The Simultaneity of Ubuntu & Law

When law and ubuntu got married

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THE UBUNTU - PHENOMENAN

The concept of "*I am because you are*", which emanates from the well-known African colloquial word, **Ubuntu** is no stranger to anyone. Although known by many, the true applicability thereof is understood by few. The purpose of this article is not only to clarify what Ubuntu really, in the essence thereof means, but also the explain the versatility thereof when applied to the various areas of the law.

Understandably so, and clear from the nature of the word itself, Ubuntu was developed from African philosophical origins. When researching the concept, one is led to understand that this concept in actual fact, and irrespective this articles' application thereof to the law, has no legal origins. In contradiction with the latter, Ubuntu had its earliest surviving written use in a published book from 1846 being the "New 4 Testamente" by HH Hare. The word itself was derived from the Nguni language of which the Xhosa and Zulu languages make up the largest part. This concept does not only hint at **a quality** that includes essential *human virtues; compassion and humanity*, but demands application of this values.

THE FLEXIBLE NATURE OF UBUNTU ENABLING APPLICATION WITHIN THE LEGAL FRAMEWORK

As described above, and by virtue of this concept developing from various cultures, and the different interpretation thereof by a group-valued-society, it can be argued that Ubuntu is versatile, flexible, and pliable to various legal fields. Since the defining of ubuntu has been left up to the Courts, and in light of ubuntu's mentioned flexible character, the courts through the identifiable characteristics of ubuntu, were able to find purposeful applicability of this concept in the law, which did not only create a framework in respect of certainty, but also allows flexibility.

UBUNTU GREW UP TO DEMAND GOOD FAITH IN CONTRACTUAL LAW

In the case of ***Barkhuizen v Napier[1]*** the Constitutional Court handed down a judgment which had a **significant impact on the principles of the law of contract** in South Africa. In fact, the aim to uphold the principles of Ubuntu and to promote good faith and fairness in contracts became a trend in judgments handed down by the Constitutional Court since 2014. The *notion of good faith* however is not a newcomer, contrary to this, it has always been part of South African common law. Good faith has been regarded as the doing of **simple justice between person-and-person**. It involves a respect for the other party's interests in a contract, this thus can be argued as a sort of logic in the pass by, but essentially, a now-requirement in interpretation of concepts in law. However, good faith is **not a stand-alone requirement in a contract**. Judgments handed down by the Supreme Court of Appeal and the Appellate Division has clearly elaborated on this through the century. The stricter, but more conscientious Constitutional Court has however expended upon this notion of good faith and, on a related note, the concept of **fairness**. The Constitutional Court, it seems, fought for, and gained momentum in the interpretation and application of the constitutional value of '**Ubuntu**'. Surprisingly and it can be said this is know by few, ubuntu has been provided for in the Interim Constitution. The Courts have over the years identified ubuntu as a constitutional value, more so when applied to the constitutional values of **freedom, dignity, and equality**.

The case of ***Botha and another v Rich N.O. and others[2]*** has given a further indication of the Constitutional Court's approach to this issue of good faith and fairness in contract. The facts in this case spoke for itself in that it found applicability in the interpretation of s 27(1) of the Alienation of Land Act[3], which provides that if a person has paid 50% or more of the purchase price of property which is subject to an instalment sale agreement, that person can demand that the seller transfer the land into his / her name on condition that he / she registers a mortgage bond in favour of the seller over the said land. In this specific case, the seller purported to cancel the agreement, and upon cancellation endeavoured to enforce the forfeiture of the purchaser's payments, because the purchaser had defaulted on her payments. The Constitutional Court approached the issue in a different manner. In an attempt to develop the notion of good faith and fairness in contract, the Court subjected the enforcement of the cancellation clause to the fairness of doing so. *The Court held that such enforcement of the cancellation clause would be unfair, and accordingly dismissed the cancellation application.*

The Constitutional Court in the matter of **Tshwane City v Afriforum and Another[4],** whilst dealing with cultural rights pertaining to the changing of a street name, reframed the constitutional vision and mindset that South-Africans should have in our approach to and application of all matters of importance in this country, to include the philosophy of ubuntu.

CONCEPTS VESTED WITHIN THE DEPTHS OF UBUNTU

Notions of fairness, justice, equity, and reasonableness cannot be separated from public policy. Public policy considers the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu. It should be argued to be common cause, that justice should be **fair, reasonable, equitable**, and not in contravention of public policy. Ubuntu in regard to the flexibility thereof, became part and parcel of all

aspect's indicative of the laws of natural justice.

THE SUSTAINABLITY OF UBUNTU IN MODERN LAW

Where does the current *status quo* leave the notional concept of fair dealing i.e., Ubuntu in modernized law? The answer is in a *state of flux*. There appear to be varying judicial interpretations of the current law. At High Court level, judgements made by the latter court, are by virtue of overruling judgements by the Constitutional Court, left with a blanket judicial discretion on venturing rather on equitable grounds. In *Mohamed's Leisure Holdings*, the applicant landlord had exercised a contractual right to cancel a commercial lease due to the late payment of rent and sought eviction of the tenant as a consequence thereof. In the High Court it was held that this was a situation of "demonstrable unfairness" to the tenant and that as a result, the principle of sanctity of contract should be relaxed.

DIVORCING LAW AND UBUNTU or **A "HAPPY EVER AFTER"**

The harmonisation of good faith and ubuntu in the South African common law of contract emphasises how the values, principles, and rules of the common law of contract play an important role in the recognition and promotion of human dignity as the core value of our constitutional dispensation[5].

CONCLUSION

In conclusion, the former hopes of **former Justice Mokgoro** is shared, he believed that ubuntu: *if consciously harnessed can become central to the process of harmonising all existing legal values and practices with the Constitution … [and] the revival of sustainable African values as part of the broader process of the African renaissance*.

And that, ultimately, will result in **Biko's vision** for a more humane world: *We believe that in the long run the special contribution to the world by Africa will be in this field of human relationship. … the great gift still has to come from Africa – giving the world a more human face.*

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[1] **2007 (5) 323 (CC)**

[2] 2014 CCT 89/13

[3] 69 of 1981

[4] 2016 (6) SA 279 (CC)

[5] There is some solid research pertaining to how Ubuntu could be harmonised with the Roman-Dutch concept of Good Faith. In this regard see the LLD thesis 5 dealing with the topic of "***The harmonisation of good faith and ubuntu in the South African common law of contract***" by HM Du Plessis, and accessible on the UNISA website at their Institutional Repository.