HUMAN DIGNITY IN THE COMMON LAW OF CONTRACT: MAKING SENSE OF THE *BARKHUIZEN, BREDENKAMP AND BOTHA* TRILOGY [[1]](#footnote-1)

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# I INTRODUCTION

The role of fairness in the South African common law of contract has been a contentious issue for centuries.[[2]](#footnote-2) After the introduction of the Constitution of the Republic of South Africa, 1996, this debate came to the forefront with the apparent tension between the Court’s decision in *Barkhuizen**[[3]](#footnote-3)* and that of the Supreme Court of Appeal in *Bredenkamp*.[[4]](#footnote-4) Legal practitioners and academics eagerly awaited the Court’s response to *Bredenkamp*, but were disappointed with the decision in *Botha*.[[5]](#footnote-5) Some argued that it aggravated the existing legal uncertainty and failed to resolve the apparent tension between these two decisions.[[6]](#footnote-6)

In this article, I propose a reading of these three contract law cases that makes sense of the role of fairness in the common law of contract through a sophisticated understanding of the constitutional value of human dignity as developed by the Court over the last two decades. First, I provide a brief summary of Beyleveld and Brownsword’s dualistic approach to human dignity in the law of contract and the resulting tension between human dignity as empowerment and constraint as based on their individualistic interpretation of Kantian dignity. Thereafter, Cornell and Wood’s more communitarian interpretation of Kantian dignity is briefly discussed as an alternative reading of Kant to resolve the above tension. Secondly, I discuss the Court’s approach to human dignity as reflected in constitutional jurisprudence outside the field of contract law which is based on a harmonisation between Kantian dignity and ubuntu. Finally, I use the Court’s evolving understanding of the constitutional value of human dignity and other contract law decisions to propose an interpretation of *Barkhuizen, Bredenkamp* and *Botha* that supports the creation of an equitable discretion in the common law of contract.

# II DUALISTIC APPROACH TO HUMAN DIGNITY IN CONTRACT LAW[[7]](#footnote-7)

Beyleveld and Brownsword distinguish between human dignity as empowerment and human dignity as constraint.[[8]](#footnote-8) Human dignity as empowerment refers to the case where human dignity promotes individual interests in the law of contract, while human dignity as constraint refers to instances where communitarian interests are promoted.[[9]](#footnote-9)

## A Human dignity as empowerment

Human dignity as empowerment entails the empowerment of a person to live an autonomous life by making her own decisions and taking responsibility for those decisions.[[10]](#footnote-10) Brownsword provides the following description of human dignity as empowerment:

[I]t is because humans have a distinctive value (their intrinsic dignity) that they have rights *qua* humans. Commonly, it is the capacity for autonomous action that is equated with human dignity and this, in turn, generates a regime of human rights organised around the protection of individual autonomy. In this way, respect for human dignity empowers individuals by protecting their choices against the unwilled interferences of others.[[11]](#footnote-11)

Brownsword and Beyleveld points out that the idea that human beings have intrinsic worth, and therefore, dignity, finds support in Kantian thinking.[[12]](#footnote-12) Kant argued that something has a dignity because it has intrinsic value and is of inestimable worth.[[13]](#footnote-13) Kant also maintained that ‘the dignity of man consists precisely in his capacity to make universal law, although only on condition of being himself also subject to the law he makes’.[[14]](#footnote-14) Relying on this passage, Brownsword and Beyleveld propose that Kantian dignity can be used to explain why human beings have dignity.[[15]](#footnote-15) Therefore, Kantian dignity is used in support of the concept of human dignity as empowerment which is based on human beings’ inherent worth, the latter being founded on their capacity for autonomous action.[[16]](#footnote-16)

Human dignity as empowerment requires that human beings should be treated as autonomous beings who can make their own decisions and should never be treated as mere things or instruments.[[17]](#footnote-17) Brownsword and Beyleveld trace this idea to Kant’s second categorical imperative, the ‘Formula of the End in Itself’:

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.[[18]](#footnote-18)

They state that this passage supports the argument ‘that it is wrong to treat persons as mere things rather than as autonomous ends’.[[19]](#footnote-19) So again, Kantian thinking is used in support of the idea that ‘human dignity empowers individuals by protecting their choices against the unwilled interferences of others’.[[20]](#footnote-20)

According to Brownsword, human dignity as empowerment comprises two aspects: Firstly, protection against direct attacks for example killing, slavery and discrimination, and secondly, the creation of the necessary conditions for the realisation of person’s human dignity which translates as a ‘right to support and assistance to secure circumstances that are essential if one is to flourish as a human’.[[21]](#footnote-21) The latter aspect is reflected in the various socio-economic rights that must be protected and promoted by the State.[[22]](#footnote-22)

The concept of human dignity as empowerment is rights-driven because it grounds ‘a set of rights claims against others’ and reinforces ‘claims to self-determination’.[[23]](#footnote-23) It places great importance on individual autonomy and maximises individual freedom which may only be limited to protect the rights of others ‘or for some less direct rights-related reason’.[[24]](#footnote-24) Accordingly, the idea of human dignity as empowerment is based on the political philosophies of individualism and economic liberalism which limits state interference in private transactions.[[25]](#footnote-25)

Human dignity as empowerment as applied in a contract law setting means that contracting parties are free to conclude contracts as an expression of their autonomy and that contracts freely entered into must be respected, failing which, there is an affront to the human dignity of the contracting parties.[[26]](#footnote-26) Hence this notion of human dignity finds expression in the classical law of contract which can also be linked to the political philosophies of individualism and economic liberalism.[[27]](#footnote-27)

## B Human dignity as constraint

While human dignity as empowerment enforces and promotes individual autonomy, human dignity as constraint refers to the limitation of an individual’s autonomy where the protection and promotion of another person’s human dignity requires such limitation.[[28]](#footnote-28)

The idea of human dignity as constraint expresses a more duty-driven approach to human rights.[[29]](#footnote-29) On a fundamental level, it refers to the correlating duty to respect the human dignity of others and includes the duty to respect another’s human dignity as given effect to by her specific human rights.[[30]](#footnote-30) Again, this conception of human dignity has been linked to Kant’s work because he speaks of the duty not to ‘act contrary to the equally necessary self-esteem of others, as human beings’ and the ‘obligation to acknowledge in a practical way, the dignity of humanity in every other human being’.[[31]](#footnote-31)

In addition, human dignity as constraint may also recognise a further duty to one’s community which would entail not only a direct duty to respect the human dignity of others but also an indirect duty ‘to respect their vision of human dignity’.[[32]](#footnote-32) This duty may arise ‘where there is a background ethic of care and concern for others (and, concomitantly, a sense of solidarity with and responsibility for others)’ which results in ‘a regime of values that reflects not only a degree of control over one’s own flourishing but also a measure of commitment to the flourishing of others’.[[33]](#footnote-33) Accordingly, it could be argued that such a duty could denote an obligation on private individuals to assist in the creation and promotion of the necessary conditions for the realisation of others’ human dignity.[[34]](#footnote-34) In this way, human dignity as constraint supports the promotion of socio-economic rights and substantive equality in the private sphere.[[35]](#footnote-35)

While human dignity as empowerment promotes a rights-driven approach to human rights which results in the maximisation of individual freedom and limits state intervention in the private sphere,[[36]](#footnote-36) human dignity as constraint involves a more duty-driven approach to human rights which allows for a greater limitation of individual freedom.[[37]](#footnote-37) Consequently, human dignity as constraint envisages a paternalistic society[[38]](#footnote-38) where the exercise of individual autonomy may be tempered where such actions are incompatible with the human dignity of others or in order to create the necessary conditions for the realisation thereof. As a result, human dignity as constraint envisages a society where not only the State but also private individuals are obliged to promote the realisation of the human dignity of others. In other words, an individual’s autonomy may be limited where necessary to respect the human dignity of others and in order to promote the socio-economic rights and substantive equality of others which they need to fully realise their human dignity.

In a contract law setting, this notion of human dignity requires that even freely concluded contracts must be tested for conformity to human dignity.[[39]](#footnote-39) Thus, this conception of human dignity is in line with the socialist values expressed in modern law of contract which make place for state intervention in contracts.[[40]](#footnote-40)

## C Tension resulting from the dualistic approach to human dignity

In the paradigm advanced by Beyleveld and Brownsword, the two notions of human dignity are in tension with each other as they pull in opposite directions.[[41]](#footnote-41) Human dignity as empowerment supports contractual autonomy while human dignity as constraint results in the limitation of contractual autonomy.

Brownsword[[42]](#footnote-42) illustrates the resulting tension by relying on the Supreme Court of Israel decision in *Jerusalem Community Burial Society v Kestenbaum*.[[43]](#footnote-43) In this case, the respondent (Mr Kestenbaum) entered into a contract with the appellant (the burial society) for his wife’s funeral arrangements. One of the terms in the standard form of contract signed by Mr Kestenbaum’s brother (on his behalf) provided that the burial society would only engrave their tombstones in characters from the Hebrew alphabet. The respondent, in accordance with his wife’s wishes, requested the appellant to engrave the tombstone with his wife’s name and Gregorian dates of birth and death in Latin characters, which the burial society refused by relying on the above contract term.[[44]](#footnote-44) The majority of the Supreme Court of Appeal annulled the contract term because it held that the term, among other things, infringed upon the respondent’s freedom of expression, conscience and human dignity.[[45]](#footnote-45) In the dissenting judgment, it was held that respect for the free will of the parties to a contract is an essential principle of public policy and should not be departed from except in rare and exceptional cases. As the burial society’s decision to engrave all its tombstones with Hebrew characters promoted the dignity of the cemetery and took account of the feelings of the community members that used it, the dissenting court argued that the term did not negate public policy.[[46]](#footnote-46) Therefore, human dignity was used to argue both for the enforcement and annulment of the contract term which leads Brownsword to conclude that there is a tension between the two concepts of human dignity.[[47]](#footnote-47)

This tension results from the fact that Brownsword and Beyleveld understand human dignity as empowerment to denote the freedom of a person to make her own choices without the interference of others. The moment her freedom (human dignity) is constraint to protect the freedom (human dignity) of another, there is a tension between the two persons’ freedom, and therefore, their human dignity. In other words, defining human dignity as unconstrained freedom always results in one contracting party’s dignity being protected while the dignity of the other contracting party is compromised. And as Brownsword articulates, the problem is then to explain why one of the contracting parties ‘should be empowered at the expense’ of the other.[[48]](#footnote-48)

## D Reconciling the tension between human dignity as empowerment and constraint

In contrast to Brownsword and Beyleveld’s individualist interpretation of Kantian dignity that defines human dignity as empowerment as unconstrained freedom, Cornell proposes a more communitarian interpretation of Kantian dignity that reconciles the resulting tension between human dignity as empowerment and constraint.

Cornell points out that in order to understand Kantian dignity, it is necessary to understand Kant’s conceptualisation of freedom and autonomy.[[49]](#footnote-49) According to Kant, freedom is a special type of causality that is a characteristic of human beings to the extent that they are rational.[[50]](#footnote-50) Kant distinguishes between ‘negative’ and ‘positive’ freedom.[[51]](#footnote-51) Negative freedom is the ability of a person to resist outside influences and her own immediate natural impulses and desires in order to act towards her own ends for her own long term well-being through practical reason.[[52]](#footnote-52) As Kant defines freedom as a type of causality that operates according to a law and cannot be lawless,[[53]](#footnote-53) positive freedom refers to the idea that a free will is the ability to act in accordance with its own laws.[[54]](#footnote-54) Accordingly, positive freedom refers to the ability to make decisions in accordance with self-imposed laws.

Kant’s conceptualisation of positive freedom should be understood in context of one of his earlier formulations of the categorical imperative, the Formula of Autonomy, which refers to ‘the Idea *of the will of every rational being as a will which makes universal law*’.[[55]](#footnote-55) For Kant, autonomy does not refer to the idea that human beings can do what they want without interference from others, but rather, that they are bound only to those laws that they, as rational beings, could lay down unto themselves, provided such laws meet the standard of a universal law.[[56]](#footnote-56) Thus, a free will is a will under moral law.[[57]](#footnote-57) Thus, Cornell’s interpretation of Kant is that freedom can be found only in the realm of morality which means there is no tension between a person’s freedom and subjecting herself to the moral law.[[58]](#footnote-58) Therefore, Kantian freedom cannot be equated to doing what you want without interference from others. Rather, Kantian freedom is the capacity to lay down moral laws for yourself and being bound by those laws.

Returning to Beyleveld and Brownsword’s interpretation of Kant, it can be argued that Kantian dignity does not support the conception of human dignity as empowerment which denotes unconstrained freedom. [[59]](#footnote-59) Rather, as Cornell argues, freedom in Kant denotes moral freedom. Importantly, this does not mean that Kantian dignity denies that human beings are autonomous beings who plot their own futures and make their own decisions. However, the freedom to set one’s own ends is a moral freedom. Although Beyleveld and Brownsword’s conception of human dignity as constraint seems to be based on Kantian dignity, it does not reflect that the constraint is self-imposed and views such constraint as external and in tension with the freedom of the person being constrained.[[60]](#footnote-60) Cornell also reads Kantian dignity as being based on constraint, but this constraint is internal because it is self-imposed and therefore not in tension with that person’s freedom.

The same type of reasoning applies when interpreting Kant’s second categorical imperative that requires that a person should ‘always treat humanity … in the person of any other, never simply as a means, but always at the same time as an end’.[[61]](#footnote-61) As pointed out by Wood, treating the humanity of another as an end has a technical meaning:

[It] refers to our *rational nature*, and specifically to the capacity to set ends for oneself, devise means to them, combine them into more comprehensive ends, setting priorities among them. Humanity for Kant develops in the social condition, and with it comes the freedom to set ends.[[62]](#footnote-62)

Thus, respect for a person’s humanity as an end in itself would denote respect for a person’s capacity to set ends for herself and choose ways to achieve them in order to lead a purposive life through her practical reason.[[63]](#footnote-63) In other words, human dignity requires respect for the unique set of ends that an individual pursues. Accordingly, Wood arrives at the following understanding of what it entails to treat humanity in a person as an end in itself:

I think a more immediate conclusion from the fact that humanity is an end in itself is that human beings should never be treated in a manner that degrades or humiliates them, should not be treated as inferior in status to others, or made subject to the arbitrary will of others, or be deprived of control over their own lives, or excluded from participation in the collective life of the human society to which they belong.[[64]](#footnote-64)

At first glance, Wood’s interpretation of Kant’s second categorical imperative seems to accord with that of Beyleveld and Brownsword because respect for a person’s unique set of ends entails respect for a person’s freedom to make choices without the interference of others. Therefore, the question arises how this interpretation ties in with the idea of Kant’s moral freedom as espoused by Cornell?[[65]](#footnote-65) Woolman explains as follows:

While Kant certainly contends that the defining feature of humanity is our capacity to overcome our instincts and that we are only truly free when we are moral, he maintains that we define ourselves – and our humanity – through the rational choice of *all* our ends and not just those that are explicitly moral. … An individual’s capacity to create meaning generates an entitlement to respect for the unique set of ends that the individual pursues.[[66]](#footnote-66)

From Woolman’s explanation it can be deduced that an individual’s choices should be respected and not be interfered with provided such choices are not immoral. In other words, the freedom to set and pursue ends is still a moral freedom that should not violate the human dignity of others. This means that in pursuit of her own ends, an individual may not treat other human beings as merely a means to her own ends but must always also treat them as ends in themselves. Thus, Kant’s second categorical imperative does not support the idea of unconstrained freedom as reflected in Beyleveld and Brownsword’s idea of human dignity as empowerment. It is a moral freedom subject to the self-imposed constraint not to violate the human dignity of others in setting and pursuing one’s own set of ends.

Finally, relying on Kant’s concept of the kingdom of ends,[[67]](#footnote-67) Cornell maintains that, as rational beings, we not only have the possibility of aligning our own actions with our own ends, but also with the ends of other rational beings.[[68]](#footnote-68) She argues that when we harmonise our own ends with the ends of others, we are aspiring to the Kantian ideal of a kingdom of ends.[[69]](#footnote-69) She further argues that the ideal of the kingdom of ends is utilised as a regulative ideal based on a moral social contract.[[70]](#footnote-70) She states that when we harmonise our own ends with the ends of others as law-making members in the hypothetical kingdom of ends, we are in fact, reconciling our own freedom with the freedom of others.[[71]](#footnote-71) This is because Kantian freedom is internally self-limiting because freedom is equated to autonomy which involves laying down self-imposed moral laws.[[72]](#footnote-72) Therefore, when freedom is viewed in this way, it results in the resolution of the tension between human dignity as empowerment and human dignity as constraint because respecting the dignity of others is represented as a moral law we have imposed upon ourselves as law-making members in the imagined kingdom of ends.[[73]](#footnote-73) Consequently, when we disrespect the dignity of others, in other words their inherent worth as reflected in the fact that they are ends in themselves, we are actually failing to respect our own dignity as law-making members in the hypothetical kingdom of ends.[[74]](#footnote-74) This is because we are not legislating together in a community that aspires to the kingdom of ends, in other words a community where our ends are harmonised with the ends of others, and consequently, we are not free in the individual or collective sense.[[75]](#footnote-75) As previously argued, the duty to respect the human dignity of others is a self-imposed constraint which we are able to exercise as part of our positive freedom ie our capacity to make moral laws as a rational being, and ultimately, it is this capacity for positive freedom that gives us our dignity and our inherent worth.[[76]](#footnote-76) Thus, when we disrespect the dignity of another, we are, in fact, disrespecting our own human dignity.[[77]](#footnote-77)

# III THE COURT’S APPROACH TO HUMAN DIGNITY

The Court in *Makwanyane* confirmed that human dignity refers to the intrinsic worth of all human beings which means that they are entitled to equal respect and concern and may not be treated in a degrading or dehumanising way.[[78]](#footnote-78) Specifically, the Kantian idea that dignity is beyond price and of incalculable worth, as well as Kant’s second categorical imperative (‘Formula of an End in Itself’), was explicitly imported into our constitutional jurisprudence by Justice Ackermann in *Dodo.*[[79]](#footnote-79)In *Khumalo v Holomisa* Justice O’Regan confirmed that human dignity does not only refer to a person’s own self-worth but also how she is valued and treated by the members of the community.[[80]](#footnote-80) Therefore, the Court confirmed the inherent and equal worth of all human beings which result in their entitlement to equal respect and concern.[[81]](#footnote-81)

In *Pillay,* dealing with a school learner’s right to wear a gold nose-stud in accordance with her South Indian family traditions and culture, the Court further explained what it means to treat human beings as an end in themselves.[[82]](#footnote-82) In the first place, the Court emphasised the importance of freedom in defining human dignity[[83]](#footnote-83) by quoting from Justice Ackermann’s minority judgment in *Ferreira*:

Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.[[84]](#footnote-84)

Justice Langa then continued as follows:

A necessary element of freedom and of dignity of any individual is an ‘entitlement to respect for the unique set of ends that the individual pursues’. One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.[[85]](#footnote-85)

The Court’s conception of what it means to treat a human being as an end in herself reflects Wood’s interpretation of Kant’s second categorical imperative. As was shown above,[[86]](#footnote-86) Wood proposed that treating a person’s humanity as an end in itself entails respecting her capacity to set her own ends and choose ways to achieve them in order to lead a purposive life through her practical reason. In other words, it would entail respecting the unique set of ends a person sets for herself. For Wood, like Beyleveld and Brownsword, this means that the autonomy of a person must be respected by not subjecting another’s arbitrary will onto that person. Furthermore, Wood emphasised that this would include that a person should not be excluded from participating in community life.[[87]](#footnote-87) Hence, respecting a person as an end in herself would include respect for a person’s participation in religious or cultural practices. In similar fashion, Botha interpreted the Court’s finding to mean that respecting a person as an end in herself ‘demands the creation of a space within which individuals are free to forge their own autonomous identities’.[[88]](#footnote-88) The Court, therefore, has developed the constitutional value of human dignity to reflect its empowerment conception which denotes a right to the creation of a space in which a person’s human dignity can flourish. In this respect, the court also confirmed the State’s duty to create and protect such a space for individual autonomy as reflected in the notion of human dignity as constraint.

In a number of recent cases, the Court has emphasised this link between human dignity and autonomy. The Court in *MM v MN* had to decide (among other things) whether the right to dignity would require a man in a customary marriage to obtain the consent of his existing wife before he could take a second wife.[[89]](#footnote-89) In arriving at its decision, the Court made the following statement:

[T]he right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances are a fundamental aspect of human dignity.[[90]](#footnote-90)

In *Teddy Bear Clinic* the Court stated that human dignity acknowledged the value of a person’s choices.[[91]](#footnote-91) And, in *Barnard*, Justice Van der Westhuizen in his separate but concurring judgment, confirmed that human dignity includes the idea that a person should be permitted to develop their unique talents[[92]](#footnote-92) by quoting the following passage from Justice Ackermann’s minority judgment in *Ferreira*:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.[[93]](#footnote-93)

Although the Court sees human dignity as creating and promoting a space for the individual to make her own decisions and pursue her own unique set of ends as promoted by the idea of human dignity as empowerment, this does not mean that the individual is viewed ‘as an isolated and unencumbered being’.[[94]](#footnote-94) In dealing with the right to privacy in *Bernstein*, Justice Ackermann emphasised the correlating nature of rights and duties:

The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. … This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen. [[95]](#footnote-95)

It would seem that Justice Ackermann was influenced by Kantian ethics, specifically Kant’s imagined kingdom of ends as he refers to Kant’s ‘community of humanity’ which ‘demands mutual respect as a universal moral duty towards persons as *moral persons*’.[[96]](#footnote-96) Therefore, the Court has developed both aspects of human dignity, namely empowerment and constraint, the latter constituting the individual’s correlating duty to respect the human dignity of others.

The Court has also relied on ubuntu to provide more content to the constitutional value of human dignity. In *Makwanyane*, it was held that ubuntu’s ‘spirit emphasises respect for human dignity’,[[97]](#footnote-97) and that ‘[r]espect for the dignity of every person’ is an integral aspect thereof.[[98]](#footnote-98) Since then, the Court has reiterated this link between ubuntu and human dignity on a number of occasions[[99]](#footnote-99) and in *Hoffmann v South African Airways* it was stated that ‘[*u*]*buntu* is the recognition of human worth and respect for the dignity of every person’.[[100]](#footnote-100) In this respect, ubuntu and Kantian dignity are similar in that they recognise the inherent human worth of each person and requires respect for the human dignity of a person.

Furthermore, ubuntu (like Kantian dignity) also emphasises the link between human dignity and morality. According to Justice Mokgoro, ubuntu denotes ‘*humaneness*’ and can be translated as ‘*personhood* and *morality*’.[[101]](#footnote-101) Cornell and Muvangua explain that the reason why Justice Mokgoro links the term ‘humaneness’ to personhood and morality is to denote how a person’s development into a unique being (his personhood) is inseparable from her moral development.[[102]](#footnote-102) This leads Cornell to argue that a person’s dignity is rooted in her personhood (uniqueness) and her embeddedness in the community which is in contrast to Kantian dignity which is based on the capacity for rationality.[[103]](#footnote-103)

Since the community must respect and support the moral development of the individual into a unique being, the community has a duty to respect the human dignity of the individual. In the same way, the individual has a duty to respect the human dignity of the other community members. As explained by Justice Langa in *Makwanyane*:

It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community.[[104]](#footnote-104)

Therefore, like Kantian dignity, ubuntu supports the idea of human dignity as constraint as reflected in the correlating duty of an individual to respect the human dignity of others.[[105]](#footnote-105)

A beautiful harmonisation between the above ideas as reflected in Kantian dignity and ubuntu can be found in *Pillay*. The Court relied upon ubuntu to emphasise that a person’s moral development into a unique human being can only happen through engagement with other community members, and therefore, that participating in the practices and traditions of the community is inseparably linked to a person’s human dignity.[[106]](#footnote-106) As seen above, the Court then also referred to Kant’s second categorical imperative to promote the idea that human dignity denotes respect for a person’s unique set of ends.[[107]](#footnote-107) Therefore, this case illustrates how both Kantian dignity and ubuntu promote human dignity in a way that protects a person’s individuality and provides a space for that person to pursue her personhood and unique destiny (ubuntu) or her unique set of ends (Kantian dignity) within and through engagement with the community which can only happen when the other community members respect the human dignity of another by creating a space for that individual to pursue her unique destiny or ends.[[108]](#footnote-108)

Ubuntu has proved particularly valuable in infusing the constitutional value of human dignity with a duty on the State to promote the realisation of socio-economic rights in order to create the necessary conditions for the realisation of everyone’s human dignity.[[109]](#footnote-109) It has also been argued that ubuntu seems more appropriate in promoting socio-economic rights and substantive equality than Kantian dignity.[[110]](#footnote-110)

More recently, in *Barnard*, Justice Van der Westhuizen extended the application of the duties reflected in human dignity as constraint to individuals when dealing with substantive equality. He relied on both and ubuntu[[111]](#footnote-111) and Kantian dignity[[112]](#footnote-112) to make the following statement:

In the context of socio-economic rights, this Court has affirmed that the responsibility for the difficulties of poverty is shared equally as a community because ‘wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole’. This would also hold in the context of substantive equality. First, the way in which individuals interact with social groups and society generally has a direct bearing on their dignity. This is true for members of both advantaged and disadvantaged groups.[[113]](#footnote-113) Second, this idea also gives effect to another Kantian way of understanding dignity – that it ‘asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves’.[[114]](#footnote-114)

This statement indicates that the Court is following the more communitarian interpretation of Kantian dignity as put forward by Cornell.[[115]](#footnote-115) She argued that Kantian dignity denotes the capacity to lay down moral laws for ourselves and being bound by those laws. This means that freedom can be found only in the realm of morality and there is no tension between our freedom and subjecting ourselves to the moral law. Relying on Kant’s ideal kingdom of ends, she concluded that when we disrespect the dignity of others we are actually failing to respect our own dignity as law-making members in the kingdom of ends. These ideas are reflected in Justice van der Westhuizen’s reasoning when he maintains that substantive equality measures ‘can enhance the dignity of individuals, even those who may be adversely affected by them’.[[116]](#footnote-116)

Likewise, ubuntu also recognises that the well-being and human dignity of the individual is tied up with the well-being and human dignity of the other community members and this idea is sometimes referred to as human dignity as a collective responsibility or concern.[[117]](#footnote-117) For example, Justice Sachs in *Port Elizabeth* explicitly relied upon ubuntu in stating the following:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.[[118]](#footnote-118)

Therefore, it can be argued that the Court is developing the constitutional value of human dignity to include a duty on the individual to assist in the creation of the necessary conditions for the realisation of the human dignity of other community members through the promotion of substantive equality as reflected in the idea of human dignity as constraint, and has done so by drawing from both Kantian dignity and ubuntu.

To summarise, the Court has developed a sophisticated understanding of human dignity endorsing both aspects of human dignity namely autonomy and constraint through the harmonisation of Kantian dignity and ubuntu. Furthermore, the Court’s conceptualisation of human dignity as constraint denotes not only a duty to respect the human dignity of others but also to share in the responsibility of creating the necessary conditions for the realisation of others’ human dignity through the promotion of socio-economic rights and substantive. More importantly, these duties are not only the responsibility of the State but also that of the individual community members.

IV NECESSARY CONTEXT: CONTRACTUAL FAIRNESS PRE- AND POST CONSTITUTION

To make sense of the *Barkhuizen*, *Bredenkamp* and *Botha* trilogy in view of the Court’s approach to human dignity as set out above, it is necessary to place these three decisions in the context of the legal position in respect of unfair contract terms immediately prior to the enactment of the Constitution as well as the most relevant decisions handed down by the Cape Provincial Division and the Supreme Court of Appeal thereafter.

## A Contractual fairness prior to the constitution: sasfin

The foremost decision dealing with contractual fairness prior to the enactment of the Constitution is *Sasfin*.[[119]](#footnote-119) Although the court did not refer to human dignity expressly, it is possible to fit the court’s reasoning into the theoretical matrix of human dignity as set out above.

In *Sasfin*, an anaesthetist (Beukes) granted a deed of cession in favour of a finance company (Sasfin) which placed Sasfin in complete control of his earnings. On notice of session to Beukes’ debtors Sasfin would be able to recover all of Beukes’ book debts and retain all amounts recovered, whether or not he owed any money to Sasfin. Beukes was incapable of ending this situation.[[120]](#footnote-120)

The court held that where a contract is contrary to public policy it should not be enforced:

Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.[[121]](#footnote-121)

The court stressed that, on the one hand, public policy generally favours freedom and sanctity of contract.[[122]](#footnote-122) As was seen above, this public policy consideration can be viewed as an expression of the idea of human dignity as empowerment that would support the enforcement of the contract.[[123]](#footnote-123)

On the other hand, the court stated that it should also take account of ‘the doing of simple justice between man and man’.[[124]](#footnote-124) In this respect, the court was of the view that the contract relegated Beukes to the position of a slave because he ‘could effectively be deprived of his income and means of support for himself and his family’ and he was unable to end this situation.[[125]](#footnote-125) It could be argued that as the terms of the contract deprived Beukes of control over his life to such an extent that it relegated him to the position of a slave, the contract treated Beukes merely as a means to an end and not as an end in himself.[[126]](#footnote-126) Accordingly, this public policy consideration can be viewed as an expression of the concept of human dignity as constraint which supports the non-enforcement of a contract term because it infringes on the human dignity of one of the contracting parties.[[127]](#footnote-127)

Therefore, determining whether a contract term is contrary to public policy involves a balancing act between these competing values[[128]](#footnote-128) and the balancing act will always be between policy considerations that support the enforcement of the contract on the one hand (as reflected in the idea of human dignity as empowerment) and policy considerations that support the non-enforcement of the contract on the other (as reflected in the concept of human dignity as constraint). Finally, in balancing these policy considerations, the court concluded that the provisions of the contract were so unfair and unreasonable towards Beukes that the terms of the deed of cession were contrary to public policy and therefore unenforceable.[[129]](#footnote-129) Accordingly, the court’s decision can be seen as an endorsement of both concepts of human dignity and the tension between them is resolved through a balancing act between the interests of the parties as reflected in the contract terms themselves.

How to explain the court’s resolution of the tension between human dignity as empowerment and constraint through a value judgment involving fairness? Lubbe argued that Kant’s second categorical imperative does not mean that a contracting party should never treat the other contracting party as a means to her own ends, but rather that she must never treat the other contracting party merely as a means, but always also as an end.[[130]](#footnote-130) He argued that Kant’s second categorical imperative ‘suggests that in the pursuit of one’s own ends, a minimum level of regard for the interests of others is indicated’.[[131]](#footnote-131) In other words, a party’s contractual autonomy is not an unconstrained freedom but a moral freedom that may not be exercised in a way that would infringe the human dignity of the other contracting party.[[132]](#footnote-132)

This is because contracts are typically bilateral co-operative ventures in terms of which both parties have to perform and both benefit from the contractual relationship in some manner. In other words, each party’s contractual performance contributes to the other party’s pursuit of her unique ends, while at the same time, each party also uses the other party as a means in pursuit of her own set of unique ends. Hence, the contract terms will always reflect two unique set of ends that must be harmonised with each other.[[133]](#footnote-133) Ultimately, this means that when determining whether a contract term infringes the human dignity of one of the parties, a court has to balance the interests of both parties in order to determine whether a contract term constitutes an unfair infringement of one of the party’s interests (her unique set of ends) and hence violates her human dignity.

Thus the appeal court followed an approach that take account of both human dignity as empowerment and constraint, the latter as reflected in an individual’s duty to respect the human dignity of other individuals. This approach necessarily leads to a balancing act between the different interests of the parties as reflected in the contract terms, and ultimately, such a balancing act involves a value judgment to determine the fairness of the terms. Therefore, the decision in *Sasfin* supports the court’s equitable discretion to refuse the enforcement of unfair contract terms on the basis of human dignity although the court did not expressly rely on human dignity to reach its decision.

It is further important to note that Lubbe argued that the principle of good faith can and should perform the same function as the policy consideration of simple justice between man and man and that where a contractual term constitutes an unreasonable and one-sided promotion of one party’s own interest at the expense of the other party it may be contrary to good faith and consequently also against public policy.[[134]](#footnote-134) In this way, good faith is an expression of the idea of human dignity as constraint.[[135]](#footnote-135) In other words, the idea of human dignity as constraint supports a general equitable jurisdiction to declare unfair contract terms invalid.

## B Contractual fairness after the constitution

Initially, there were indications that the multi-faceted idea of human dignity as empowerment and constraint, the latter finding expression through good faith, would find application in the common law of contract. In the Cape Provincial Division decision of *Mort*,Judge Davis *obiter* stated that the court must develop the common law of contract in line with the Constitution.[[136]](#footnote-136) He maintained that the concept of good faith is shaped by the legal convictions of the community with reference to the constitutional values of dignity, equality and freedom.[[137]](#footnote-137) Freedom supports the idea of freedom and sanctity of contract but equality and dignity support the idea that contracting parties ‘must adhere to a minimum threshold of mutual respect in which “the unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts”’.[[138]](#footnote-138)

Soon thereafter, the court in *Coetzee* endorsed the idea of human dignity as constraint when it held that a contract term that infringed upon one of the contracting party’s human dignity would be considered contrary to public policy and therefore invalid and unenforceable.[[139]](#footnote-139) Woolman has pointed out that the court’s judgment was based on Kant’s second categorical imperative as the court stated that the contract infringed upon the soccer player’s human dignity because in terms of the contract he was ‘helpless’ and ‘treated just like an object’,[[140]](#footnote-140) and hence, not treated as an end in himself.[[141]](#footnote-141) Specifically, the court held that the National Soccer League (NLS) rules as incorporated into the contract ‘are akin to treating players as goods and chattels who are at the mercy of their employer once their contract has expired’.[[142]](#footnote-142) Therefore, the court’s definition of what it means to treat a person as an end in herself accords with Wood’s interpretation of Kant’s second categorical imperative in that treating a person as an end in herself denotes respect for the person’s unique set of ends which would include that a person should not be deprived of control over her life[[143]](#footnote-143) which was also endorsed by the Court in *Pillay*.[[144]](#footnote-144) As the NSL rules incorporated into the contract left the player helpless and at the mercy of his former employer, the contract deprived him of control over his life and hence infringed his human dignity. Consequently, the contract was contrary to public policy.

However, it was not long before the Supreme Court of Appeal endorsed the empowerment conception of human dignity only. In *Brisley* dealing with the enforceability of a non-variation clause, the court stressed the fact that ‘public policy generally favours the utmost freedom of contract’[[145]](#footnote-145) and struck a damaging blow to the principle of good faith when it held that good faith was an abstract value underlying the substantive common law of contract and not an independent substantive rule that can be used to strike down a contract that would otherwise be enforceable.[[146]](#footnote-146) If this would be allowed, the court argued, it would mean that whether a contract would be enforceable or not would depend on what a particular judge viewed as fair and just.[[147]](#footnote-147) The court held that granting a judge such a discretion would ignore the principle of *pacta sunt servanda* and lead to commercial uncertainty.[[148]](#footnote-148) Finally, it held that the principles set out in *Sasfin* cannot be used to prevent the enforcement of contractual terms that are not in themselves contrary to public policy. It stated that even if the principles in *Sasfin* could be extended to the unfair enforcement of terms, it should only be applied in exceptional cases.[[149]](#footnote-149)

Soon thereafter, the enforceability of an exemption clause that excluded a private hospital’s liability for the negligent conduct of its nursing staff was considered in *Afrox*.[[150]](#footnote-150) With reference to *Sasfin* the court accepted that a contract term which is so unfair as to be against public policy would be unenforceable but cautioned that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases to prevent the decision being based on the judge’s own subjective perception of fairness.[[151]](#footnote-151) The court confirmed that public policy is now rooted in the Constitution and its founding values, namely dignity, equality and freedom.[[152]](#footnote-152) The court stated that these values require the courts to show restraint when striking down contracts because contractual autonomy is part of the constitutional value of freedom and also informs the constitutional value of dignity.[[153]](#footnote-153) The court further elevated contractual freedom to the status of a constitutional value.[[154]](#footnote-154) Although the court recognised that the unequal bargaining position of the parties is a relevant factor in deciding whether a contract term is contrary to public policy, it argued that its presence alone will not result in the contract term being contrary to public policy.[[155]](#footnote-155) Finally, the court confirmed that good faith is an abstract value underlying the substantive common law of contract and not an independent substantive rule that can be used to strike down a contract that would otherwise be enforceable.[[156]](#footnote-156)

The appeal court’s approach in both cases is a giant step backwards from the principles laid down in *Sasfin*.[[157]](#footnote-157) In *Sasfin* the court accepted that the principles of freedom and sanctity of contract were not absolute and that public policy required that a balance should be found between freedom and sanctity of contract on the one hand and fairness or equity on the other.[[158]](#footnote-158)As was shown above, this approach is based on a the multi-facetted approach to human dignity as both empowerment and constraint and requires the court to balance the interests of the parties through a value judgment based on fairness. In contrast, the appeal court’s approach to human dignity over-emphasises its empowerment conception and fails to take account of the idea of human dignity as constraint. As a result, there is little possibility for a balancing act between the interests of the parties through a value judgment based on fairness. Firstly, because contractual autonomy is now enshrined as a constitutional value itself and informs the constitutional value of human dignity.[[159]](#footnote-159) Secondly, because any consideration of fairness is not allowed as it would defeat the rule of law and result in arbitrary decisions and legal and commercial uncertainty.

# IV MAKING SENSE OF *BARKHUIZEN*, *BREDENKAMP* AND *BOTHA*

## A Barkhuizen

The issue of contractual fairness finally arrived in the Court in *Barkhuizen* dealing with the enforcement of a time-limitation clause in a short-term insurance contract. The Court held that constitutional challenges to contractual terms must be determined by testing the terms against public policy, which in turn is informed by the Constitution and the constitutional values of freedom, dignity, equality and the rule of law. A contract term that is contrary to such values is contrary to public policy and therefore unenforceable.[[160]](#footnote-160)

The Court referred to the test laid down in *Sasfin* which entails a balancing act between the policy considerations of freedom and sanctity of contract on the one hand and simple justice between individuals on the other[[161]](#footnote-161) and held that such a balancing act necessarily implicates notions of fairness, justice, equity and reasonableness.[[162]](#footnote-162) In this respect, the Constitutional Court stated that ‘the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of ‘freedom of contract’, while seeking to permit individuals the dignity and autonomy of regulating their own lives’.[[163]](#footnote-163) The Court also expressly rejected the Supreme Court of Appeal’s contention that the fact that a contract term is unfair or might operate harshly cannot lead to the conclusion that the term is contrary to constitutional values and principles.[[164]](#footnote-164) Therefore, the Court’s approach aligns with that in *Sasfin* in that it reflects a multi-facetted approach to human dignity as both empowerment and constraint which results in a balancing act between the interests of the parties through value judgment based on fairness.

The Court then laid down a two-part test for fairness dealing with the fairness of the contract term itself as well as the enforcement of the contract term.[[165]](#footnote-165) The first part of the test requires a balancing act between the policy considerations of freedom and sanctity of contract which gives effect to the constitutional values of freedom and human dignity on the one hand, and another policy consideration as reflected in a constitutional right or value in support of the non-enforcement of the contract on the other.[[166]](#footnote-166) This examination is objective in nature as it deals with these values on an abstract level as reflected in the terms of the contract itself.[[167]](#footnote-167) Unfortunately, the Court then endorsed the idea of human dignity as empowerment only when it reiterated that contracts freely and voluntarily entered into must generally be enforced. This is, the Court reasoned, because the ability to regulate your own affairs – even to your own detriment – comprises the constitutional values of freedom and dignity.[[168]](#footnote-168) Therefore, the Court did not take into consideration the idea of human dignity as constraint as reflected in the duty to respect the human dignity of the other contracting party and which would provide justification for setting aside a freely concluded contract term where it violates one of the contracting party’s human dignity.[[169]](#footnote-169) In other words, the Court did not recognise that the constitutional value of, or right to, human dignity can also be invoked on the other side of the balancing scale to limit contractual freedom and that this would necessarily implicate the notion of fairness because it entails a balancing act of the different parties’ interests as reflected in the contract terms themselves.

The Court further held that if the clause objectively does not violate public policy, it has to be determined whether the clause violates public policy in light of the relative situation of the contracting parties which would include an assessment of the bargaining position of the parties which determination is subjective in nature. This is an extension of the fairness test in *Sasfin* which was limited to an investigation of the contract terms themselves and did not include a consideration of the surrounding circumstances. It can be argued that this extension was inspired by ubuntu because it promotes substantive equality.[[170]](#footnote-170) Therefore, although the Court did not refer to human dignity as constraint the Court’s reasoning reflects a conceptualisation of human dignity as constraint which denotes not only a duty to respect the human dignity of others but also to share in the responsibility of creating the necessary conditions for the realisation of others’ human dignity by promoting substantive equality.

The second part of the test for fairness investigates whether, in spite of the fact that the clause itself does not violate public policy, enforcement of the clause would be fair in light of the circumstances which prevented compliance therewith.[[171]](#footnote-171) Again, the second part of the test is therefore subjective in nature and promotes substantive equality.[[172]](#footnote-172) Accordingly, it can be argued that it was inspired by ubuntu.[[173]](#footnote-173) It is also an extension of the fairness test in *Sasfin* as it is concerned with the unfair enforcement of a contract term and not only whether the contract terms themselves are fair or not. Again, this reflects a conceptualisation of human dignity as constraint which denotes not only a duty to respect the human dignity of others but also to share in the responsibility of creating the necessary conditions for the realisation of others’ human dignity through the promotion of substantive equality.

In view of the above fairness test, it is therefore unsurprising that the Court *obiter* questioned the restricted role of good faith in the common law of contract.[[174]](#footnote-174)

## B Bredenkamp

The Supreme Court of Appeal struck back in *Bredenkamp* which dealt with the exercise of a contractual right that entitled the bank to close a client’s bank accounts on reasonable notice and for any reason.[[175]](#footnote-175) Relying on the principles of fairness laid down in *Barkhuizen*, the client argued that the bank was required to exercise this right fairly and for good cause.[[176]](#footnote-176) In other words, the client relied on the second part of the test for fairness in *Barkhuizen* which deals with the unfair enforcement of a contract term.[[177]](#footnote-177)

The court stated that the judgment in *Barkhuizen* did not hold that the enforcement of a valid contractual clause must be fair and reasonable where no public policy consideration in the Constitution or elsewhere is implicated.[[178]](#footnote-178) Therefore, fairness and reasonableness becomes relevant only when a specific constitutional value or right is implicated and it must be determined whether the clause or its enforcement is contrary to public policy.[[179]](#footnote-179)

Following the Court’s approach in *Barkhuizen*, the appeal court recognised that human dignity can be invoked in support of contractual autonomy and sanctity[[180]](#footnote-180) as reflected in its empowerment conception to argue for the enforcement of the contract but failed to recognise that human dignity as a constitutional value or right can also be invoked on the other side of the balancing scale in support of the non-enforcement of the contract and that this would necessarily implicate the notion of fairness. This approach enabled the appeal court to reject the idea that fairness is an overarching requirement in the common law of contract[[181]](#footnote-181) and it expressly stated that an equitable discretion cannot be allowed because it would defeat the rule of law entrenched as a founding constitutional value.[[182]](#footnote-182)

## C Botha

The Court’s development towards an understanding of human dignity that reflects a multi-faceted approach that encompasses both empowerment and constraint, the latter reflected in the duties on an individual to respect others’ human dignity and promote the conditions for the realisation thereof is more pronounced in *Botha* which pre-dates the decision in *Barnard*.[[183]](#footnote-183)

The facts in *Botha* concerned the unfair enforcement of a cancellation clause in an instalment sale of immovable property between Botha (as buyer) and a trust (as seller). The cancellation clause provided for the cancellation of the agreement and the forfeiture of all sums already paid by Botha in the event of a breach by her. The contract also provided that Botha may demand transfer of the property in terms of s 27 of the Alienation of Land Act 68 of 1981 after she had paid at least half the purchase price.[[184]](#footnote-184) After Botha had paid three quarters of the purchase price she began to default on the payments and the trust sued for cancellation and eviction.[[185]](#footnote-185) In turn, Botha demanded transfer of the property in terms of s 27 of the Alienation of Land Act as provided for in the contract.[[186]](#footnote-186)

One of Botha’s main contentions was ‘that the enforcement of the cancellation clause, where more than half the purchase price has been paid, and in the face of a demand for a transfer pursuant to s 27, is contrary to public policy’.[[187]](#footnote-187) In determining this question, the Court held that public policy generally requires enforcement of contractual obligations freely and voluntarily undertaken which gives effect to the constitutional values of freedom and human dignity.[[188]](#footnote-188) This is an endorsement of human dignity as empowerment which supports the enforcement of the contract.

In support of her case, Botha contended that the cancellation of the contract, in other words the enforcement of the cancellation clause by the trustees, was contrary to public policy because it violated her constitutional rights.[[189]](#footnote-189) It is not stated which constitutional rights Botha implicated in her application before the Court but most likely she relied upon her rights to dignity and equality as these were the rights cited before the Supreme Court of Appeal.[[190]](#footnote-190) Therefore, it can be argued that Botha invoked human dignity as the specific constitutional right or value in favour of the non-enforcement of the contract term as required by the Court in *Bredenkamp*. Furthermore, by linking human dignity and equality, the idea of human dignity as constraint refers not only to a duty on the individual to respect the human dignity of another but also the duty to promote the realisation of the other’s human dignity which entails the promotion of substantive equality in the law of contract.[[191]](#footnote-191)

The Court then applied the idea of human dignity as constraint which it conceptualised through the principle of good faith:

The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one’s own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party’s interest. Good faith is the lens through which we come to understand contracts in that way.[[192]](#footnote-192)

Although this statement was made in respect of the application of the *exceptio non adimpleti contractus* to the facts of the case, the Court later stated that the enforcement of the cancellation clause and the concomitant forfeiture of the purchase price already paid was unfair[[193]](#footnote-193) for the same reasons because it constituted a disproportionate penalty in circumstances where three-quarters of the purchase price has already been paid.[[194]](#footnote-194)

The Court’s decision can therefore be viewed as an application of the test for fairness as set out in *Barkhuizen* andas further expanded upon in *Bredenkamp*. By referring to both parties’ human dignity[[195]](#footnote-195) the Court recognised that determining the fairness of a contract term or the enforcement thereof will always entail a balancing act between the human dignity of the contracting party who wants to enforce the contract term as expressed through the maxims of freedom and sanctity of contract and the human dignity of the other contracting party who avers that the contract term or its enforcement infringes her human dignity as expressed in the demand that a human being should never be treated merely as a means to an end, but always also as an end. This means that the unique set of ends of both parties must be harmonised which entails that the court has to weigh up the interests of both parties in order to determine whether the contract term or its enforcement constitutes an unfair infringement of one of the party’s interests and hence violates her human dignity. Consequently, by impliedly invoking the concept of human dignity as constraint through the principle of good faith the Court was able to apply the subjective test for fairness in determining whether the enforcement of the cancellation clause was unfair. In coming to the decision that the enforcement of the cancellation clause was unfair, the Court took specific notice of the fact that the cancellation in the specific circumstances of the case would entail the forfeiture of almost three-quarters of the purchase price that was already paid by Botha while the trust would keep the property. The Court thus balanced the interests of the parties and came to the conclusion that the enforcement of the contract term would be unfair.

As the Court linked good faith to both duties as reflected in human dignity as constraint, namely to respect and promote the realisation of the human dignity of the other contracting party through the idea substantive equality, the decision relies by implication on ubuntu. As was argued above,[[196]](#footnote-196) the subjective part of the test for fairness which includes considerations based on substantive equality is an expression of ubuntu because it requires an investigation into the contracting parties’ actual social and economic conditions. Accordingly, ubuntu can be construed as the subtext. Thus, it is unfortunate that the Court did not refer to ubuntu expressly as doing so could have enabled the court to consider further factors in favour of the non-enforcement of the cancellation clause. For example, Hawthorne argued that the parties were in an unequal bargaining relationship:

To enter into an instalment sales contract in terms of which the purchaser agrees to losing everything in the event of defaulting is a clear indication that the purchaser, Botha (and every other instalment purchaser), had little negotiating power in reaching this agreement. If she had been in a stronger position she would have qualified for a mortgage initially.[[197]](#footnote-197)

A further possible factor is the fact that Botha used the property to operate a laundry service through a closed corporation of which she was the sole member.[[198]](#footnote-198) Losing the property would probably mean that she would no longer be able to operate her business which provided her with a substantial part (if not the sole source) of her income.[[199]](#footnote-199) Therefore, enforcement of the cancellation clause, coupled with the forfeiture of the purchase price already paid, might well have resulted in the deprivation of Botha’s livelihood.

# V CONCLUSION

The above analysis illustrates that the Court is in the process of developing the aspect of human dignity as constraint in the common law of contract which is the result of the harmonisation of Kantian dignity and ubuntu. In this respect, human dignity as constraint would refer to the duty to respect the human dignity of the other party as well as the duty to promote the realisation of the other party’s human dignity through the idea of substantive equality.

The recognition of human dignity as both empowerment and constraint in the common law of contract through the open norm of public policy inevitably requires a balancing act between the interests of the parties. The contracting party who wishes to enforce the contract term relies on freedom and sanctity of contract as opposed to the other contracting party who avers that the contract term infringes her human dignity, as expressed in the demand that a human being should never be treated merely as a means to an end, but always also as an end. Accordingly, a court will always have to balance the interests of the contracting parties in order to determine whether a contract term or its enforcement constitutes an unfair infringement of one of the party’s interests and hence violates her human dignity. Therefore, the multi-facetted approach to human dignity means that notion of fairness is always implicated when a court has to determine whether a contract term or its enforcement is contrary to public policy. Therefore, the proper appreciation of the constitutional value of human dignity in the common law of contract results in a general equitable discretion to declare unfair contract terms or the unfair enforcement of contract terms invalid. Finally, it is submitted that the Court in *Botha* created such an equitable discretion by conceptualising the idea of human dignity as constraint through the principle of good faith.

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2. For a detailed legal historical exposition of the role of fairness in the South African common law of contract see Du Plessis (note 1 above) ch 2. [↑](#footnote-ref-2)
3. *Barkhuizen v Napier* [2007] ZACC 5, 2007 5 SA 323 (CC) (‘*Barkhuizen*’). [↑](#footnote-ref-3)
4. *Bredenkamp and others v Standard Bank of South Africa Ltd* [2010] ZASCA 75, 2010 4 SA 468 (SCA) (‘*Bredenkamp*’). [↑](#footnote-ref-4)
5. *Botha and another v Rich NO and others* [2014] ZACC 11, 2014 4 SA 124 (CC) (‘*Botha*’). [↑](#footnote-ref-5)
6. M Wallis ‘Commercial certainty and constitutionalism: are they compatible?’ (2016) 133 *South African Law Journal* 545, 557; L Hawthorne ‘Rethinking the philosophical substructure of modern South African contract law: Self-actualisation and human dignity’ (2016) 79 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 286, 296-297; R Sharrock ‘Unfair enforcement of a contract: a step in the right direction? *Botha v Rich* and *Combined Developers v Arun Holdings*’ (2015) 27 *South African Mercantile Law Journal* 174, 180; D Bhana & A Meerkotter ‘The impact of the Constitution on the common law of contract: *Botha v Rich NO* (CC)’ (2015) 132 *South African Law Journal* 494,506. [↑](#footnote-ref-6)
7. This section comprises a brief summary of the relevant issues for the purposes of this article. A detailed critical analysis of the dualistic approach to human dignity in the law of contract including its philosophical origins can be found in Du Plessis (note 1) 215-255. [↑](#footnote-ref-7)
8. D Beyleveld & R Brownsword *Human dignity in bioethics and biolaw* (2004) 11ff. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. L Hawthorne ‘Constitution and contract: Human dignity, the theory of capabilities and *Existenzgundlage* in South Africa’ (2011) 2 *Studia Universitatis Babes Bolyai Iurisprudentia* para 4 2; D Bhana & M Pieterse ‘Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited’ (2005) 122 *South African Law Journal* 865, 880-881; G Lubbe ‘Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law’ (2004) 121 *South African Law Journal* 395, 421; D Feldman ‘Human dignity as a legal value – part 1’ (1999) *Public Law* 682, 685. [↑](#footnote-ref-10)
11. R Brownsword ‘Freedom of contract, human rights and human dignity’ in D Friedmann & D Barak-Erez (eds) *Human rights in private law* (2001) 183. [↑](#footnote-ref-11)
12. Ibid at 191. [↑](#footnote-ref-12)
13. I Kant *Grundlegung zur Metaphysik der Sitten* (1785) (trans HJ Paton, 1978) 96. [↑](#footnote-ref-13)
14. Ibid at 101. [↑](#footnote-ref-14)
15. Beyleveld & Brownsword (note 8 above) at 52-54 & D Beyleveld & R Brownsword ‘Human dignity, human rights, and human genetics’ (1998) 61 *Modern Law Review* 661, 666. [↑](#footnote-ref-15)
16. Beyleveld & Brownsword (note 8 above) at 53 & Beyleveld & Brownsword (note 15 above) at 666. See also AJ Barnard *Critical legal argument for contractual justice in the South African law of contract* (LLD University of Pretoria 2005) 233. [↑](#footnote-ref-16)
17. Beyleveld & Brownsword (note 15 above) at 666. [↑](#footnote-ref-17)
18. Kant (note 13 above) at 91 as quoted by Beyleveld & Brownsword (note 15 above) at 666. [↑](#footnote-ref-18)
19. Ibid. See also Lubbe (note 10 above) at 421. [↑](#footnote-ref-19)
20. Brownsword (note 11 above) at 183. [↑](#footnote-ref-20)
21. R Brownsword ‘Human dignity from a legal perspective’ in M Düwell *et al* (eds) *The Cambridge handbook of human dignity: interdisciplinary perspectives* (2014) 4. [↑](#footnote-ref-21)
22. H Botha ‘Human dignity in comparative perspective’ (2009) 2 *Stellenbosch Law Review* 171, 174. An oft-quoted example of this approach to human dignity is art 22 of the Universal Declaration of Human Rights (1948) (see eg Brownsword (note 21 above) at 4). [↑](#footnote-ref-22)
23. Beyleveld & Brownsword (note 8 above) at 27-28. [↑](#footnote-ref-23)
24. R Brownsword ‘Genetic engineering, free trade and human rights: global standards and local ethics’ in D Wüger & T Cottier (eds) *Genetic engineering and the world trade system: world trade forum* (2008) 297-298. [↑](#footnote-ref-24)
25. Ibid at 189. [↑](#footnote-ref-25)
26. Brownsword (note 11 above) at 193-194. See also Hawthorne (note 10 above) at para 4 2; D Bhana ‘The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)’ (2007) 24 *South African Law Journal* 269, 274; Bhana & Pieterse (note 10 above) at 881; Barnard (note 16 above) at 231-232; Lubbe (note 10 above) at 421. [↑](#footnote-ref-26)
27. Brownsword (note 11 above) at 184-185; Brownsword (note 24 above) at 298. See also Hawthorne (note 10 above) at para 4 2; Bhana (note 26 above) at 274; Bhana & Pieterse (note 10 above) at 881; Barnard (note 16 above) at 232; Lubbe (note 10 above) at 421. [↑](#footnote-ref-27)
28. Brownsword (note 21 above) at 1. [↑](#footnote-ref-28)
29. Beyleveld & Brownsword (note 8 above) at 36. [↑](#footnote-ref-29)
30. Ibid at 37. See also Brownsword (note 24 above) at 295; Beyleveld & Brownsword (note 15 above) at 667-668 on the duty not to compromise the dignity of others. [↑](#footnote-ref-30)
31. I Kant *Die Metaphysik der Sitten* (1797) (trans M Gregor, 1996) 209. See further Lubbe (note 10 above) at 421-422 & AJ Barnard-Naude ‘”Oh what a tangled web we weave…” Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract’ (2008) 1 *Constitutional Court Review* 155, 206. [↑](#footnote-ref-31)
32. Beyleveld & Brownsword (note 8 above) at 37. [↑](#footnote-ref-32)
33. Ibid at 41-42. [↑](#footnote-ref-33)
34. A Clapham *Human rights in the private sphere* (1993) 148. See also Brownsword (note 21 above) at 4. [↑](#footnote-ref-34)
35. See also Botha (note 22 above) at 174. [↑](#footnote-ref-35)
36. Cf the discussion in the text at n 23 above. [↑](#footnote-ref-36)
37. Brownsword (note 24 above) at 297-298. [↑](#footnote-ref-37)
38. Beyleveld & Brownsword (note 8 above) at 11 & 31 esp n 4. See also Brownsword (note 11 above) at 194-195; Feldman (note 10 above) at 700. [↑](#footnote-ref-38)
39. Brownsword (note 11 above) at 194. See also Hawthorne (note 10 above) at para 4 2; Bhana (note 26 above) at 274; Bhana & Pieterse (note 10 above) at 881; Barnard (note 16 above) at 231-232; Lubbe (note 10 above) at 421. [↑](#footnote-ref-39)
40. See Feldman (note 10 above) at 699 who maintains that this conception of human dignity has been used to promote social justice & Brownsword (note 24 above) at 298 who states that this conception of human dignity can be used to limit free trade. See also Hawthorne (note 10 above) at para 4 2; Bhana & Pieterse (note 10 above) at 881; Lubbe (note 10 above) at 422. [↑](#footnote-ref-40)
41. Brownsword (note 11 above) at 194. See also Brownsword (note 24 above) at 296. [↑](#footnote-ref-41)
42. Brownsword (note 11 above) at 182, 194-195. See also his discussion of this decision in Brownsword (note 21 above) at 11. [↑](#footnote-ref-42)
43. *Jerusalem Community Burial Society v Kestenbaum* CA 294/91, [1992] IsrSC 46(2) 464 (Hebrew). I rely on a translation of this decision by Yuval Abrams as available at <https://law.utexas.edu/transnational/foreign-law-translations/israeli/case.php?id=1391> (‘*Jerusalem translation*’). [↑](#footnote-ref-43)
44. See the summary of the facts in *Jerusalem translation* (note 43 above) & Brownsword (note 11 above) at 182. [↑](#footnote-ref-44)
45. Per Shamgar P (opinion of the court) as found *Jerusalem translation* (note 43 above) & discussed in Brownsword (note 11 above) at 182. In his concurring judgment, Justice Barak held that the contract term violated both the human dignity of the deceased and that of her family if neither the deceased (during her lifetime) nor her family is allowed to determine the inscription on the tombstone (Barak J (concurring judgment) para 28 as set out in *Jerusalem translation* (note 43 above)). [↑](#footnote-ref-45)
46. Per Elon DP (in dissent) as found in *Jerusalem translation* (note 43 above). See also Brownsword (note 11 above) at 182. [↑](#footnote-ref-46)
47. Brownsword (note 21 above) at 11; Brownsword (note 11 above) at 194. [↑](#footnote-ref-47)
48. Brownsword (note 11 above) at 194-195. [↑](#footnote-ref-48)
49. D Cornell ‘Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence’ (2008) *Acta Juridica* 18, 24-26. [↑](#footnote-ref-49)
50. Kant (note 13 above) at 107. [↑](#footnote-ref-50)
51. Ibid. [↑](#footnote-ref-51)
52. Ibid. See further Cornell (note 49 above) at 24-25 & D Cornell & S Fuller ‘Introduction’ in D Cornell *et al* (eds) *The dignity jurisprudence of the Constitutional Court of South Africa: cases and material vol 1* (2013) 8. [↑](#footnote-ref-52)
53. Kant (note 13 above) at 107. See also Cornell & Fuller (note 52 above) at 9. [↑](#footnote-ref-53)
54. Kant (note 13 above) at 107. See also Cornell (note 49 above) at 25; A Wood *Kant’s ethical thought* (1999) 172. [↑](#footnote-ref-54)
55. R Johnson *et al* ‘Kant’s moral philosophy’ in EN Zalta (ed) *The Stanford encyclopedia of philosophy* (Spring ed, 2017) para 7. Paton’s version reads as follows: “[A]ct that your will can regard itself at the same time as making universal law through its maxim” (Kant (note 13 above) at 33). [↑](#footnote-ref-55)
56. For Kant, a universal law refers to “an objective principle valid for every rational being; and it is a principle on which he *ought to act* – that is, an imperative” (Ibid at 84). In other words, a universal law is a moral law. [↑](#footnote-ref-56)
57. Ibid 107-108. [↑](#footnote-ref-57)
58. D Cornell ‘A call for a nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation’ (2004) 19 *South African Public Law* 666 (referred to with approval by Barnard (note 16 above) at 235-236 & AJ Barnard ‘A different way of saying: on stories, text, a critical legal argument for contractual justice and the ethical element of contract in South Africa’ (2005) 21 *South African Journal on Human Rights* 278, 288-289). [↑](#footnote-ref-58)
59. Cf the discussion of Kantian dignity by Beyleveld and Brownsword in the text at n 15 above. [↑](#footnote-ref-59)
60. Beyleveld & Brownsword (note 8 above) at 65. [↑](#footnote-ref-60)
61. As quoted in the text at n 18 above. [↑](#footnote-ref-61)
62. A Wood ‘Human dignity, right and the realm of ends’ (2008) *Acta Juridica* 47, 53. [↑](#footnote-ref-62)
63. As explained by Wood (note 62 above) at53: “It is humanity – our capacity to set ends, choose means to them and combine them into an idea of happiness – that is an end in itself and that the Formula of Humanity [the Formula of the End in Itself] declares that we must always treat as an end, never merely as a means.” [↑](#footnote-ref-63)
64. Ibid at 52. [↑](#footnote-ref-64)
65. Cf the discussion on Cornell’s interpretation of Kantian dignity and freedom in the text at n 49 above. [↑](#footnote-ref-65)
66. S Woolman ‘Dignity’ in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2nd Edition, Revision Service 6, 2014) para 36.2(*c*). [↑](#footnote-ref-66)
67. Kant (note 13 above) at 95 states that the hypothetical “kingdom of ends” refers to “a systematic union of different rational beings under common laws”. [↑](#footnote-ref-67)
68. Cornell (note 49 above) at 384. [↑](#footnote-ref-68)
69. Ibid. [↑](#footnote-ref-69)
70. Cornell & Fuller (note 52 above) at 15. Although Wood (note 62 above) at57 argues that the Kantian realms of right and ethics are distinct systems with their own rational basis, he later argues that right can be used to further and promote the moral ideal of the kingdom of ends (at 61). [↑](#footnote-ref-70)
71. Cornell & Fuller (note 52 above) at 15; Cornell (note 49 above) at 26. [↑](#footnote-ref-71)
72. Cornell & Fuller (note 52 above) at 14-15. [↑](#footnote-ref-72)
73. As succinctly explained by Cornell (note 49 above) at 28: “Understanding freedom as integrally limited by the conditions of its exercise, the seeming paradox of unlimited freedom can be resolved internally”. See also Barnard (note 16 above) at 235. [↑](#footnote-ref-73)
74. Cornell & Fuller (note 52 above) at 15; Cornell (note 49 above) at 26. [↑](#footnote-ref-74)
75. Cornell & Fuller (note 52 above) at 15. [↑](#footnote-ref-75)
76. Cf the discussion in the text at n 60 above. [↑](#footnote-ref-76)
77. Cornell (note 49 above) at 26. [↑](#footnote-ref-77)
78. *S v Makwanyane* *and another* [1995] ZACC 3, 1995 3 SA 391 (CC) (‘*Makwanyane*’) paras 26 (Chaskalson J), 271 & 281 (Mohamed J), 313-316 (Mokgoro J) & 328 (O’Regan J). See also C Albertyn ‘Values in the South African Constitution’ in D Davis *et al* *An inquiry into the existence of global values through the lens of comparative constitutional law* (2015) 327; Botha (note 22 above) at 202. [↑](#footnote-ref-78)
79. *S v Dodo* [2001] ZACC 16, 2001 3 SA 382 (CC) para 38 (‘*Dodo*’). See also Albertyn (note 78 above) at 327 n 28; Botha (note 22 above) at 202. [↑](#footnote-ref-79)
80. *Khumalo and others v Holomisa* [2002] ZACC 12, 2002 5 SA 401 (CC) para 27 (‘*Khumalo*’). [↑](#footnote-ref-80)
81. See the discussion of this decision in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, 2014 6 SA 123 (CC) para 172 (‘*Barnard*’). [↑](#footnote-ref-81)
82. *MEC for Education, KwaZulu-Natal, and others v Pillay* [2007] ZACC 21, 2008 1 SA 474 (CC) (‘*Pillay*’). [↑](#footnote-ref-82)
83. Ibid at para 63. [↑](#footnote-ref-83)
84. *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* [1995] ZACC 13, 1996 1 SA 984 (CC) para 49 (‘*Ferreira*’). [↑](#footnote-ref-84)
85. *Pillay* (note 82 above) at para 64. [↑](#footnote-ref-85)
86. Cf the discussion in the text at n 62 above. [↑](#footnote-ref-86)
87. Cf the discussion in the text at n 64 above. [↑](#footnote-ref-87)
88. Botha (note 22 above) at 203-204. [↑](#footnote-ref-88)
89. *MM v MN and another* 2013] ZACC 14, 2013 4 SA 415 (CC) (‘*MM v MN*’). However, the decision of the court has been criticised for not dealing with the human dignity of the second wife (Kruuse & Sloth-Nielsen 2014 *PELJ* 1724). [↑](#footnote-ref-89)
90. *MM v MN* (note 89 above) atparas 73-74. [↑](#footnote-ref-90)
91. *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* [2013] ZACC 35, 2014 2 SA 168 (CC) para 56 (‘*Teddy Bear Clinic*’). Referred to by approval in the minority judgment in *AB and another v Minister of Social Development* [2016] ZACC 43, 2017 3 SA 570 (CC) para 110, esp n 118. [↑](#footnote-ref-91)
92. *Barnard* (note 81 above) at para 173. [↑](#footnote-ref-92)
93. *Ferreira* (note 84 above) at para 49. [↑](#footnote-ref-93)
94. *Barnard* (note 81 above) at para 174. See also *Bernstein and others v Bester and others NNO* [1996] ZACC 2, 1996 2 SA 751 (CC) paras 65 (‘*Bernstein*’); L Ackermann *Human dignity: Lodestar for equality in South Africa* (2013) 109-111. [↑](#footnote-ref-94)
95. *Bernstein* (note 94 above) at para 67. [↑](#footnote-ref-95)
96. Ibid at para 66 (esp n 93). [↑](#footnote-ref-96)
97. *Makwanyane* (note 78 above) at para 308 (Mokgoro J). [↑](#footnote-ref-97)
98. *Makwanyane* (note 78 above) at para 225 (Langa J). [↑](#footnote-ref-98)
99. For example, *Pillay* (note 82 above) at para 53; *Dikoko v Mokhatla* [2006] ZACC 10, 2006 6 SA 235 (CC) para 68 (Mokgoro J); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 1 SA 217 (CC) para 37 (‘*Port Elizabeth*’). [↑](#footnote-ref-99)
100. *Hoffmann v South African Airways* [2000] ZACC 17, 2011 1 SA 1 (CC) para 38 n 31. See also Ackermann (note 94 above) at 113. [↑](#footnote-ref-100)
101. *Makwanyane* (note 78 above) at para 308. [↑](#footnote-ref-101)
102. D Cornell & N Muvangua ‘Introduction’ in D Cornell & N Muvangua (eds) *uBuntu and the law: African ideals and postapartheid jurisprudence* (2012) 8. [↑](#footnote-ref-102)
103. D Cornell ‘Is there a difference that makes a difference between uBuntu and dignity?’ (2010) 25 *South African Public Law* 382,298. [↑](#footnote-ref-103)
104. *Makwanyane* (note 78 above) at para 224. [↑](#footnote-ref-104)
105. Cf the discussion on human dignity as constraint in the text at n 30 above. [↑](#footnote-ref-105)
106. *Pillay* (note 82 above) at para 53. [↑](#footnote-ref-106)
107. Cf the discussion of this decision in the text at n 82 above. [↑](#footnote-ref-107)
108. See also Botha (note 22 above) at205. [↑](#footnote-ref-108)
109. See eg *Port Elizabeth* (note 99 above). See also C Himonga “Exploring the concept of ubuntu in the South African legal system” in U Kischel & C Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 15 esp n 61. [↑](#footnote-ref-109)
110. See D Cornell & K Van Marle ‘Exploring *ubuntu*: Tentative reflection’ (2005) 5 *African Human Rights Law Journal* 195, 211 & Cornell (note 58 above) at 667-668 on why Kantian dignity struggles to justify the promotion of socio-economic rights. See Cornell & Muvangua (note 102 above) at 6; Cornell (note 103 above) at 396 on how ubuntu supports the promotion of socio-economic rights. [↑](#footnote-ref-110)
111. Specifically, Van der Westhuizen J referred to the following decisions that relied on ubuntu to develop the constitutional value of human dignity: *Pillay* (note 82 above); *Port Elizabeth* (note 99 above); *Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others* [2000] ZACC 8, 2000 3 SA 936 (CC). [↑](#footnote-ref-111)
112. Specifically, Van der Westhuizen J referred to the following decisions that incorporate aspects of Kantian dignity into South African law: *Khumalo* (note 80 above); *Dodo* (note 79 above); *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* [1998] ZACC 15, 1999 1 SA 6 (CC); *Ferreira* (note 84 above); *Bernstein* (note 94 above); *Makwanyane* (note 78 above). [↑](#footnote-ref-112)
113. *Barnard* (note 81 above) at para 175 quoting from *Khosa and others v The Minister of Social Development and others; Mahlaule and others v Minister of Social Development and others* [2004] ZACC 11, 2004 6 SA 505 (CC) para 74 (‘*Khosa*’). [↑](#footnote-ref-113)
114. *Barnard* (note 81 above) at para 175 quoting from *Khosa* (note 113 above) at para 74. [↑](#footnote-ref-114)
115. See the discussion of Cornell’s interpretation of Kantian dignity in the text at note 49 above. [↑](#footnote-ref-115)
116. *Barnard* (note 81 above) at para 175. [↑](#footnote-ref-116)
117. See eg Albertyn (note 78 above) at 344 & Y Mokgoro & S Woolman ‘Where dignity ends and uBuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell’s thoughts’ (2010) 25 *South African Public Law* 400, 403 n 10. [↑](#footnote-ref-117)
118. *Port Elizabeth* (note 99 above) at para 18. [↑](#footnote-ref-118)
119. *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7 (‘*Sasfin*’). [↑](#footnote-ref-119)
120. *Sasfin* (note 119 above) at 7, 13-14. [↑](#footnote-ref-120)
121. *Sasfin* (note 119 above) at 7-8. [↑](#footnote-ref-121)
122. Ibid. [↑](#footnote-ref-122)
123. See discussion in the text at n 26 above. [↑](#footnote-ref-123)
124. *Sasfin* (note 119 above) at 9. [↑](#footnote-ref-124)
125. Ibid at 13. [↑](#footnote-ref-125)
126. See also Floyd ‘Legality’ in D Hutchison & C Pretorius (eds) *The law of contract in South Africa* (2nd Edition, 2012) 186. [↑](#footnote-ref-126)
127. See the discussion in the text at n 39 above. [↑](#footnote-ref-127)
128. G Lubbe ‘*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg’ (1990) 1 *Stellenbosch Law Review* 7, 13. See also J Lewis ‘Fairness in South African law’ (2003) 120 *South African Law Journal* 330, 334. [↑](#footnote-ref-128)
129. *Sasfin* (note 119 above)at 18-19. [↑](#footnote-ref-129)
130. Lubbe (note 10 above) at 421 n 188 referring to Beyleveld & Brownsword (note 15 above) at 666 n 30. See also Woolman (note 66 above) at para 36.2(*b*). [↑](#footnote-ref-130)
131. Lubbe (note 10 above) at 421 n 188. [↑](#footnote-ref-131)
132. Cf Cornell’s interpretation of Kant’s concept of freedom as a moral freedom as discussed in the text at n 49 above. [↑](#footnote-ref-132)
133. See also Lubbe (note 129 above) at20 who speaks of the need to harmonise conflicting individual interests. Cf Cornell’s interpretation of Kant’s kingdom of ends which entails the harmonisation of ends as discussed in the text at n 67 above. [↑](#footnote-ref-133)
134. Lubbe (note 129 above) at17-21. [↑](#footnote-ref-134)
135. Barnard (note 16 above) at 232; Barnard (note 58 above) at 289. [↑](#footnote-ref-135)
136. *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 475 (‘*Mort*’) referring to *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C) 325-326. See further the discussions by L Hawthorne ‘Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism’ (2006) 12-2 *Fundamina* 71, 78-79; L Hawthorne ‘The end of bona fides’ (2003) 15 *South African Mercantile Law Journal* 271, 274; P Du Plessis ‘Good faith and equity in the law of contract in the civilian tradition’ (2002) 65 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 397,411; P Du Plessis ‘*Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C)’ (2002) 35 *De Jure* 385, 385-390. [↑](#footnote-ref-136)
137. *Mort* (note 138 above) at 474-475. [↑](#footnote-ref-137)
138. Ibid at 475. [↑](#footnote-ref-138)
139. *Coetzee v Comitis and others* 2001 1 SA 1254 (C) paras 34 & 41 (‘*Coetzee*’). See also Lubbe (note 10 above) at 422. [↑](#footnote-ref-139)
140. *Coetzee* (note 141 above) at para 34. [↑](#footnote-ref-140)
141. Woolman (note 66 above) at para 36.4(*f*). See also Lubbe (note 10 above) at 422. [↑](#footnote-ref-141)
142. *Coetzee* (note 141 above) at para 38. [↑](#footnote-ref-142)
143. Cf the discussion in the text at n 62 above. [↑](#footnote-ref-143)
144. Cf the discussion of *Pillay* (note 82 above) in the text at n 82 above. [↑](#footnote-ref-144)
145. *Brisley v Drotsky* [2002] ZASCA 35; 2002 4 SA 1 (SCA) para 31 (‘*Brisley*’) quoting *Sasfin* (note 119 above) at 9 (Cf the discussion in the text at n 120 above). [↑](#footnote-ref-145)
146. *Brisley* (note 147 above) at para 22. The court (at para 21) expressly rejected the views of the court in *Mort* (note 138 above) as discussed above. [↑](#footnote-ref-146)
147. *Brisley* (note 147 above) at para 24. [↑](#footnote-ref-147)
148. Ibid. [↑](#footnote-ref-148)
149. Ibid at para 31. [↑](#footnote-ref-149)
150. *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73, 2002 6 SA 21 (SCA)para 8 (‘*Afrox*’). [↑](#footnote-ref-150)
151. *Afrox* (note 152 above) at para 8. [↑](#footnote-ref-151)
152. Ibid atpara 18. [↑](#footnote-ref-152)
153. Ibid atpara 22 quoting the minority judgment of appeal judge Cameron in *Brisley* (note 147 above) at para 94. [↑](#footnote-ref-153)
154. *Afrox* (note 152 above) atpara 23. [↑](#footnote-ref-154)
155. Ibid atpara 12. [↑](#footnote-ref-155)
156. Ibid atpara 32. [↑](#footnote-ref-156)
157. DM Davis & K Klare ‘Transformative constitutionalism and the common and customary law’ (2010) 26 *South African Journal on Human Rights* 403, 481. [↑](#footnote-ref-157)
158. *Sasfin* (note 119 above) at 9 as discussed in the text at n 120 above. [↑](#footnote-ref-158)
159. Botha (note 22 above) at 212. [↑](#footnote-ref-159)
160. *Barkhuizen* (note 3 above) at paras 28-29. [↑](#footnote-ref-160)
161. *Barkhuizen* (note 3 above) at para 50 n 33 referring to *Sasfin* (note 119 above) at 9. [↑](#footnote-ref-161)
162. *Barkhuizen* (note 3 above) at paras 51 & 73. [↑](#footnote-ref-162)
163. Ibid at para 70 referring to *Napier v Barkhuizen* [2005] ZASCA 119, 2006 4 SA 1 (SCA) para 13. [↑](#footnote-ref-163)
164. *Barkhuizen* (note 3 above) at para 72. [↑](#footnote-ref-164)
165. Ibid at para 56. [↑](#footnote-ref-165)
166. Ibid at para 57. [↑](#footnote-ref-166)
167. Ibid at para 59 where the court refers to the “objective terms” of the contract. See also L Hawthorne ‘Contract law: contextualization and unequal bargaining position *Redux*’ (2010) 43 *De Jure* 395, 398; Botha (note 22 above) at 212. [↑](#footnote-ref-167)
168. *Barkhuizen* (note 3 above) at para 57. [↑](#footnote-ref-168)
169. FDJ Brand ‘The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution’ (2009) 126 *South African Law Journal* 71, 85; Bhana (note 26 above) at 274; Lubbe (note 10 above) at 420-421. [↑](#footnote-ref-169)
170. *Barkhuizen* (note 3 above) at para 51. See further D Bhana & N Broeders ‘Agreements to agree’ (2014) 77 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 164, 175; Cornell and Muvangua (note 102 above) at 24; Hawthorne (note 169 above) at 400. [↑](#footnote-ref-170)
171. *Barkhuizen* (note 3 above) at para 56. [↑](#footnote-ref-171)
172. Ibid at para 59. See also Wallis (note 6 above) at 552-553; Bhana & Meerkotter (note 6 above) at 504; D Bhana ‘Contract law and the Constitution: Bredenkamp v Standard Bank of South Africa (SCA)’ (2014) 29 *South African Public Law* 518, 509. [↑](#footnote-ref-172)
173. See the sources listed in n 172 above. [↑](#footnote-ref-173)
174. *Barkhuizen* (note 3 above) at para 82. [↑](#footnote-ref-174)
175. *Bredenkamp* (note 4 above) at para 6. [↑](#footnote-ref-175)
176. Ibid at paras 1, 25-26. [↑](#footnote-ref-176)
177. Cf the discussion in the text at n 173 above. [↑](#footnote-ref-177)
178. *Bredenkamp* (note 4 above) at para 50. [↑](#footnote-ref-178)
179. Ibid at paras 43-44. [↑](#footnote-ref-179)
180. Ibid at para 50. [↑](#footnote-ref-180)
181. Ibid at paras 50-53 [↑](#footnote-ref-181)
182. Ibid at para 39 referring to s 1(*c*) of the Constitution. [↑](#footnote-ref-182)
183. As discussed in the text at n 111 above. [↑](#footnote-ref-183)
184. *Botha* (note 5 above) at para 4. [↑](#footnote-ref-184)
185. Ibid at paras 5-6. [↑](#footnote-ref-185)
186. Ibid at para 8. [↑](#footnote-ref-186)
187. Ibid at para 19. [↑](#footnote-ref-187)
188. Ibid at para 23. [↑](#footnote-ref-188)
189. Ibid at para 19. [↑](#footnote-ref-189)
190. Ibid at para 15. [↑](#footnote-ref-190)
191. The idea of substantive equality as linked to human dignity and equality can be identified in para 28 of the Court’s judgment. [↑](#footnote-ref-191)
192. *Botha* (note 5 above) at para 46. Cf the discussion in the text n 135 above which deals Lubbe’s postulation on how human dignity can be conceptualised through good faith. [↑](#footnote-ref-192)
193. The court specifically speaks of the “fairness of awarding cancellation” (*Botha* (note 5 above) at para 51). [↑](#footnote-ref-193)
194. Ibid. [↑](#footnote-ref-194)
195. Ibid at para 46 where the court speaks of the “reciprocal recognition of the dignity … of the respective contracting parties”. [↑](#footnote-ref-195)
196. Cf the discussions in the text at n 172 & 175 above. [↑](#footnote-ref-196)
197. Hawthorne (note 6 above) at 299. [↑](#footnote-ref-197)
198. *Botha* (note 5 above) at para 3. [↑](#footnote-ref-198)
199. The relevance of these factors are evidenced by Bhana & Meerkotter’s contention that the facts of the case could have implicated the right to property (s 25) & the right to freedom of trade, occupation and profession (s 22) (see Bhana & Meerkotter (note 6 above) at505). [↑](#footnote-ref-199)