The Sub-Saharan African ethic of Ubuntu and its implications for the South African labour dispensation.[1]

Abstract

This paper is about the Sub-Saharan relational ethic of ubuntu. The writer looks briefly at the etymological origin and meaning of the concept of ubuntu. The writer also examines how the South African courts, particularly the Constitutional Court, have begun to move away from the purely philosophical or theoretical foundations of ubuntu towards its constitutional and juridical value, and the inevitable implications for the South African constitutional project.

To illustrate this development, the writer examines a few, specific labour-law examples with the view to demonstrating how the courts can rely on ubuntu to develop the law in this regard, in order to ensure a dynamic and responsive constitutional jurisprudence; and to fashion out new remedies that are suitable for the workplace, which will engender industrial peace and harmony, and guarantee optimum production and maximum economic growth for the country.

Keywords: Ubuntu; constitution; law, fairness; justice

Glossary

1. **A:** Appellate Division (now the SCA)
2. **Batswana:** mother-tongue speakers of Setswana
3. **AD:** Appellate Division (now the SCA)
4. **C:** Cape Provincial Division of the Supreme Court (now the High Court)
5. **CC:** Constitutional Court
6. **CCMA:** Commission for Conciliation, Mediation and Arbitration
7. **ILJ:** Industrial Law Journal
8. **IsiZulu:** one of the official languages spoken in South Africa
9. **LAC:** Labour Appeal Court
10. **LC:** Labour Court

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11. **PER:** Potchefstroomse Electroniese Regsblad (Potchefstroom Electronic Law Journal)
12. **Sepedi:** one of the official language spoken in South Africa
13. **Sesotho**: one of the official languages spoken in South Africa
14. **Setswana**: one of the official languages spoken in South Africa
15. **SCA:** Supreme Court of Appeal

1. Introduction

The aim of this paper is to take a cursory look at the etymological, theoretical and philosophical foundations of ubuntu, and then demonstrate how it has become part of the South African jurisprudential lexicon and legal practice (see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 35 and 37; see also *Dikoko v Mokhatla* 2006 (6) at para 113). The ultimate purpose is to demonstrate how ubuntu can be infused into the principles of labour law thereby ensuring contractual justice and industrial justice peace in the workplace. This is because the courts have now begun to rely more on the juridical, transformative and corrective nature of ubuntu in adjudicating cases that come before them. The exercise, therefore, involves explaining the meaning and content of some of the sub-Saharan African maxims particularly Southern African ones, and to demonstrate how they may be used to: (a) revive remedies which, for policy or other extraneous considerations, were discarded under colonialism and apartheid; (b) discard those that no longer serve any useful or legitimate purpose; (c) and, where necessary, develop the nascent ones that possess the potential to serve South Africa's constitutional project of promoting social justice, fairness and equity with particular reference to the law of contract and labour law. And, as already indicated above, ubuntu is by no means a post-democratic South African invention (GE Devenish (1999) 623; TW Bennett (2011) 30/351; *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) at paras 11 and 16–18). The problem is that, like many aspects of South African Customary law, ubuntu was edited out of the formal legal system, which resulted in its juridical aspects being under-developed (*Ibid*).

2. The etymology, content and meaning of ubuntu

Etymologically and ontologically, ubuntu is a gerund or verbal noun, and it belongs to the Seventh Declension of Zulu nouns (GR Dent and CLS Nyembezi *Scholar's Zulu Dictionary* (1969) iii). It shares the same root as *"umuntu"* (a human being or a person). It therefore refers to a person's state of being, or what a person is expected to do alone or in concert with others in the advancement and promotion of the interests of his community (JS Mbiti (1990); 108-108; Mokgoro (2011) 1). Ubuntu is, therefore, not just a meaningless foreign loanword with no connection to Africa particularly the southern part of the Continent. It is a socio-legal corrective which seeks to engender humanness, sympathy, mercy and social solidarity among members of a particular community, the Continent or the world (Bennett 30/351-31/351). It recognises the fallibility and vulnerability of all human beings, and serves a corrective that constantly reminds us of such other values as fairness equity and justice, thereby creating an effective, humane and caring constitutional order with all the concomitant legal remedies. The profundity of ubuntu finds real expression in the adage *"umuntu ngumuntu ngabantu"* ("I am because we are, and since we are, therefore I am" (Mbiti 209; see also *S v Makwanyane* 1995 (3) 591 (CC) para 14)). It is important, however, to understand that there are many sub-Saharan maxims that give practical and juridical meaning to ubuntu. For instance, there is a Sepedi one to the effect that "g*ofa ke go fega, ware go fa wafegolla*" (which means that "by giving, and being charitable, one qualifies to receive from practically anyone in the world"). The Batswana also have an equivalent, which teaches that *"molomo otlhafunang oroga omongwe"* (which literally, it means that a mouth that is chewing insults the one that is not chewing"). However, at a formal level, the elders used this maxim as a verbal sword to eradicate selfishness among their communities and progeny, thereby fostering empathy, compassion, sympathy and generosity. The underlying tenet is that no one loses by sharing with others. Even though the ethic of ubuntu is about the interconnected of humanity, it should not be interpreted as being about rationality to the exclusion of everything else. For instance, Mokgoro captures the essence of ubuntu in the following terms:

> "*Ubuntu, a foundational value in traditional African society evades being defined with scientific precision, but that does not preclude it from having particular relevance as principle of legal interpretation. As a fundamental value of traditional African society, it connotes a worldview and an approach to human relationships in which humanness and the inherent humanity of the individual are central…Owing to its emphasis on the community, ubuntu runs the risk of being conflated with communalism. It is important to hasten to a nuance that lies between communalism and ubuntu; the latter is more concerned with the realisation of the uniqueness of each individual in the context of his or her community, while communalism's focus is less on the autonomy of the individual members of the community and more on the collective."* (JY Mokgoro (2011) 1-2); see also Cornell (2010) 392 where the author says ubuntu should not be confused "with mindless communitarianism").

In other words, individual rights – not just group rights - have always been an important part of the different pre-colonial African societies and their legal systems. Therefore, the rights of a particular member of society were not completely subsumed under those of the group he or she belonged to (Bennett 256-257; Bekker 106-107; 110-111). Even in the context of a customary marriage, which is a legal relationship between two family groups, the rights of the bride were not, and could not, be ignored. Her consent was an integral part of the process and its consequences, including conjugal rights (see *S v Jezile* 2015 (2) SACR 452 (WCC).

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

3.1 The law of contract: general observations

Even though black people in South Africa were denied quality education and excluded from the job market through a systematic low absorption into the economy of the country, they were still expected to enter into often complex commercial contracts based on the same terms and conditions as their white, educated and wealthy countrymen. This situation conduced to inequity, unfairness and a lack of contractual justice. As Sparks puts it:

> "*The purpose of the (apartheid) policy was not only to protect white jobs but to attempt the Sisyphean task of reversing the relentless influx of rural black people to the cities…The result was that black people were deliberately given a separate and inferior education (most, in fact, got no education at all). They were barred from the major universities. They were prohibited by law from doing skilled work. A black man could carry a white craftsman's toolbox for him and hand him the tools. He could mix the paint and clean the paint brushes and set up the ladder, but could not paint the wall himself. Such work was reserved for whites under the Job Reservation Act*." (A Sparks Beyond the Miracle 111; see also M Mbeki "Introduction" in M Mbeki (ed) *Advocates for Change: How to Overcome Africa's Challenges* 6; 12).

The result of this form of exclusionary policy, and its concomitant "enclave economy", resulted in South Africa looking like an island of white wealth and opulence which is surrounded by a dark ocean of poverty, grime and crime. The situation was exacerbated by the fact that the common law whose principles, at least some of them, could have afforded form of protection was either abolished or idelogized in the form of unfairly discriminatory piece of legislation. (see Mbeki (Ibid); see also PQR Boberg *Law of Person and the Family* (1977) 79; AJ Kerr *The Principles of the Law of Contract* (2002) 638-666; HR *Christie The Law of Contract* (2001) 16-17; E Cameron *Justice: A Personal Account* (2014); *Magna Alloys & Research v Ellis* 1984 4 874 (A); 1988 (3) SA 580 (A) and *Safin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)). However, ubuntu, and the values it encapsulates, offers solutions that might result in enduring contractual justice in South Africa. It is for this reason that many of the pieces of legislation that have been enacted by the South African Parliament, since 1994, have had one common *leitmotif* - ubuntu (fairness, equity, contractual and social justice) (see Employment Equity Act 45 of 1998; National Credit Act 34 of 2005; Consumer Protection Act 68 of 2008 and Financial Sector Regulation 9 of 2017). The example of a "car-guard" and a shopper, at a mall, will be used to illustrate how ubuntu can ensure that there is contractual justice in virtually all situations that involve human interaction.

3.2 The shopper and the "car-guard"

The agreement between a customer and a "car guard" is a very good example where the ethic of ubuntu and its corollary components of equity, compassion, fairness, sympathy and social justice find expression. In terms of this contract, which is often tacit, the customer whose car is directed into a vacant spot in the parking bay of a shopping mall. The guard then looks after the car until the customer completes his or her shopping expedition. The contract is tacit because, except for gesticulation and exchanging pleasantries, the parties would not have uttered any word to each other (RH Christie 92-93; AJ Kerr 339). The discussion whether this relationship is one between an employer and employee, or with an independent contractor, falls outside the scope of this article. One of the implied terms of the contract under consideration is that the car-guard will do whatever he can in the circumstances in order to prevent any possible loss of, or damage to, the car (and the contents inside it) for a reasonable *honorarium*. *Honorarium* is used in this context to indicate that the shopper appreciates the fact that there is endemic unemployment in the country, and the guard is demonstrating the ability to work and the capacity to earn an income, instead of engaging in criminal activities. The shopper is also mindful of the fact that the presence of these men and women helps to enhance the security profile of the particular mall. When the shopping therapy is complete, the shopper is expected to pay the guard the customary *honorarium*. *Customary* is used in this regard to emphasise the point that the *honorarium* is expected (by members of society) to be reasonable in the circumstances of the case, and not demeaning to the dignity of the recipient, despite the ailing economy of the country at that particular time. In other words, there is a level below which the shopper dare not go lest he or she faces social opprobrium (from passengers in the car or on-lookers) or lives with a troubled conscience for a long time. Sadly, greed and a lack of empathy seems to be creeping in, on the side of the owners or managers of these malls. Some of them are now demanding a "ramp fee", which is about R75 a day, from the guards. The justification seems is that the guards use electricity, ablution and other facilities that the mall has to offer. They seem to ignore the fact that the guards come from the lowest social stratum of the country's populace, and that the fee is extortionate, unfair and inequitable in the circumstances. They need to understand that the guards are not an unwelcome nuisance, but that their presence helps to enhance the security detail of the shopping precinct (for a comprehensive study of this phenomenon see www.scielo./org.za/php?scrip=sci_arttext&pid=S1991).

3.3 Ubuntu and the new South African workplace

As indicated above, the primary aim of this work is to demonstrate that ubuntu is, in addition to its communitarian appeal, a concept laden with the values of social justice, empathy, sympathy, equity and compassion. In other words, it is not just about mechanically looking at the conduct of a particular person and without more concluding that it is lawful (legal) or unlawful (illegal); but it is also about examining all the circumstances of the particular case, and determining whether ubuntu was displayed. It is about whether fairness, equity and social justice won the day. Needless to say, ubuntu is not a completely new phenomenon in South Africa; and, in this particular context, the period between 1979 and 1994 provides a perfect politico-legal foil to illustrate this. During that time, the Industrial Court enjoyed a very wide discretion to deal with a wide range of labour issues without being unduly bound by the letter of the law (see D Du Toit *et al The Labour Relations Act 1995* (1998) 3-41). This is because when the Industrial Relations Act 28 of 1956 was amended in 1979, it resulted in the Industrial Court enjoying a wider discretion under the "unfair labour practice" rubric. This gave the court the power to develop a kind of labour jurisprudence that promoted the values readily encapsulated in ubuntu – without mentioning it *eo nomine*. Currie and De Waal explain that development as follows:

> *"When granted its 'unfair labour practice' jurisdiction, the Industrial Court initially chose not to define precisely what it understood by the concept of "fairness", or it synonym, "equity". What it did say, however, was that fairness was something more than lawfulness. This meant that even though conduct was lawful, it was not necessarily fair. Whether conduct is fair or not necessarily involves a degree of subjective judgment. However, this is not to mean that the assessment of fairness is unfettered or a matter of whim."* (I Currie & De Waal *The Bill of Rights Handbook* (2005) 503).

Therefore, ubuntu, which subsumes equity and fairness, is not merely concerned with the rigid, impersonal or legalistic application of the law, but it is also about doing justice between human beings, and ensuring continued social cohesion, industrial peace and social justice (see *PE Municipality* para 37). Reference to this historical background helps to put the provisions of section 22 and 23 of the Constitution in their proper context. For instance, section 22

provides that every South African has the right to follow a trade, occupation or profession of his choice, provided that it is legal. And, section 23, in turn, provides that "*everyone* has a right to fair labour practices". This is a major constitutional step if one considers that good faith, much less equity, was not a requirement for the validity of any contract, including the *locatio conductio operarum* (the common-law contract of employment). In pre-democracy South Africa, which was characterised by high levels of illiteracy and economic exclusion of black people from the economy, it did not matter how unfair or inequitable a contract between the employer and employee was. During the period of colonialism and apartheid "and its thinly disguised forms of forced labour", black employees were practically forced sign away most of their human rights - particularly the rights to equality and human dignity - when they entered into a contract of employment. Nor did they have the right to follow a trade, occupation or profession of their own choice (J Grogan *Employment Rights* (2010) 2) 1-2; 5-6; see also 111; 121). These are the South African socio-legal ills that s 22 and 23 of the Constitution (or s 27 of the interim Constitution) sought to excise from the country's constitutional and labour jurisprudence. Three areas of the South African labour law jurisprudence will be examined to illustrate how ubuntu can be used to give the employees optimum protection and benefit from the law. The areas are: (a) maternity leave as a basic condition of employment (b) pre-dismissal proceedings in the context of a common law contract of employment; (c) and the legal position of sex workers. As indicated above, ubuntu (which is itself the substratum of the South African Constitution) could, and should, be used to interpret all labour legislation in such a way that there is contractual justice, fairness and equity in the workplace. Needless to say, dissatisfied, demotivated and despondent workers, particularly those who have reason to believe that there is subliminal racism in the workplace, are likely to be less productive. And, ubuntu is the most appropriate palliative in such a situation. However, it is important to note that, unlike the United States, the right to benefits such as maternity leave, sick leave and family responsibility leave is not dependent on the corporate culture of the individual organisation in South Africa, but it is dependent on the Constitution and the relevant labour legislation.

a) maternity leave

Like all the other State Parties to the Convention on the Elimination of All Forms of Discrimination Against Women of 1993, South Africa has, *inter alia*, the obligation to make

maternity leave a statutory basic condition of employment by, *inter alia*, "safeguarding the function of reproduction" of female employees in the country (see Article 11(f) of the Convention for the Elimination of All Forms of Discrimination Against Women of 1993). As a consequence, maternity leave is regulated by section 25 of the Basic Conditions of Employment Act 75 of 1997. Unfortunately, neither CEDAW nor the BCEA makes maternity leave a fully-fledged right; it still remains a conditional right. This is because, unlike sick leave and annual leave, maternity leave still remains an unpaid form of leave in South Africa. This means that, in the absence of any agreement, the only saving grace for a pregnant employee would be to approach the local office of the Department of Labour to claim unemployment insurance benefits in terms of the Unemployment Insurance Act 63 of 2001. This position seems open to constitutional attack, for being unfairly discriminatory against some women on the grounds mentioned in s 9 (3) of the Constitution and s 6 of the Employment Equity 45 of 1998, on one or some or all of these grounds: sex, gender, pregnancy, maternity, marital status or family responsibility. And, because the Constitution itself and the Employment Equity Act are founded on the values of ubuntu (of social justice, fairness, empathy and equity), this constitutional *lacuna* cannot be left unattended, indefinitely. The fact that some female employees are entitled to maternity benefits (merely by virtue of being parties to a collective agreement with their employers) and the others are not, is inimical to the spirit of ubuntu, especially if one considers the fact that all the other types of leave are paid in full, *automatically*. Ubuntu dictates that there be adequate and appropriate protection of the family structure; and that familial and social bonds and cohesion be fostered. Also, CEDAW - an international instrument which is coterminous with ubuntu - enjoins State Parties like South Africa "to take all appropriate measures to eliminate discrimination against women in the field of employment" (see Article 11).

b) pre-dismissal inquiries

The applicability of the provisions of the Constitution (and the pieces of legislation that implicate the Bill of Rights) to the common law contract of employment is not clear, particularly where dismissals are concerned. At the dawn of constitutional democracy in South Africa, the view was that the interpretation of the law in conformity with the Constitution was so well-established as to be implied in the Bill of Rights (D Du Toit *Labour and the Bill of Rights* (1999) 4B-15). And, as indicated above, s 23 provides that every

person has the right to fair labour practices. It therefore did not come as a complete surprise when the Supreme Court of Appeal led the way by holding that the common law on employment had to be developed in line with the spirit, purport and objects of the Bill of Rights (*Makhanya v University of Zululand* (2009) ILJ 1539 (SCA); *Boxer Superstores Mthatha & another Mbenya* (2007) ILJ 2209 (SCA); *Nxele v Chief Deputy Commissioner, Corporate Services,* D*epartment of Correctional Services and others* (2008) 29 2708 (LAC); *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) ILJ 1499 (SCA). The nub of this approach was that the common-law contract of employment imposed on the employers not only an obligation to institute a fair pre-dismissal inquiry before terminating the employment contract with an employee, but that they also had a general obligation to treat their employees fairly. However, there seemed to a change of heart at the Supreme Court, a few years later; and the approach was reconsidered in *SA Maritime Safety Authority v McKenzie*, (2010) 529, by holding that the legislature intended to keep the "unfair labour practice provisions self-contained; and that if the common law had made provision for unfair (as opposed to unlawful) dismissals, there would not have been a need for there to be such comprehensive dispute-resolution mechanisms and special remedies in the Labour Relations Act 66 of 1995. The SCA also held, in the last-mentioned case, that the judgments in which it was held that the common law on employment be developed were merely *obiter*, and not determinative of the issue. In other words, employees who have entered into a common-law contract of employment are only entitled to a pre-dismissal inquiry (or to seek redress for unfair treatment) if there is an agreement to that effect (Grogan 5-6).

c) the position of sex workers

Unlike countries such as Australia, Belgium and Colombia where prostitution or sex work is legal, in South Africa it still remains illegal (the Sexual Offences Act 23 of 1957 and the Department of Justice's position paper on this subject on www.justice,gov.za/salrc/dpapers-2009_prj107_2009.pdf). Despite the continued debate on the morality or legality of sex work in the country, the relevant tribunals have already had occasion to pronounce on this legal issue in the case of *"Kylie" and Van Zyl t/a Brigittes* (2008) 28 470. "Kylie", a prostitute, worked at a massage parlour where she rendered "sexual services" to the patrons, for a reward. The question to be determined was whether sex workers were employees in terms of the labour dispensation of South Africa; and whether they were entitled to any remedy in

instances where their dismissal was found to have been unfair. The matter was first dealt with in the Commission for Conciliation Mediation and Arbitration (CCMA). The Commissioner was of the view that "Kylie" was not an "employee" in terms of the Labour Relations Act, 1995, and that the kind of work that she was engaged in was illegal and was prohibited in terms of the Sexual Offences Act 23 of 1957. The Commissioner then concluded that the CCMA had no jurisdiction to hear such a matter, particularly because section 213 of the LRA (which sets out the definition of an "employee") did not cover someone in "Kylie's" position, who had not entered into a valid contract of employment with his or her employer. Her case was dismissed.

"Kylie" then approached the Labour Court. That court accepted in its judgment that section 213 of the LRA was wide enough to include persons who find themselves in her position; and that despite her work being illegal, there existed an employment contract between the parties. However, the question that remained to be dealt with was whether, as a matter of policy, the courts and other tribunals should sanction illegal contracts by enforcing the rights that persons in "Kylie's" position have in terms of the statutes and the Constitution. Cheadle AJ was of the view that a contract for the performance of illegal activities was *contra bonos mores* and was therefore void and unenforceable (Para 7). The acting judge was influenced by the common-law rule that no claim can be founded on a tainted cause of action: *ex turpi causa non oritur actio*. This rule prohibits the enforcement of an immoral or illegal contract. A contract is illegal, he continued, if it is against public policy, and that it is against public policy to enter into a contract which is illegal or immoral (see para 7; see also *Jajbhay v Cassim* 1939 537 at 542-544). The acting judge said that even though section 213 of the LRA was wide enough to cover a person in "Kylie's" position, the Act did not provide such a person with protection against unfair dismissal (Para 3). His view was that the courts had a constitutional duty to uphold the rule of law and not to sanction or encourage illegal activity (Ibid). Cheadle AJ said that even if "Kylie" had such a right, that right was subject to limitation by the provisions of the LRA, a law of general application which is, itself, an amplification of the provisions of the Constitution of South Africa (see section 23 (1) of the Constitution).

"Kylie" then took the matter on appeal, to the Labour Appeal Court (see *Kylie v CCMA and others* (2010) 7 705; 2010 383). The Labour Court emphasised the point that the purpose of the Labour Relations Act was to promote economic development, social justice and labour peace; and that section 23 of the Constitution is to protect vulnerable employees such as "Kylie" (Para 40). In the Labour Appeal Court the appellant's ("Kylie's") starting point was to look at the provisions of section 23 of the Constitution: that everyone has the right to fair labour practices (Para 16). The LAC accepted that "everyone" as used in section 23 "was a term of general import and had an unrestricted meaning" (para 17). In the course of his judgment, Davis JA cited, with approval, the dictum of Ngcobo J (as he then was) in *Khosa and Others v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 111: that the Constitutional Court supported "an extremely broad approach to the protection of the right guaranteed in the Constitution". Davis JA also emphasised the point that section 23 required that every employee, including one who is in "Kylie's" position, be treated with dignity by his or her employer (para 22-26). And, having accepted that "Kylie" was indeed an employee in terms of the Labour Relations Act, the judge of appeal held that "Kylie" was an employee, and that she was entitled to appropriate legal protection (para 20). In other words, even though the employment contract she had entered into with her employer was illegal or immoral, that did not leave the courts without any discretion; and that the *pari delictum*-rule (which tampers the rigidity of the *non oritur actio*-rule) was not inflexible, and gave the courts some discretion (para 37). This, the court said, was a question that could be appropriately determined with particular reference to public policy which in turn could be sourced to the Constitution (*Ibid*). The judge of appeal held that "Kylie" was entitled to all the constitutional rights, including the right to human dignity; and that the criminalisation of the sex work that "Kylie" was engaged in did not mean that she forfeited all the rights provided for in section 23 of the Constitution and amplified by the Labour Relations Act (para 39). The judge of appeal was of the view that the Constitution and the applicable labour dispensation was intended to preserve the dignity of vulnerable persons such as sex workers; and that there were (legal and constitutional) implications for parties to such a relationship (para 46). However, Davis JA added a rider: that "Kylie" was not entitled to all the rights that other dismissed employees were entitled to; and that ordering that she be reinstated would be against public policy. His view was that "Kylie" was entitled to some remedy albeit short of reinstatement. He accordingly made an order that she be compensated, *in lieu* of reinstatement.

It is important to note that the court was influenced by international instruments such as the provisions of CEDAW. For instance, Article 1 of the Convention defines discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women…of human rights and fundamental freedoms…." The Convention also places a specific obligation on State Parties to eliminate discrimination against women "in the field of employment". In the context of South African law, "the field of employment" is wide enough to encompass places where sex workers render their services. It is important to note that the final word on the matter has not been spoken. The Supreme Court of Appeal and the Constitutional Court have not been called upon to pronounce on it. However, there are some questions that this case raises: are the dependants of such an employee have a claim for loss of support in the event that she died while still being employed at a "massage parlour"? In the case of injury, would she be able to claim for loss of earning capacity? The South African courts have answered the first question in the negative; and the second one in the affirmative (*Ferguson v Santam Insurance Ltd* 1985 207 (C) 208; Neethling *et al Law of Delict* (1999) 239-241). In other words, a clear distinction will have to be made between these two situations: a person in "Kylie's" position may claim for loss of earning capacity resulting from bodily injuries she sustained wrongfully; but her children will be not suited (*Santam Insurance Ltd v Ferguson* 1985 (4) 483 (A) at 850-851). However, yet another question still lingers on in this context: what does ubuntu (compassion, sympathy, equity and social justice) demand in such a situation given the fact that it now influences how public policy should be determined? In *Jajbhay v Cassim* the Appellate Division (now the Supreme Court Appeal) laid a firm foundation in this regard by saying that the courts should, in the exercise of their discretion, strive to do justice between man and man (at 547). This view is consonant with ubuntu: that in each case the courts should be guided by mercy and compassion in trying to balance the competing interests of the litigants who appear before them. Put otherwise, what needs to be determined in each case, is whether the turpitude of the activity involved outweighs the injustice that may result from a litigant like "Kylie" being non suited (see Christie 453; Kerr 196). And ubuntu, as a communitarian ethic, favours the integrity of the family structure and the enhancement of healthy human relations that ensure social cohesion. "Kylie's" position is not dissimilar to that of someone who operates a shebeen. A shebeen is a place in respect of

which the owner has no valid licence to sell liquor and other similar beverages to members of the public, as opposed to a tavern.

4. Conclusion

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

References

1) Bank of Lisbon and South Africa Ltd v Ornelas 1988 (3) SA 580 (A)

2) Basic Conditions of Employment Act 75 of 1997

3) Boberg, PQR Law of Person and the Family (Juta & Co Ltd 1977) 79

4) Bekker, CJ, Seymour's Customary Law in Southern Africa (Juta & Co Ltd 1989) 338-341

5) Bennett, TW Customary Law in South Africa (Juta & Co Ltd 2004)

6) Bennett, TW "Ubuntu: African Equity" (2011) PER 30/351

7) Boxer Superstores Mthatha & another Mbenya (2007) 2209 (SCA)

8) Cameron, E Justice: A personal Account (Tafelberg 2014) 56-57; 177-178

9) Christie, RH, Law of Contract (Butterworths 2001) 16-17

10) Consumer Protection Act and Financial Sector Regulation 4 of 2017

11) Convention on the Elimination of All Forms of Discrimination Against Women, 1993

12) Curie, I & De Waal, J A Bill of Rights Handbook (Juta & Co 2005) 503

13) Dent, GR and Nyembezi, CLS, *Scholar's Zulu Dictionary; English–Zulu, Zulu–English* (Shooter & Shooter 1969) iii

14) Devenish, GE, A Commentary on the South African Bill of Rights (LexisNexus 1999).

15) D Du Toit et al The Labour Relations Act 1995 (Juta & Co Ltd 1998) 3-41

16) Du Toit, D "Labour and the Bill of Rights" in C De Beer Bill of Rights Compendium (1999) 4B-15

17) Employment Equity Act 45 of 1998

18) Financial Sector Regulation Act 9 of 2017

19) Gumede v President of the Republic of South Africa 2009 (3) SA 152 (CC) at para 11; 16-17

20) Himonga, C; Taylor, M and Pope, A, "Reflections on the Judicial Views on Ubuntu" (2013) PER at 372/614.

21) Jajbhay v Cassim 539 AD 542-544

22) Kerr, AJ The Principles of the Law of Contract (2002) 339, 638-666

23) Khosa and Others v Minister of Social Development 2004 (6) BCLR 569 (CC) para 111

24) Makhanya v University of Zululand (2009) 30 ILJ 1539 (SCA)

25) SA Maritime Safety Authority v McKenzie, (2010) 31 ILJ 529 (SCA)

26) Mbeki M "Introduction" in M Mbeki (ed) *Advocates for Change: How to Overcome Africa's Challenges* (Picador Africa 2011) 6; 12

27) Mbiti, JS, African Religions and Philosophy (Heinemann 1990) 208–209.

28) Murphy, JG, "Mercy and Legal Justice" in J Coleman and E Paul (eds) Philosophy and Law (Blackwell 1987) 2

29) National Credit Act 34 of 2005

30) Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services and others (2008) 29 ILJ 2708 (LAC)

31) Old Mutual Life Assurance Co SA Ltd v Gumbi (2007) 28 ILJ 1499 (SCA)

32) Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at 35-37

33) Consumer Protection Act 68 of 2008

34) Quartaert, JH, Advocating Dignity: Human Rights Mobilizations in Global Politics (University of Pennsylvania Press 2009) 4

35) S v Jezile 2015 (2) SACR 452 (WCC)

36) S v Makwanyane 1995 (3) SA 391 (CC) at para 224 and 308

37) Santam Insurance Ltd v Ferguson 1985 (2) 207 (C) at 208

38) Santam Insurance Ltd v Ferguson 1985 (4) 483 (A) at 850-851

39) Sasfin (Pty) Ltd v Beukes 1989 (1) SA 850 (A)

40) Sparks, A Beyond the Miracle: Inside the New South Africa (University of Chicago Press 2003) 111; 121

41) Washington, JM Martin, JM "Letter from a Birmingham jail" in JM Washington (ed), Martin Luther King Jr I have a Dream: Writings and Speeches that changed the World (Harper One 1992) 85