually predates him.[57] However, Mbeki can certainly take credit for reviving the custom in order to encourage the spirit of loyalty to the country and its Constitution and selfless service among government employees and members of the community; and ensuring that the rendering of essential government services is not just a clock-bound affair, but is driven by the needs of the citizens

[53] However, it is important to note that wool and the progeny of the livestock is not regard as part of the arrangement – see Bekker (n 49) 33.
[54] Id.
[55] Bekker (n 49) 340.
[56] The practice has since been linked to the government's Batho-Pele (people first) public service policy. It is intended to inspire government employees into becoming a people-spirited corps of civil servants, thereby "ensuring a better life for all South Africans" – *www.http:/www.dpsa.gov.za/documents.*
[57] Keevy (n 27) 26.

(and residents) of the country.[58] The essence or leitmotif of letsema seems to be very much similar to what is called "*umuganda*" in Rwanda. *Umganda* is a practice which involves the community "coming together in order to do something good for the benefit of a person, the community or nation" of that country.[59]

c) The stokvel

Even though stokvel is not completely "indigenous" to pre-colonial South Africa, it has nevertheless been infused with the spirit of ubuntu.[60] For those South Africans who live in townships and rural areas, the stokvel also creates a networking forum through which people share resources and skills – and help one another (and the children) with job opportunities and professional advancement. It also serves as an important social support system for those members of the community who are experiencing grief and bereavement in times of death or loss of a loved one; and in times of celebration, when children graduate from college or have a wedding or one of the traditional festivities. In the latter case, the support comes in the form cars, tools and labour that are provided in the days preceding the funeral or festivity. It is also important to note that, in many black communities, whenever a neighbour had (has) borrowed a hoe, a pot or similar implement, it was (and still is)[61] incumbent on him or her to return it with some food, meat, seedlings or grain inside. And, although it is often described in somewhat narrow, commercial terms, the stokvel does not only serve as a financial stop-gap in times of penury or merely to help those of the entrepreneurial bent to set up business enterprises, such the taxi operations.[62] For example, Schulze describes the practice in the following terms: "The stokvel is important for the commercial and business world because it resembles several concepts of the 'formal' South African law of insurance and banking. A stokvel is a form of credit-rotating association in terms of which a group of people enter into an agreement to contribute a fixed amount of money to a common pool on a periodic

[58] Id.
[59] See Uwimbabazi (n 14) 2-3; 55-58.
[60] See Schulze (n 51) 605-606.
[61] Obviously, these maxims and accompanying practices have waned in the glare of poverty and other socio-economic problems, which precipitated greed and selfishness.
[62] See Schulze (n 51) 605-606.

basis."[63] This definition ignores the many non commercial benefits of becoming a member of a stokvel.

What is clear from the aforegoing is that the maxims and the practices were (and still are) part of the positive morality of the communities in which they find expression. Metz describes these maxims (and practices) in the following terms: "Probably the most salient ethical-political-legal feature among indigenous sub-Saharan Africans is the importance accorded to the community…Regardless of the precise relationship between law and morality, there is little doubt that the term 'communitarian' is apt for characterising sub-Saharan norms." [64] It is for this reason that black South Africans believe that "*umuntu akalahlwa*":[65] there is no dumping site for living human beings. At a practical level, it means that there is some good in all human beings; we just have to assiduously look for it, and find it.[66] In other words, there is good and bad in all of us;[67] and that makes us all *human* and deserving of humane treatment.

3. *The criticism of ubuntu*

The first criticism is that ubuntu is a "new" and strange concept.[68] Clearly, this assertion cannot be correct. As indicated above, the criticism is one of those that are founded on ignorance or cultural chauvinism. Westerners, including some South Africans of European extraction, seem to be very quick to brand what they do not know as strange or *contra bonos mores*.[69] Ubuntu has not just been part of African philosophy and jurisprudence since time immemorial, it has also been an integral component of the "living customary law" of the different indigenous communities of South Africa.[70] It is not just a post-1994 creation shorn

[63] Id.
[64] See Metz (n 1)131.
[65] Literally, it means that a human being cannot just be disposed of like dirt.
[66] Mr Matthews of Phosa, a senior member of the governing party, the African National Congress, used this maxim at one of the centenary celebrations of the governing party. At that time, attempts were being made to expel Mr Julius Malema – now the Commander in Chief of the Economic Freedom Front – from the party. He said that "there is no dustbin for (errant) comrades" – *City Press*, 2012 17 January.
[67] These words are quoted from the song *Ebony and Ivory*, by Stevie Wonder and Paul McCartney.
[68] See Bennett (n 14) 30/351 -53/351.
[69] For instance, the successive colonial and apartheid governments refused to accord recognition to customary marriages, despite being valid in terms of the original *lex loci celebrationis* – see Dlamini "Recognition of a customary marriage" (1982) DR at 593 594.
[70] Himonga "African South African Law: The Living Customary Law" in Cornell & Muvangua (eds) *uBuntu and*

of all history and tradition. It is firmly rooted in the native soil of South Africa.[71] The second criticism is that ubuntu is deeply entrenched in African religion and is therefore conservative and backward-looking; and that because it seeks to impose African religious beliefs on foreigners, it is not consonant with the core values of the Constitution.[72] The impression that is created is that ubuntu is parochial, exclusionary and insular. The assertion ignores the very essence of ubuntu: *isisu somhambi singangentso yenyoni*.[73] At a formal level, the maxim enjoins members of the community to be cordial and welcoming to strangers. And, in reality, it serves as a prohibition against tribalism, ethnocentrism and xenophobia. As Cornell puts it: "[L]et us remember that some of these criticisms involve a fundamental misunderstanding of uBuntu. Often, critics of uBuntu make the mistake of reducing uBuntu to an ethical ontology of a purported (contrived) shared world. What is missed in this criticism is precisely the activism in participatory difference"[74] The third criticism is that ubuntu is vague and ambiguous, and that the dicta that have found their way into the law reports, are just a collection of the judges' own personal, and subjective, views.[75] However, the criticism loses potency when one considers that ubuntu, like many other normative phenomena, "encompasses different values simultaneously"; and this where its strength lies.[76] It is also important to note that most of the judges are South African men and women who have received the values embedded in the concept of ubuntu from oral history as passed down to them by their parents and other agnates. Some of them were, prior to ascending to the bench, in the trenches of public interest or human rights litigation, and they know how dehumanising poverty and oppression were to the black majority of South Africans.[77] The fact that the one judge emphasises one basic right in one context, and the other another, in a different context, does not render the rest of the catalogue of rights worthless.[78] The judges are acutely aware that all these rights are part of the same founding document. The fourth criticism, which is linked to the third one, is that ubuntu could be used to mean virtually anything to anyone,

---

the Law: African Ideals and Postapartheid Jurisprudence (2012) 44.

[71] Devenish (n 2) 587.

[72] Keevy (n 27) 33-35.

[73] Literally, the maxim means that the stomach of a stranger is a small as that of a bird.

[74] Cornell "Is there a difference that makes a difference between uBuntu and dignity?" (2010) SAPL 382 396.

[75] Himonga et al "Reflections on the judicial views on ubuntu" (2013) PER at 372/614.

[76] Himonga et al Id 385/614.

[77] They include the late Chief Justices Arthur Chaskalson, Ishmael Mohammed and Pius Langa, Deputy Chief Justice Dikgang Moseneke and Justices Kate O'Regan, Louis Skweyiya and Edwin Cameron.

[78] For instance, in *Hugo v President of the Republic of South Africa*1997 4 SA 1 (CC) para 74 Kriegler J laid emphasis on the importance of equality, saying that equality "is our Constitution's focus and organising principle". And in *S v Makwanyane* (n 41) para 144 and *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 37 O' Regan J stressed the significance of dignity.

thereby stifling the debate on its nuances.[79] Kroeze, for instance, says that even though there is nothing wrong with ubuntu as a concept, there is definitely something wrong "with the Constitutional Court's approach to constitutional values".[80] This is because, she opines, the Court just invokes values (such as ubuntu) like "little divinities" whose validity and authenticity is not be questioned by anyone.[81] She concludes that these values might end up being "accepted as immutable, debate-stopping certainties without any apparent awareness of their ontological status as cultural artifacts".[82] It is readily conceded that the parameters of ubuntu need to be carefully delineated.[83] This is because ubuntu is just like the proverbial unruly horse which "when you get astride, you never know where it will carry you".[84] However, that should not be done with the result that its juridical potency is diluted, or its practical relevance, compromised. In other words, we should not end up with a contrived version of the concept, which only serves extraneous interests.[85] Nor should ubuntu remain a mere loan-word which is used only to give a florid resonance to a weak contention or dictum; a verbal crutch of sorts.[86] It is gratifying, however, to note that the judges, led by the justices at the Constitutional Court, are beginning to use ubuntu to expand or circumscribe old legal remedies and processes in order to improve their efficacy.[87] The fifth criticism is that the communal ethic of ubuntu stifles individual autonomy.[88] This is one of the many myths about African concepts that need debunking. As has been the case with lobolo and the customary marriage, ubuntu is being viewed from a Western perspective, through a European or American lens, with disastrous results.[89] This approach creates the impression that

---

[79] See Bohler-Muller "Some Thoughts on the *uBuntu* Jurisprudence of the Constitutional Court" in Cornell & Muvangua (eds) *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 367; see T Bekker The Reemergence of uBuntu Court in Cornell & Muvangua (eds) *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 377 378, and Kroeze Doing Things With Value: The Case of uBuntu Court in Cornell & Muvangua (eds) *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 333.

[80] Kroeze *Things of value* (n 27) 341.

[81] Id.

[82] Kroeze (n 27) 343.

[83] And, the greater challenge lies not in whether "we can understand or determine the exact contours of uBuntu, but in defending a certain conception of uBuntu" – see Mokgoro & S Woolman "Where dignity ends and ubuntu begins: An amplification of, as well as an identification in Drucilla Cornell's thoughts" SAPL (2010) 401 at 406.

[84] To borrow from Burrough J *Richardson v Mellish* (1924) Bing, 2 Bing 229 at 252.

[85] See Devenish Id. 587.

[86] Kroeze (n 27) 340.

[87] To illustrate this point, some of the post-*Makwanyane* judgments such as *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC), *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) and *Molusi and others v Voges NO* 2016 3 SA 370 (CC) will be discussed below.

[88] See Cornell *Difference between uBuntu and dignity* (n 73) 395-396.

[89] See *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) para 12; 16-18; see also *Amodu Tijani v The Secretary, Southern Nigeria* 1912 (2) AC 399 (PC) at 404 and Dlamini "Recognition of a customary marriage" (1982) DR 593 594.

communality and individual autonomy are mutually exclusive in African law and jurisprudence. Even during the not-so-idyllic pre-colonial times,[90] the individual, male or female, had clearly distinct and separate rights which did not require the co-operation of the community for their realisation and protection.[91] Despite it being a relational ethic, ubuntu allows for the individual person to "transcend (his or her) biological distinctiveness".[92] And, therefore, it would be very wrong to confuse it "with simple-minded commutarianism".[93] The relationship between the individual and property and marriage, under customary law, will be used to illustrate this point. There is family property, house property and personal property.[94] Family property – which is sometimes referred to as "the general family estate"[95] - comprises property that the family head has not allotted to any particular house.[96] It has to be used for the benefit all the members of the family.[97] House property consists of the property that has already been allotted to a particular house.[98] In many instances, this category includes the lobolo paid in respect of maiden of a particular house in the homestead (family home), or fines and damages paid for the wrongs committed against the women or children of that house.[99] Both family property and house property fall under the control of the family head,[100] and must be used for the benefit of all the members of the family.[101] However, different rules apply in respect of personal property. It accrues and inheres in the individual owner, male or female, to the exclusion of everybody else.[102] The examples of this category are the person's own clothes, pets, weapons or artefacts; and can be used only with the consent and

[90] A phrase used by Moseneke DCJ in *Gumede* (n 88) para 19.
[91] Bennett *Customary Law* of South Africa (1999) 256-257.
[92] Cornell *uBuntu and dignity* (n 73) 392 where she also says that in ubuntu "individuals are intertwined in a word of ethical relations and obligations from the time they are born". This characterises ubuntu as a relational ethic, which does not allow for individuality or autonomy.
[93] Id.
[94] Bennett *Customary Law* 254-260.
[95] Bennett *Customary Law* 258.
[96] Bennett *Customary Law* (n 21) 256-257. It is important to note that in allotting the property, the family head has to consider the rights and interests of all the individual members of the family, including women and children.
[97] It is submitted that, under original customary law, this was the only category of property which the family head could dispose of by means of a will – J C Bekker (n 49) 72. However, on how the law on this point has been changed, to rid it of discrimination on the basis of race, sex and gender, see *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC); see also s 6 of the Recognition of Customary Marriages Act 120 of 1998, and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.
[98] A "house" is a unit into which a family home is divided; and it has its own property and status – see Bekker (n 47) 126.
[99] See Bennett *Customary Law* 256-257.
[100] It is important to note that South Africa's constitutional compact, of which ubuntu is an integral part, now prohibits unfair discrimination on the basis of sex or gender – see s 9 of the Constitution of the Republic of South Africa Act 108 of 1996.
[101] Bennett *Customary Law* 255.
[102] See Bennett *Customary Law* 256-257.

permission of that owner.[103] A customary marriage is viewed as the coming together of two family groups to which the bridal couple belong.[104] However, the individuality of the two persons making up the bridal couple cannot be discounted.[105] This is because, among other requirements, the consent of the woman, for instance, is an essential part of the resultant matrimonial pact; and the enjoyment of conjugal rights is strictly conditional on her consent.[106]

4. The transformative function of ubuntu in the context of South African labour law

4.1 The law of contract: general observations

In addition to being denied quality education and being excluded from the job market by a systematic low absorption into the mainstream economy, black South Africans were still expected to enter into commercial contracts based on the same terms and conditions as their white, educated and wealthy countrymen. The common law, whose principles could have afforded some form of protection,[107] was stifled by a very conservative interpretation of the sources of law by the courts.[108] This approach actually exacerbated the already unfair situation in which many black people found themselves: they could not extricate themselves from unfair contracts, or those contracts that contained unfair terms.[109] The *laesio ernomis* which was introduced by the Justinian Code in order to alleviate the harsh consequences of the application of the *pacta sunt servanda* principle.[110] It was initially introduced to protect rural farmer from urban capitalists who had the financial muscle to force the hand of the

---

[103] Id.
[104] Bekker (n 49) 96.
[105] Bekker (n 49) 106-107; 110-111.
[106] With regard to the approach of the South African courts where forced marriages and the custom of *ukuthwala* are concerned, see *S v Jezile* 2015 2 SACR 452 (WCC).
[107] PQR Boberg *Law of Person and the Family* (1977) 79 where says: "The point is simply that, in the field of private law racial discrimination is superimposed piecemeal by legislative enactment upon a common-law framework that knows no distinctions of colour, class or creed." For the limited remedies that the common law provided under those circumstances, see also HR Christie *The Law of Contract* (2001) 16-17; see also *Magna Alloys & Research (SA) v Ellis* 1984 4 SA 874 (A) *Safin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).
[108] See Christie 14-15; see also AJ Kerr *The Principles of the Law of Contract* (2002) 638-666; S Van der Merwe et al *Contract: General Principles* (2003) 116-120; *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 859 (A) *Bank of Lisbon and South Africa v De Ornelas & another* 1988 (3) SA 580 (A).
[109] See Christie above 17 and all the authorities cited therein; see also *Burger v Central South African Railways* 1903 TS 571 576.
[110] J Barnard *THRHR* (2008) "The unfairness of the price and the doctrine of *laesio ernomis* in consumer sales" 521; see also AJ Kerr above (n 39) 9 and all the authorities cited therein.

sellers.[111] Then, it was the seller, who was in a weaker position, who needed to be protected. However, centuries later, the boot was on the other foot. But because of the changes in the economic balance in the world, the remedy came to be used more by the purchaser than by the seller.[112] And, insofar as the law of contract and labour law are concerned, it is important to note that the relevant concepts were abolished or abrogated by disuse. In many instance, the approach was influenced by the political ideology of the time,[113] or founded on practice that had no basis in law.[114] For instance, concepts such as public policy and good faith were viewed from the prism of Western legal norms and values which left black people with a sense of injustice whose effect is still felt to date. Nor was there any sound reason or principle propounded for the abolition of the law of equity, *laesio ernomis* and the *exceptio doli generalis* – or the non reception of the concept of equity into South African law.[115] Reliance on public policy did not provide adequate protection to many of the contractants, particularly the illiterate one who fell for the ruses and wiles of the more educated businesspeople. This is because, by definition refers to the legal convictions of a particular society as perceived and articulated by the judges in resolving disputes brought before them.[116] That state of affairs conduced to untold levels of injustice.[117] It is for that reason that ubuntu has become the prism through which public policy should be viewed and articulated.[118]

4.2 The shopper and the "car-guard"

---

[111] The price of the *merx*, particularly land, had to be *verum* or *justum*. There had to be an appreciable relationship between the price and the thing sold. As Barnard (n 102) 522 puts it: "The rule was that the seller of land for less than half its real value might get back his land on returning the price unless the buyer preferred to pay the full price."

[112] Barnard (n 109) 523.

[113] See *Bank v of Lisbon and South Africa v Ornelas* 1988 (3) SA 580 where the *exceptio doli generalis* was abolished.

[114] See *National Union of Textileworkers v Stags Packings (Pty) Ltd* 1982 (1) SA 580 (T).

[115] See Bennett (n 14) 50/531 -51/531 where he explains it in this unfortunate situation in the following terms: "As it happened, the English doctrine of equity was not received into South African law. Purists engaged in the *bellum juridicum* [the conscious ideologisation of the law] argued that an alien concept such as this would pollute Roman-Dutch law."

[116] See Neethling et al *Law of Delict* (1999) 37-38; see also *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597.

[117] Id.

[118] See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 51; see also *RH v DE* 2014 (6) SA 436 (SCA) 17-18; *DE v RH* [2015] ZACC 13 para 3; *Makate v Vodacom (Pty) Ltd* [2016] 13 para 87, and *Sarrahwitz v Maritz* NO [2015] ZACC par 29.

A very good example where ubuntu finds expression, in the South African context, is the agreement between a customer and a "car guard"[119] in terms of which the customer is directed into a vacant parking spot.[120] When the shopper is finished with the business that he had come to the mall for, he is (customarily) expected to pay the guard a reasonable amount in the circumstances of the case; which is not demeaning to the dignity of the recipient, despite the ailing economy of the country.[121] From a formalistic legal perspective, this is a "tacit contract"[122] which can be deduced from the conduct of the parties whose implied terms are that the shopper is a human being who has the financial means that the car guard, another human being, does not have; and the shopper will demonstrate his humaneness by paying the car card an appreciable *honorarium*[123] for looking after one of his prized possessions. However, at a human level, an average shopper does not even want to find out whether the car guard is an employee of the company that owns the mall or whether he is just an entrepreneur who is trying to make a living without resorting to crime. To him, it is just a self-enforcing contract which is based on humanity and everything that it represents, such as empathy, compassion and sympathy. All he knows is that "it is ubuntu" (humane) to do that – it is an expression of the interconnectedness of humanity. The only problem is that management at some of the malls insist on the guards paying up a "ramp fee". This fee is based on the fact that the guards use electricity, ablution and other facilities that the mall has to offer.[124] What follows below therefore, is a brief review of some of the cases in order to indicate how the flexibility of ubuntu has found favour with the South African courts.

4.3 Ubuntu and the new South African workplace

As indicated above, the primary aim of this work is to demonstrate that ubuntu, in addition to its communitarian appeal, it is a concept laden with values of empathy, sympathy,

---

[119] For a discussion of this phenomenon, see www.scielo./org.za/php?scrip=sci_arttext&pid=S1991 (site visited on the 14 July 2017).
[120] This is a common feature at shopping malls in South Africa. These are men and women who help shoppers to find parking space especially on busy days, and to guide them out of it when the leave the mall. Their presence also enhances the security profile of the mall.
[121] There is even a sense opprobrium among fellow shoppers or travellers where the amount paid to the guard is less than R5 at a particular time.
[122] RH Christie *Law of Contract* (2001) 92-93; AJ Kerr *The Principles of the Law of Contract* (2002) 339.
[123] *Honorarium* is used here to indicate that the shopper appreciates the fact that the car guard is demonstrating the ability to work and the capacity to earn an income, instead of engaging in criminal activities.
[124] However, ubuntu can be relied on to remind management that the presence of the guards actually enhances the security detail of the shopping precinct, and minimises the occurrence of nefarious activities - and that exacting such a fee is unreasonable, unfair and unconscionable.

compassion; that it is not about looking at the conduct of a particular person or prevailing situation and just concluding that it is lawful (legal), but also about adjudicating to determine whether, in the circumstances of a particular case, ubuntu was displayed, and whether the outcome of the decision (and its consequences) are equitable and engender mutual respect and social co-existence and cohesion. This approach is more apposite in the workplace. This is because the period between 1979 and 1994 provides a perfect politico-legal foil. During that time, the industrial labour court enjoyed very wide discretion to deal with a wide range of labour issues without being unduly bound by a strictly legalistic approach to the law. [125] With the amendments of the Industrial Relations Act coming into effect in 1979,[126] the Industrial Court was given a wider discretion under the rubric of "unfair labour practice", and was able to develop a kind of labour jurisprudence that promoted the values encapsulated in ubuntu. This development was very much in line with the values of ubuntu, and is described by Currie and De Waal as follows: "When granted its 'unfair labour practice' jurisdiction, the Industrial Court initially chose not to define precisely what it is understood by the concept 'fairness', or it synonym, 'equity'. What it did say, however, was that fairness was something more than lawfulness. This meant that even though conduct was lawful, it was not necessarily fair. Whether conduct is fair or not necessarily involves a degree of subjective judgment. However, this is not to mean that the assessment of fairness is unfettered or a matter of whim." [127] Therefore, ubuntu, which invariably subsumes equity is not merely concerned with the mechanical, impersonal or legalistic application of the law, but about doing justice between human beings, and ensuring continued social cohesion and peaceful co-existence.[128] Reference to the historical background is necessitated by the need to understand the provisions of section 22 and 23 of the Constitution. For instance, section 22 provides every South African has the right to follow a trade, occupation or profession of his choice, provided it is legal. And, section 23, in turn, provides that "*everyone* has a right to fair labour practices". This is a major step when one considers that good faith, let alone equity, was not part of the requirement for the validity of any contract, including the *locatio conductio operarum* (contract of employment)[129] under the common law.[130] In pre-democracy South Africa, which was characterised by high levels of illiteracy and economic exclusion of black people, it did not matter how unfair or inequitable a contract between the employer and

[125] Du Toit et al (n 7) 3-41.
[126] Act 28 of 1956.
[127] I Currie & De Waal *The Bill of Rights Handbook* (2005) 503.
[128] See *PE Municipality* (n 127) para 37.
[129] The common-law contract of employment.
[130] J Grogan *Employment Rights* (2010) 2.

employee was.[131] Under apartheid "and its thinly disguised forms of forced labour",[132] black employees practically signed away most of their human rights, particularly the rights to equality and human dignity when they entered into a contract of employment.[133] Nor could they have the right to follow a trade, occupation or profession of their own choice.[134] Three areas of the South African labour law jurisprudence will be examined with the view to illustrating this point: (a) maternity leave as a basic condition of employment (b) the impact of common law on pre-dismissal proceedings; (c) and the legal position of sex worker, their status and its effect on their earning capacity if they get injured while working for another person or establishment such as a brothel and the position of their children if they should die while working at such at such an establishment. As indicated above, ubuntu (which is itself the substratum of the South African Constitution) could be used to interpret legislation or develop the common law in such a way that there is contractual justice, and fairness and equity in the workplace.[135] This, in turn, would ensure a happy workforce and satisfied employers and increase spending, thereby improving the general welfare of the entire populace.[136] The salutary point with regard to South Africa, unlike the United States of America for instance,[137] is that these rights are not dependent on the corporate culture of the individual organisation, but there is some constitutional or legal foundation.[138]

a) maternity leave

Like all the other State Parties to the Convention on the Elimination of All Forms of Discrimination Against Women, South Africa has, *inter alia*, the obligation to make maternity leave a statutory basic condition of employment by "safeguarding the function of

[131] See Grogan (n 128) 5-6.
[132] Grogan (n 128) 1.
[133] See Grogan (n 128) 2.
[134] A South African socio-legal ill that s 22 of the Constitution seeks to remedy. It is for this reason that s 27 of the interim Constitution contained a radical, if bold, proclamation: "Everyone shall have the right to economic activity."
[135] Needless to say, dissatisfied, demotivated and despondent workers, particularly those who have reason to believe that there is subliminal racism in the workplace, could be less productive.
[136] See s 3 of the National Credit Act 34 of 2005, which sets out the purposes of the Act, and the manner in which they are to be achieved.
[137] It is for that reason that the introduction of these benefits by Facebook, Microsoft and Netflix is regarded as "radical", putting these companies "on the leading edge of the curve, given that (it) ranks in the bottom by most measures of paid parental leave" – *time.com/money/4129990/facebook-paid-parental-leave;* see also *www. businessinsider/facebook-parental-leave-policy-2015-8* (sites visited on the 14 July 2017).
[138] See s 23 of the Constitution.

reproduction" of female employees.[139] Maternity leave is therefore regulated by section 25 of the Basic Conditions of Employment Act.[140] Unfortunately, neither CEDAW nor the BCEA makes maternity leave a fully-fledged right. It still remains a conditional right. This is because, unlike sick leave and annual leave, maternity still remains an unpaid form of leave in South Africa. Practically, this means that, in the absence of any agreement the only saving grace a pregnant employee would be to approach the local office of the Department of Labour to claim unemployment insurance benefits in terms of the Unemployment Insurance.[141] However, the situation is open to constitutional attack, for being unfairly discriminatory against women on the grounds mentioned in s 9 (3) of the Constitution and s 6 of the Employment Equity, particularly on the grounds of sex, gender, pregnancy, maternity, marital status or family responsibility.[142] And, because the Constitution itself and the Employment Equity Act are founded on the values of ubuntu (of social justice and equity), this lacuna cannot continue indefinitely. It is inimical to ubuntu that some female employees be compensated during accouchement, and others not, particularly if one considers that all the other types of leave are automatically paid in full. As indicated above, ubuntu is founded on compassion and fairness which, in turn, help to ensure the protection of the family structure and foster social cohesion. Also, CEDAW, an international instrument which is coterminous with ubuntu, enjoins State Parties like South Africa "to take all appropriate measures to eliminate discrimination against women in the field of employment".[143]

b) pre-dismissal inquiries

The application of the Constitution and the relevance of legislation implicating the Bill of Rights to the common law contract of employment has be questioned, decided upon – retracted on, particularly where the dismissal of an employee was imminent.[144] Initially, the view was that interpretation of the law in conformity with the Constitution was so well-established as to be implied in the Bill of Rights.[145] The Supreme Court Appeal led the way by initially holding that the common law on employment had to be developed in line with the

[139] See article 11(f) of the Convention for the Elimination of All Forms of Discrimination Against Women of 1993.
[140] Act 75 of 1997.
[141] Act 63 of 2001.
[142] Act 45 of 1998.
[143] Article 11
[144] See (n 139) above.
[145] Du Toit "Labour and the Bill of Rights" in De Beer (ed) *Human Rights Compendium* (1999) 4B-15.

spirit, purport and objects of the Bill of Rights.[146] The cumulative effect of this approach was that the common-law contract of employment imposed on the employers not only an obligation to institute a fair pre-dismissal inquiry before terminating the employment contract, but that they had a general obligation to treat their employees fairly. However, the Supreme Court reconsidered the matter in *Maritime Safety Authority v McKenzie*,[147] saying that the legislature intended to keep the "unfair labour practice provisions self-contained; and that if the common law provision mad provision for unfair, as opposed to unlawful, dismissals, the Labour Relations Act,[148] would not have been a need for comprehensive dispute-resolution mechanisms and special remedies. The Supreme Court also held that the judgments that held that the common law on employment had to be developed were merely *obiter*.[149] In other words, employees who have entered into a common-law contract of employment are entitled to a fair pre-dismissal inquiry, or to seek redress for unfair treatment at work, only if the parties have agreed to it.[150]

c) the position of sex workers

Unlike countries such as Australia, Belgium and Colombia, prostitution or sex work is still illegal in South Africa.[151] However, the relevant tribunals in South Africa have already had occasion pronounce on this legal issue in the case of *"Kylie" and Van Zyl t/a Brigittes*.[152] "Kylie" worked at a massage parlour where she rendered "sexual services" to the patrons for a reward. The question to be determined was determine whether sex workers were employees in terms of the labour dispensation of South Africa; and whether they were entitled to any remedy in instances where their dismissal was found to be unfair. The matter was first dealt with in the Commission for Conciliation Mediation and Arbitration (CCMA). The Commissioner was of the view that "Kylie" was not an "employee" in terms of the LRA, and that the kind of work that she was engaged in was illegal and was prohibited in terms of

---

[146] see also *Makhanya v University of Zululand* (2009) ILJ 1539 (SCA); *Boxer Superstores Mthatha & another Mbenya* (2007) ILJ 2209 (SCA); *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services and others* (2008) 29 ILJ 2708 (LAC); *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 1499 (SCA).
[147] (2010) ILJ 529 (SCA).
[148] Act 66 of 1995.
[149] See (n 143) above.
[150] Grogan (n 128) 5-6.
[151] See the Sexual Offences Act 23 of 1957 and the Department of Justice's position paper on this subject on www.justice,gov.za/salrc/dpapers-2009_prj107_2009.pdf (site visited on 17 July 2017).
[152] (2008) 28 ILJ 470 (CCMA).

the Sexual Offences Act.[153] The Commissioner then concluded that the CCMA had not jurisdiction to hear such a matter, particularly because section 213 of the LRA did not cover someone who had not entered into a valid contract of employment with his or her employer.

"Kylie" then approached the Labour Court which accepted that section 23 of the Labour Relations Act was wide enough to include persons who find themselves in her position; and that despite her work being illegal, there existed an employment contract between the parties. However, the question that remained was whether, as a matter of policy, the courts and other tribunals should sanction illegal contracts by enforcing their rights under the statutes and the Constitution. The Labour Court held that a contract for the performance of illegal activities was *contra bonos mores* and was therefore void and unenforceable.[154] Cheadle AJ was influenced by the common-law rule that no claim can be founded on a tainted cause of action: *ex turpi causa non oritur actio*.[155] This rule prohibits the enforcement of an immoral or illegal contract.[156] A contract is illegal if it is against public policy; and it is against public policy to enter into a contract which is illegal or immoral.[157] The acting judge said that even though section 213 of the Labour Relations Act was wide enough to cover a person in "Kylie's" position, the provisions of section 185 (a) did not provided such a person with protection against unfair dismissal.[158] His view was that the courts had a constitutional duty to uphold the rule of law and not to sanction or encourage illegal activity.[159] Cheadle AJ said that even if "Kylie" had such a right, that right was subject to limitation by the provisions of the LRA, a law of general application which is, itself, an amplification of the provisions of the Constitution of South Africa. "Kylie" then took the matter on appeal to the Labour Appeal Court.[160] The Labour Court emphasised the point that the purpose of the Labour Relations Act was to promote economic development, social justice and labour peace; and that section 23 of the Constitution is to protect vulnerable employees such as "Kylie".[161]

---

[153] Act 23 of 1957.
[154] Para 7.
[155] Id.
[156] See para 7; see also *Jajbhay v Cassim* 1939 AD 537.
[157] Id.
[158] Para 3.
[159] Id.
[160] *Kylie v CCMA and others* [2010] 7 BLLR 705 (LAC); 2010 (4) SA 383 (LAC).
[161] Para 40.

In the Labour Appeal Court the appellant's starting point was section 23 of the Constitution: that everyone has the right to fair labour practices.[162] The LAC accepted that "everyone" as used in section 23 "was a term of general import and had an unrestricted meaning"[163] and that it was supportive of "an extremely broad approach to the protection of the right guaranteed in the Constitution".[164] The LAC also emphasised that section 23 required that every employee, including one in "Kylie's" position, to be treated with dignity by his or her employer.[165] And, having accepted that "Kylie" was an employee in terms of the Labour Relations Act, Davis JA held that "Kylie" was an employee, and was entitled to appropriate legal protection.[166] In other words, even though the employment contract she had entered into with her employer was illegal or immoral, that did not leave the courts without any discretion;[167] and that the *pari delictum* rule (which tampered the rigidity of the *non oritur actio*) was not inflexible and gave the courts some discretion.[168] This, the court said, was a question that could be appropriately determined with particular reference to public policy which in turn could be sourced to the Constitution.[169] The judge of appeal held that "Kylie" was entitled to all the constitutional rights, including the right to human dignity; and that the criminalisation of sex work that "Kylie" was engaged in did not mean that she forfeited all the rights provided for in section 23 of the Constitution and amplified by the Labour Relations Act.[170] The judge of appeal was of the view that the Constitution and the applicable labour dispensation was intended to preserve the dignity of vulnerable persons such as sex workers and that there were implications for parties to such a relationship.[171] However, the LAC held that "Kylie" was not entitled to all the rights that other dismissed employees were entitled to – and that ordering that she be reinstated would be against public policy. His view was that "Kylie" was entitled to some remedy albeit short of reinstatement; and her employer was ordered to pay her compensation in lieu of reinstatement. It is important to note that the court was influenced by international instruments such as the Convention on the Elimination of All Forms of

[162] Para 16.
[163] See para 17 where Davis JA cited with approval the dictum of Ngcobo J (as he then was) in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 111.
[164] Id.
[165] Para 22-26.
[166] See para 20 where the judge of appeal said: "[The] illegal activity of sex workers does not per se prevent the latter from enjoying a range of constitutional rights. By contrast, the test is rather what constitutional protections are necessarily removed from a sex worker, given the express prohibition of their employment activities in terms of the (Sexual Offences) Act (1957)."
[167] Para 37.
[168] Id.
[169] Id.
[170] Para 39.
[171] Para 46.

Discrimination Against Women, 1993. For instance, Art 1 of the Convention defines discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women…of human rights and fundamental freedoms…." The Convention also places a specific obligation on State Parties to eliminate discrimination against women "in the field of employment". In the context of South African law, "the field of employment" encompasses the places where sex workers render their services.

It is important to note that the final word on the matter has not been spoken. The Supreme Court of Appeal and the Constitutional Court have not been called upon to pronounce on it. However, there are some questions that this case raises: what would happen to the employee's dependants in the event that she died while still being employed at an establishment such as a "massage parlour"? In the case of injury, would she be able to claim for loss of earning capacity? The South African courts have answered the first question in the negative; and the second one in the affirmative.[172] In other words, a clear distinction will have to be made between these two situations: a person in "Kylie's" position may claim for loss of earning capacity resulting from bodily injuries she sustained wrongfully; but her children will be not suited.[173] What does ubuntu (compassion, sympathy and social justice) demand in such a situation given the fact that it now influences how public policy should be determined? In *Jajbhay v Cassim*,[174] the Appellate Division (now the Supreme Court Appeal) laid a firm foundation in this regard, saying that the courts should, in the exercise of their discretion, strive to do justice between man and man.[175] This view is consonant with ubuntu: that in each case the courts should be guided by mercy and compassion in trying to balance the competing interests of the litigants who appear before them.[176] Put otherwise, what needs to be determined in each case, is whether the turpitude of activity involved outweighs the injustice that may result from a litigant like "Kylie" being non suited.[177] Moreover, as a communitarian ethic, ubuntu favours the integrity of the family structure and

[172] *Ferguson v Santam Insurance Ltd* 1985 (1) SA 207 (C) 208; see also Neethling et al *Law of Delict* (1999) 239-241.
[173] Unless there was a clear indication that she would desist from such an illegal activity in the future – *Santam Insurance Ltd v Ferguson* 1985 (4) 483 (A) 850-851. For example, the South African Law Reform Commission is considering the question whether prostitution or sex work should be legalised.
[174] 1939 AD 537 547.
[175] Id.
[176] Id.
[177] See Christie (n 140) 453; see also Kerr (n 140) 196.

the enhancement of healthy human relations that ensure social cohesion. "Kylie's" position is not dissimilar to that of someone who operates a shebeen[178] – as opposed to a tavern.

5. *Conclusion*

From the aforegoing, it is clear that ubuntu is not just a mere philosophical or theoretical concept. It is a concept laden with normative values which have found expression in African communities since time immemorial. Nor is it wise to limit its characterisation as a mere relational ethic. For to do so would not help to distinguish it from other normative values which are by nature concerned about the relationships between legal persons *inter se*; and between legal persons and objects. The truly distinctive feature of ubuntu is that it encompasses sympathy, empathy, mercy and compassion. In South Africa, the courts have begun to infuse these values into the jurisprudence and court practice, thereby ensuring that there is contractual and social justice in the workplace. And, that engenders a productive workplace, higher earnings, social cohesion and a prosperous country. It is hoped that, in time, sex workers will enjoy all the labour rights, and all working women will, *ex lege*, enjoy paid maternity leave. And, that all workers who fall outside the ambit of collective bargaining will not be dismissed at the whim of the employer – without a fair disciplinary process. Ubuntu demands, and ensures, such a workplace.

[178] These are places in respect of which the owner has no valid licence to sell liquor and other similar beverages.