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Bridging the Public/Private Divide in South African Construction Procurement Law: Evolving from a Transactional to a Relational Perspective*

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Abstract

This article follows on a previous article in which the suitability of the private law of contract for public procurement, a necessarily public process, was determined. It was established that contract law is ill suited to the needs of a public process. In this article, a relational public procurement law for the construction industry is suggested and is based on the American relational contract theory. It is recommended that relational construction procurement law will remove the obstacles placed by the private law of contract in order to better comply with legal rules for construction procurement in South Africa.

Keywords: public procurement; relational contract theory

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1 INTRODUCTION

In the first part of this article, the inadequacy of the private law of contract for the public process and function of procurement was discussed. The conclusion was made that an alternative legal framework is needed which adequately provides for the needs of a unique procurement system in South Africa which is innately public but more often than not, serviced by private parties. The basis for this alternative framework can be found in relational contract theory which originated in the American contract law. This article, in turn, explains how relational procurement law, in other words, relational contract theory adapted for a South African procurement system can function as a concept in South African public procurement law.

2 THE SIGNIFICANCE OF RELATIONAL CONTRACT THEORY

The law in itself is not an isolated or static field. Since it regulates human behaviour, contracts and buying and selling of goods and services, areas such as the social sciences and commerce are naturally involved. Moreover, in the case of construction procurement, a further dimension is added in the form of the engineering and construction fields of practice. In the case of construction procurement specifically, a number of role-players, and stakeholders, large amounts of taxpayer money and thus a large public interest are affected in the procurement process and the resultant contract. There has also been a growing need for the recognition of good faith and a consideration of social implications in contractual dealings. This is connected to the fact that all law, including construction procurement law, is subject to the Constitution, the principles enumerated therein and its spirit. Principles such as equity and equality where black contractors are concerned, have not been implemented to an extent where the right can be regarded as fulfilled amongst these contractors.[1] Furthermore, fairness refers to substantive fairness and thus links to equity. Lastly, the principle of dignity in the ability to conclude and arrange contractual relations to an extended degree (meaning not only arranged in a formal contract) provided that it does not offend against public policy, has not yet been fulfilled. Hawthorne notes that the need for open norms such as good faith, reasonableness and public policy to be applied in contractual dealings is based on the fact that the rules of classical contract law are not flexible enough to cope with the complexity of modern society.[2] By this she means the prevalence of long-term contracts and the relational aspect of these agreements.

The concept of public policy is one which has not been given a precise definition by South African courts and as discussed in this article, is one which the courts appear to be uncomfortable or perhaps unwilling to apply given its changing and evolving nature.[3] It is submitted that the doctrinal legal system as it applies to construction procurement law does not fully comply with the principles or spirit of the Constitution. Hawthorne notes that there is no doubt that the Constitution does not support the traditional orthodox contract law which promotes a formalistic system, but rather advocates for the recognition of substantive values and the existence of differing socio-economic circumstances.

1 The Construction Monitor of January 2017 indicates that although there has been an increase in the percentage of black ownership in construction contractors, the state of the industry is that it is not representative of the demographics of the country. See http://www.cidb.org.za/publications/Documents/Construction%20Monitor%20-%20January%202017.pdf (accessed 14-10-2017). Moreover, employment equity is shown as having increased by a mere 6% between 2013 and 2017 and professional black staff accounts for a meagre 13% of all professional staff.

2 Hawthorne "The 'New Learning' and Transformation of Contract Law: Reconciling the Rule of Law with the Constitutional Imperative to Social Transformation" 2008 SAPL 77 78.

3 See for example, *Jajbhay v Cassim* 1939 AD 537; Sasfin v Beukes 1989 1 SA 1 (A); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 31 (SCA); *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) and *Brisley v Drotsky* 2002 4 SA 1 (SCA) where the concept public policy was described in different ways, yet synonymous with good faith. See also Hawthorne "Public Policy: The Origin of a General Clause in the South African Law of Contract" 2013 *Fundamina* 300–320, who discusses the varying description of public policy by the courts at length.

Relational theory, as a conceptual tool may assist in developing a more flexible, legally and economically sound method of interpreting legal rules. It may thus go a long way in fulfilling constitutional imperatives. Relational theory, if incorporated into South African law, will act as a conceptual tool and not a doctrine or theory. Legal doctrine has been known to constitute rigid rules to be applied with few if any exceptions which is not the aim or purpose of relational theory. A legal theory, on the other hand, is an idea on which law is based and involves some speculation as to its accuracy. Contrary to this, relational theory is a manifestation of a long-standing socio-legal practice – the creation of unwritten agreements and fostering of long-term relations. Ireland[4] notes that the obligations which arise from "informal, latent, implicit agreements and understandings" supplement and at times modify those contained in express terms. Many of these expectations not only involve good faith, trust and relationality but are also context-specific, arising from particular customs, practices and market conventions. Therefore, they can only be identified with reference to the specific contexts from which they arise. The concept of implicit contract, is thus seen as a useful analytical tool which can assist in overcoming the deficiencies of classical contract law.

As noted, empirical studies have been done which prove that parties to contracts seldom rely on written contracts for various reasons. In addition to this, it will be argued that the working of relational theory is in line with the Constitution and the obligations placed on the state in fulfilling its duties. Moreover, it is not possible for parties to a contract to provide for every eventuality which may arise. Based on the evolving nature of long-term relationships and the possible unpredictable nature of a particular sector, additional duties may arise which have not been provided for in the contract. Therefore, relational theory should be regarded as a conceptual tool which is described in the Oxford Dictionary as an idea of a class of objects, a general notion; a theme, or a design. In this case, it is an idea of a class of processes and contracts; that of construction procurement law. The next section will explain in detail what relational contract theory as a concept, entails.

3 RELATIONAL CONTRACT LAW

As explained above, relational contract theory, contrary to classical contract law is based on substantive values rather than doctrine – values such as solidarity, trust, reciprocity and co-operation.[5] Although it arises from mutual interests, it can be said that individual interests indeed play a role since the relation would not have been formed if each individual did not have pecuniary or other interests. They merely identified that these interests can be achieved more effectively if a partnership is established. Relational theory is also based on social habits and customs that become internal to a contract. Even unwritten norms, in other words, expectations and obligations not expressly included in the agreement become binding (these are the external norms referred to by MacNeil). As Collins states, the question to be answered is whether the written document exhausts the obligations of the parties or whether it is supplemented by implicit undertakings.[6] Therefore, legal systems should develop techniques for determining the legal significance of contexts surrounding contracts.

A significant difference in relational contracts from classical contracts is that not all rights and duties are enumerated in the physical document. The outcome is therefore determined by the relations between the parties rather than expressed terms in a contract.[7] This is in line

4 Ireland "Recontractualising the Corporation: Implicit Contract as Ideology" in Campbell, Collins & Wightman (eds) *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (2003) 284.

5 Campbell & Harris note that co-operation in a long-term relationship is very different from that in a discrete contract. This is because the precise co-operation required over a long period cannot necessarily be defined in advance. The parties therefore accept a general and "productively vague" norm of fairness in their conduct. Campbell & Harris 1993 *J of Law and Society* 167.

6 Campbell, Collins & Wightman *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (2003) 3.

7 Hawthorne "The First Traces of Relational Contract Theory – The Implicit Dimension of Co-operation" 2007 *SA Merc LJ* 234 237. Gordon writes that obligations grow out of their commitment to each other, but may change as circumstances change. The purpose of contracting is not the allocation of risks, but to signify a commitment to co-operate. She notes that parties to a relational contract "treat their contracts more like marriages than like one-night stands." Gordon 1985 *Wisconsin LR* 569. According to Campbell & Harris a relational contract is analogous to a partnership. They note that "the parties are not aiming at utility-maximization directly through performance or specified obligations; rather, they are aiming at utility-maximization indirectly through long-term co-operative behaviour manifested in trust and not in reliance on obligations specified in advance." Campbell & Harris 1993 J of Law and Society 167.

with MacNeil's idea that *the* contract is merely an example of relational contracting. Instead of an exclusive written agreement, there exists an unwritten agreement to co-operate with one another. Hawthorne notes that because the ambit of the agreement is the long-term relationship between the parties, emphasis is placed on the requirements of trust, mutual responsibility, solidarity and co-operation.[8] More specifically, MacNeil writes that of all the essential elements of relational contract theory, the two most important are contractual solidarity and reciprocity.[9] Therefore, a minimum obligation in terms of which to perform exists.[10]

Remedies in relational contracts depend on how the parties wish to resolve the dispute. At the conclusion of the contract, they agree to allow for sufficient discretion to decide how conflicts will be resolved.[11] Gordon notes that in bad times parties are expected to lend one another mutual support and that an insistence on literal performance will be treated as "wilful obstructionism."[12] If unexpected losses occur, the parties must equitably divide the losses and a possible sanction for bad behaviour could be a refusal to contract in future.[13] Allowing this kind of approach to dispute resolution may therefore allow more small businesses to participate in the process of resolution. The procurement process and contract will therefore be more inclusive of developing contractors.[14]

Feinman notes that relational contracts are "relational with a vengeance."[15] The core of relational analysis is found in the context of a specific contract. However, context is not enough. The context must be filtered through the contractual norms starting with the internal norms. Since they are common to all relational contracts, they will be found in every analysis of a relational contract. However, as the case with the norms found in section 217 of the Constitution, each norm will carry a different weight depending on the nature of the contract.[16]

3 CONSTRUCTION PROCUREMENT LAW AS A RELATIONAL CONSTRUCT

The new Standard for Infrastructure Procurement and Delivery Management came into operation on 1 July 2016. However, the Construction Industry Development Board (CIDB) prescripts have not yet been repealed. Therefore, they were still applicable at the time of writing this article. Section 5(4)(a) of the Construction Industry Development Board Act (CIDB Act)[17] provides that the Construction Industry Development Board (CIDB) must publish a Code of Conduct[18] for "all construction related procurement and all participants involved in the procurement process." The preamble of the Code of Conduct states that good corporate governance is valued by the construction industry. The key elements identified in the preamble are discipline, transparency, independence, accountability, responsibility, fairness and social responsibility. It further states that the development of the construction industry will be promoted by participants that have *inter alia* clearly stated and enacted corporate values, ensure that they perform efficiently and in accordance with the key elements of good governance, engage in long-term relationships, give due recognition to human rights, respect the well-being of employees by treating them fairly and with cultural sensitivity, practice and encourage greater social responsibility, promote collaborative partnerships with communities and guard against abuse of power by the stronger

8 Galletti writes that a co-operative approach would entail that courts would more readily intervene in contractual gaps based on good faith and will regard a contextual approach to contractual interpretation as important as opposed to contrary to the will of the parties. Galletti 2014 *The Comparative and International LJ* 253.

9 MacNeil 1983 *NorthwesternUniv LR* 347–348. To this end, Hawthorne notes that: "There appears to exist a hidden sub-culture which constitutes a powerful enforcement mechanism based upon social approval and various codes of conduct typical of particular contracts. This enforcement is effected by certain implicit dimensions, which are conceptions to be understood, though not expressed in words, and are deep rooted and settled. This social mechanism of enforcement does not fall within the ambit of the reigning paradigm of contract law which favours the literal enforcement of written contracts, but is found in relational contract theory embodied in the norms of solidarity and co-operation." Hawthorne 2007 SA Merc LJ 234.

10 Feinman 2000 *NorthwesternUniv LR* 743.

11 Speidel 2000 *NorthwesternUniv LR* 823–824.

12 Gordon 1985 *Wisconsin LR* 569.

13 Gordon 1985 *Wisconsin LR* 569.

14 Although the CIDB Standard for Uniformity refers to "emerging enterprises" and not developing contractors, it is submitted that these two concepts are interchangeable. The former is defined as "an enterprise which is owned, managed, and controlled by black people and which is overcoming business impediments arising from the legacy of apartheid."

15 Feinman 2000 *NorthwesternUniv LR* 742.

16 Feinman 2000 *NorthwesternUniv LR* 742

17 38 of 2000.

18 Published as Board Notice 127 of 2003 in Government Gazette (GG) No 25656 of 31-10-2003.

party in contractual relationships. Moreover, it states that:

> A common code of conduct to guide and regulate behaviour of parties engaged in construction-related procurement is necessary to establish the standards of behaviour that participants may expect from each other and against which their behaviour can be measured.[19]

Part two of the Code sets out the principles governing the conduct of both public and private parties in construction-related procurement. They are required to behave equitably, honestly and transparently, discharge duties and obligations timeously and with integrity, comply with all applicable legislation and associated regulations, satisfy all relevant requirements established in procurement documents, avoid conflicts of interest and not maliciously or recklessly injure or attempt to injure the reputation of another party. Furthermore, specific duties for each party involved in the process are set out by the Code. To ensure that these patterns of behaviour are applied, section 27 of the CIDB Act provides for an inquiry into any breach of conduct committed in terms of the Code.

The key elements of corporate governance along with the elements of expected behaviour by participants in the procurement process align with those established by MacNeil as common norms of relational contracts. For example, it is apparent that the elements mentioned above relate or are similar to those of reciprocity, implementation of planning,[20] flexibility,[21] solidarity,[22] restraint of power[23] and harmonisation with the social matrix.[24]

MacNeil writes that "contract" denotes the kind of relations found in a relational contract and "the contract", meaning the actual document, merely serves as an example of such relations. Therefore, the public procurement process constitutes such relational exchange and therefore "contract" as MacNeil refers to it. The subsequent physical contract resulting from the process is an example of the relationship already formed between the procuring organ of state and tenderers. Various relations are thus formed between the procuring organ of state and tenderers.

4 RELATIONAL PROCUREMENT LAW IN SOUTH AFRICA

MacNeil writes that:

> Any contract law system necessarily must implement certain norms. It must permit and encourage participation in exchange, promote reciprocity, reinforce role patterns appropriate to particular kind of exchange relations, provide limited freedom for exercise of choice, effectuate planning, and harmonize the internal and external matrixes of particular contracts.[25]

In support of this, Macauley writes that:

> If we want our courts to carry out the expectation of the parties to contracts, both those that they express in writing and those that are left unrecorded or even unspoken, we must accept a contract law that rests on standards rather than on clear, quantitative rules.[26]

Having established that there exists a need for a relational law of contracts, to which the public procurement process and the resultant contract will be subject, the question which arises is

19 See CIDB Code of Conduct at 17.

20 Required by the new Standard for Infrastructure Procurement and Delivery Management issued as National Treasury Instruction Note 4 of 2015/2016 in terms of section 76(4)(c) of the Public Finance Management Act 1 of 1999. See http://www.treasury.gov.za/legislation/pfma/TreasuryInstruction/Treasury%20Instruction%20No.%204%20of%202015%202016%20on%20Std%20for%20Infr%20Proc%20and%20Delivery%20Mngmt.pdf (accessed 14-10-2017).

21 This can be seen in the elements of transparency, accountability, and fairness.

22 In giving due recognition to human rights and treating participants to the process fairly, in other words treating them in accordance with the interest they hold in the procurement process or contract. This is also evident in the requirement to promote collaborative partnerships and long-term relationships with participants.

23 In guarding against abuse of power by a stronger party. Gordon writes that in the case of classical contracts, an attempt is made to curb the problem of power by giving parties only those rights bargained for or formally agreed to in the contract. However, "what starts out as a mere inequity in market power can be deepened into persistent domination on one side and dependence on the other." Gordon "MacNeil, Macaulay, and the Discovery of Power and Solidarity in Contract Law" 1985 *Wisconsin LR* 570.

24 In practicing and encouraging greater social responsibility and treating other participants to the procurement process with cultural sensitivity.

25 MacNeil 1978 *NorthwesternUniv LR* 862.

26 Macaulay "The Real and the Paper Deal" in Campbell et al *Implicit Dimensions of Contract* 52.

how relational contract law will be applied and/or enforced by the courts.

As noted, the public procurement and therefore the construction procurement process is undoubtedly a relational one. The fact that public procurement constitutes an exchange, and that relational theory dictates norms belonging to a long-term relationship not necessarily based on a formal contract indicates that the construction procurement process falls within the ambit of relational contract theory. Perhaps in this instance, in ensuring legal certainty it may be useful to refer to only a relational theory rather than a relational contract theory in the case of public procurement, since no formal contract has been concluded at this stage. If MacNeil's synthesis of relational contract theory is applied, the process will have both internal and external norms. The internal norms of the construction procurement process will have two aspects. First, the values in section 217 of the Constitution will constitute internal norms. In other words, fairness, equity, transparency, competition and cost-effectiveness will form the basis of the construction procurement process and the consequent contract. The second aspect will be those internal norms which the parties agree to. For example, those set out in the CIDB Code of Good Conduct. To some extent the constitutional internal norms and the legislative internal norms may overlap. Any values or norms prescribed by the relevant professional associations will form the external norms to the construction procurement relation.[27]

It is submitted that the above suggestion is not an implausible one in the South African context. In fact, the Constitutional Court has acknowledged, although in a minority judgment, the existence and potential application of relational contract theory in South African law. Sachs J in *Barkhuizen v Napier*[28] in adjudicating on the enforceability of a standard term insurance contract held that these types of contracts are drafted in advance by the insurer or supplier and presented to the consumer on a "take-it-or-leave-it" basis.[29] This is also the case in construction procurement contracts where standard form contracts such as the JBCC,[30] NEC,[31] and FIDIC[32] forms of contract are used. He notes further that these contracts contain common contract terms that weigh heavily in favour of the insurer and often limit the insured's normal contractual rights. The insured is often unable to object to the standard terms and even more often unaware of their existence or unable to appreciate the terms fully.[33] The contract is merely handed over or posted to the insured to sign. This process indicates an imposition of will rather than a mutual consent to the contract.[34] Significantly, the judge notes that:

> A strong case can be made out of the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity, equality and freedom … [w]hat is needed is a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society.[35]

An important factor which had to be decided in this case, according to Sachs J, was the enforceability of terms which may be brought into the formal contract but which did not form part of the actual consensus or real agreement between the parties.[36] To this end, this judgment

27 Schwartz notes that courts could possibly view relational contracts as little societies in which values evolve over time. The criteria for resolving disputes can be based on the interpretation that best reconciles with these local values. A second way is to base "decisional criteria on what parties probably expect of each other." Parties to a contract seldom accept obligations that are not in their best interest. Consequently, each party will suppose that the other commits to practices which are in the interest of both parties. Norms that derive from these expectations will be efficient – they will maximise the parties' welfare. Therefore, judges who derive the norms from the relationship "will act as the internal relational approach directs." See Schwartz "Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies" (1992) 21(2) *The Journal of Legal Studies* 271 276.

28 2007 5 SA 323 (CC).

29 Paragraph 135.

30 This is a standard form contract created by the Joint Building Contracts Committee.

31 This is the New Engineering Contract, a standard form contract commonly used by construction contractors.

32 This is a standard form contract created by The International Federation of Consulting Engineers.

33 Paragraph 135.

34 Paragraph 138.

35 Paragraph 140.

36 Paragraph 148.

finds application to the possible field of relational procurement law.[37]

In the interpretation of contracts, "[w]hat public policy seeks to achieve is the reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition."[38] Moreover, it is significant that:

> [I]n long-term international commercial contracts, reasonableness rather than purely formal compliance is regarded as the yardstick against which duties of requisite good faith are tested. This renders the issues of good faith one of discretion and understanding, rather than one of formalistic principles.[39]

Hawthorne clearly states that the very reason why relational contract theory was developed was that classical contract law failed to adequately provide a framework in terms of which long-term contracts could operate.[40] In *South African Forestry Company Limited v York Timbers Limited*[41] the Supreme Court of Appeal held that although it was not entitled to impose on clearly expressed intentions of the parties its own notion of fairness, it was indeed entitled to do so where the contract is ambiguous. In such a case, the general principle that all contracts must be based on good faith is applicable and the intention of the parties is interpreted based on the assumption that they negotiated in good faith.[42] This, Hawthorne notes, is the operation of relational contract theory which justifies the application of implicit dimensions of a contract by inserting norms derived from trade usage, intention of the parties and as a course of dealing between the parties.[43]

Naturally, if relational theory were to be applied in a public procurement context, it would have to be determined whether there are any limits or parameters of the external norms to be imported into the process or the contract and if so, what these limits are. This would not be applicable to the internal norms as these would be determined by the parties themselves. Galletti, in referring to the Scottish example, notes that the Scottish Report on Interpretation in Private Law of 1997 identified "context" in contracts to be those norms which arise from the juridical act itself.[44] Those which constitute "surrounding circumstances", in other words the external norms, are those which are external to the juridical act. The limits of the external norms would be to exclude the parties' direct and individual statements of intention, the negotiating stage and the subsequent conduct. However, only individual statements of intentions may be excluded from the normative framework of the contract. It should therefore not be considered for purposes of interpreting contracts. This is due to the fact that relational theory is by its very nature based on the intention of the parties which can only be determined by that which is written in the contract, their oral evidence and their conduct.

37 It is interesting to note that the judge held that it is not only the indigent and illiterate who are ignorant of the contents of a contract. The rich, too, have the same rights to fair treatment in their capacity as consumers. Therefore, a possible argument that the enforceability of standard contract terms may not be applicable to larger contractors in the construction procurement process does not hold water. The judge notes that "[i]f, in our new constitutional order, the quality of public policy, like the quality of mercy and justice, is not strained, then the wealthy must be as entitled to their day in court as the poor." See para 149.

38 Paragraph 174.

39 Paragraph 167 in the court's reliance on the South African Law Reform Commission Report on consumer protection in contracts in South Africa.

40 Hawthorne 2007 *SA Merc LJ* 243.

41 2004 All SA 168 (SCA) para 32.

42 Paragraph 32.

43 Hawthorne 2007 *SA Merc LJ* 243–244. Campbell discusses the English court's acknowledgement and use of relational contract theory in its judgment Yam Seng Pte Ltd v International Trade Corporation Ltd 2013 EWHC 111 (QB). The court held at para 142 that "[s]uch 'relational' contracts, as they are sometimes called, may require a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements." See Campbell 2014 The Modern LR 475–492. See also Goetz & Scott "Principles of Relational Contracts" 1981 Virginia LR 1089 1091 who refer to these examples of relational contracts.

44 Galletti (2014) *The Comparative and International LJ* 250.

As noted above, the norms applicable to the construction procurement process will be those found in section 217 of the Constitution, those prescribed by the CIDB Code of Good Conduct and lastly those dictated by the industry such as those expected by trade societies or associations. An analysis of a construction contract will therefore commence with these internal norms along with MacNeil's common contract norms, then move to a consideration of the external norms. As with all law, common norms to all relational contracts will also be developed by the courts over time. The starting point of an analysis would be to determine whether the contract to be interpreted in fact constitutes a relational procurement contract.

It is further submitted that classical contract law cannot be entirely ignored in relational procurement theory. As noted, some contractual terms are included as a safety net for parties in the event of a breakdown of the relationship and also to set clear internal norms. The courts can therefore assist in interpreting the external norms to the relation. Therefore, although there is a need for relational exchanges to be recognised as a separate category of law, or at least of contract law, a hybrid system (meaning a combination of relational and classical contract law) will be best employed in doing so. Credence is therefore given to both legal certainty for parties who prefer this and the inclusion of relational norms according to which the exchange will occur.

In further support of the proposition, as Judge Sachs in *Barkhuizen v Napier* stated, standard term contracts, often used in construction procurement contracts, have been constructed in a way which favours the party with more bargaining power. This leaves room for abuse of power especially in the case of procurement since the process and contract is between a government entity and a private body who has less resources to enforce its rights in the case of a dispute. Furthermore, construction contracts are drafted in the engineering equivalent of "legalese." In other words, they are couched in construction terms which may be challenging even for the courts to interpret. They may therefore be inclined to not make any pronouncements around the substantive terms of a contract based on deference.

Section 39 of the Constitution enjoins the courts to develop the common law in line with the Bill of Rights. Included in the Bill of Rights is section 9, the right to equality, which it has been established, refers to substantive equality.[45] By incorporating relational norms into construction procurement, a less adversarial system is created. Smaller contractors who are not able to enforce their rights by way of litigation may thus be given an opportunity to resolve disputes with the government and subcontractors more amicably. The development of small contractors therefore promotes the implementation of substantive equality as a constitutional imperative. Moreover, section 217 of the Constitution reiterates the need for equity and requires that public procurement be fair, which does not exclude substantive fairness.[46]

It has also been held by the courts that the invitation, evaluation, and award of public tenders is a form of administrative action.[47] Therefore, section 33 of the Constitution is applicable. As such, the construction procurement process must be *inter alia* reasonable. This requires that the conduct be rational and proportional of which the purpose of the latter element is to avoid an imbalance between the adverse and beneficial effects of the administrative action, in this case, the values which underpin behaviour in the construction procurement process.[48]

Furthermore, section 195 of the Constitution which provides for the conduct of public administration states in subsection 1*(a)* that a high standard of professional ethics is required. Subsection (3) in turn requires that national legislation must ensure the promotion of these values in subsection (1).[49] Therefore, there is a constitutional obligation on the government to act

45 Currie & De Waal *The Bill of Rights Handbook* 6 ed (2013) 213–215.

46 Bolton *The Law of Government Procurement in South Africa* (2007) 47.

47 See *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* 1997 2 All SA 548 (A) paras 552–553; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 2 BCLR 176 (SCA) para 23; *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) para 5; *Metro Projects CC v Klerksdorp Municipality* 2004 1 SA 16 (SCA) para 12.

48 See Hoexter *Administrative Law in South Africa* (2012) 340–346 for a discussion on the rationality and proportionality elements of reasonableness in the administrative law context. Brownsword writes that when interpreting commercial contracts, a literal interpretation can give rise to two untenable situations. First, where the language suffers from ambiguity and second, where the application of a literal meaning of the words would lead to absurdity. Therefore, literalism must have a solution to these problems. He suggests that courts must draw on reasonableness in solving this. Contextualism, on the other hand, takes the meaning of the terms of a contract from the context in which the agreement was made. The fundamental feature of contextualism, he writes, is that it seeks out the meaning of the agreement that best fits with its context. See Brownsword "After Investors" in Campbell *et al* 110.

49 In the construction procurement law context, this has been done in the CIDB Code of Conduct in the

ethically, including the performance of contractual duties, and a corresponding constitutional obligation on the courts when developing the common law of contracts to consider foreign law such as incorporating relational theory of the USA into South African construction procurement law.[50] Relational procurement law will therefore promote the broader goal of realising transformative constitutionalism.[51] This perhaps leads to a possibility that relational contract theory can form not only a basis for relational procurement law, but also the basis on which public law matters in South Africa in general are dealt with. Maser proffers that constitutions are relational contracts because they secure co-operative relationships among members of a group and these relationships differ and change.[52] Although the author by referring to "constitutions" means municipal charters in an American context, this idea can be adapted to the South African context. In other words, it is submitted that the South African Constitution in itself is a relational document. It is a document intended to last a long period, and binds all parties in the country in both the public and private spheres. The Bill of Rights consistently refers to the "progressive realisation" of rights which indicates that the Constitution is intended to serve the country for a long period.[53] The manner in which the Constitution is applied must be based on its values and must be done in a spirit of co-operation. This is evident in the weighing up of rights and values which is present throughout the Constitution. For example, the values in section 217 must be weighed against one another in order to achieve a fair result. The same is applicable in the case of socio-economic rights.[54] No right in the Constitution is absolute, therefore competing rights must always be evaluated and respected in light of co-operation between the parties involved.

Section 2 of the Constitution states that it is the supreme law of the land and that any law inconsistent with it is invalid. This would of course include the private law of contract in which relational contract theory is based and by analogy, it would include relational procurement law. Section 1 of the Constitution provides that South Africa, in which the Constitution is supreme, is based on a democratic state founded on human dignity, equality and freedom. The state is naturally bound by the Constitution and as such must apply and vindicate the rights enshrined in the Bill of Rights. Relational procurement law, based on norms of fairness, equity, transparency, competition and cost-effectiveness in section 217(1) of the Constitution can therefore assist courts in determining whether duties of both the government and private

requirement that all participants in the procurement process must act with transparency, accountability, responsibility and fairness.

50 Section 39(2) of the Constitution further states that courts in developing the common law, must promote the spirit, purport and object of the Bill of Rights. This should include the dignity imbedded in the freedom of contract parties have in deciding which norms to hold themselves bound to in the exercise of delivering goods and services to the government. It should further involve equality in how the rights of both parties (that of the government and the winning private contractor) are applied and vindicated. This involves reasonableness in how the express and implicit terms of a contract are applied to avoid unfair treatment of private contractors based on a traditionally uneven power relationship with the government. This way fundamental rights in the Constitution are vindicated while giving effect to s 39(2) in developing the common law.

51 This has been a contested term in South African constitutional law as a precise definition has not yet been established, but it is broadly considered to be the realisation of the values of the Constitution – transforming South African law and society by realising constitutional goals. Transformation has been referred to by former Pius Langa CJ as social and economic revolution. See Langa "Transformative Constitutionalism" 2006 *Stellenbosch LR* 351 352. Bhana writes that to this end, those who undertake legal work must be aware of conservative legal culture as it manifests in their professional practices. They must ensure that it does not undermine the constitutionalisation of the common law. This, to Bhana, means that judicial commitment to legal principle such as *pacta sunt servanda* and the "contract law machine" in general must be justifiable in terms of a substantively progressive and transformative Constitution, especially in terms of the founding values of freedom, dignity and equality. The same would apply to the rules of interpretation. See Bhana (2015) *SALJ* 131–132. Justice Moseneke writes that the most important purpose of the change sought by the Constitution is freedom and achievement of equal worth and social justice. Social justice, in turn, is closely related to fair access to *inter alia* vital socio-economic goods and services. By parity of reasoning, private power cannot be immune from constitutional scrutiny especially when private power approximates public power or has a wide public impact. Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" 2009 *Stellenbosch LR* 12.

52 Maser "Constitutions as Relational Contracts: Explaining Procedural Safeguards in Municipal Charters" 1998 *Journal of Public Administration Research & Theory* 527 527.

53 See ss 26(2) and 27(2) of the Constitution.

54 For example, the right to healthcare versus the ability of the state to provide such healthcare. See *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC). The same is applicable in the right to housing. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

parties have been performed adequately.

Further constitutional values to those mentioned above, include lawfulness,[55] transparency,[56] accountability,[57] reasonableness[58] and fairness.[59] Section 8(1) of the Bill of Rights in turn binds all organs of state. Subsection 2 provides that a natural or juristic person is bound by the Bill of Rights to the extent that it is applicable, considering the nature of the right and the duty imposed by the right. Section 8(3) provides that when, for purposes of this article, an organ of state applies the Bill of Rights to a natural or juristic person such as a contractor, a court in giving effect to a right in the Bill of Rights must apply, or if necessary, develop the common law. As noted, relational procurement law will be based on the same principles on which the Constitution was founded, therefore it has the potential to assist courts in vindicating rights enshrined in the Bill of Rights. By the same token, the same principles apply in general public law since the state is an actor as in the case of public procurement law. Consequently, the courts may be less hesitant in applying standards of reasonableness when taking into account implicit dimensions of not only contracts, but administrative acts as well.

Moreover, the argument has been made that the common law of contract is in the process of being "constitutionalised".[60] This means that private law contracts are moving towards being interpreted in constitutional terms which include reasonableness and good faith. This will inevitably blur the lines between private and public law. Such a development may be positive for the law of public procurement since the concluded contract, after the tender process has been completed, will then solely be formed and judged by the rules of public law which align with those of a proposed relational procurement law.

5 CONCLUSION

Relational contract theory is a theory developed in the USA in response to the inadequacy of classical contract law to provide for the intricacies of long-term contracts. At present, it is a theory which advocates for an additional, complementary system of law which adequately provides for a framework in which long-term contracts can operate based on a set of norms. Both express and unexpressed norms are part of the theory, therefore, parties to a contract are bound by express, implied and tacit terms. The difference from classical contract law is that the norms applicable to the contract are the common contract norms which MacNeil has identified as role integrity, reciprocity, implementation of planning, effectuation of consent, flexibility, contractual solidarity and linked norms: restitution, reliance and expectation interests, restraint of power, harmonisation with the social matrix and propriety of means.

Relational contract theory is applicable to relational contracts which are characterised by a long duration of time and a relationship formed between the parties. In these relational contracts, a distinction is made between internal and external norms. Internal norms are those which the parties decide to include in their formal contract. The common norms identified by MacNeil are present in all long-term contracts, therefore they automatically become internal norms. External norms, on the other hand, are those external to the surroundings of the parties to the contract. These are norms prescribed by the industry in which the parties function and those norms prescribed by professional associations and societies to which they belong.

When parties partake in a relational contract, legal rights arise from this relationship.

55 Section 33.
56 Section 217.
57 Section 195.
58 Section 33.
59 This includes procedural and substantive fairness in ss 9, 33 and 217 of the Constitution.
60 This topic has been debated in academic journals at great length. See for example Tladi "Breathing Constitutional Values into the Law of Contract: Freedom of Contract and the Constitution" 2002 *De Jure* 306–317; Cherednychenko "The Constitutionalisation of Contract Law: Something New Under the Sun?" 2004 *Electronic J of Comparative L* 1–17; Mupangavanhu "Yet Another Missed Opportunity to Develop the Common Law of Contract? An Analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30" 2013 *Speculum Juris* 148–173; Lourens & Frantzen "The South African Bill of Rights – Public, Private or Both: A Viewpoint on its Sphere of Application" 1994 *CILSA* 340–356; Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" 2009 *Stellenbosch LR* 3–13; Kruger "The Role of Public Policy in the Law of Contract, Revised" 2011 *SALJ* 712–740; Bhana & Meerkotter "The Impact of the Constitution on the Common Law of Contract: *Botha v Rich NO* (CC)" 2015 *SALJ* 494–509; Bhana "The Implications of the Right to Equality in Terms of the Constitution for the Common Law of Contract" 2017 *SALJ* 141–161; Hawthorne "The 'New Learning' and Transformation of Contract Law: Reconciling the Rule of Law with the Constitutional Imperative to Social Transformation" 2008 *SAPL* 77–99.

The law is there to provide stability, facilitate co-operation between the parties and allow for enforcement mechanisms in the case of a breach of contract. It is also an indication of the social norms, customs and practices we subscribe to and become the norms according to which we measure behaviour including contractual behaviour. Therefore, the law is an important indicator of contractual norms.

It has been established that public procurement constitutes an exchange and a relationship is formed between the procuring organ of state and all tenderers in a tender process. This is owing to the fact that the tender process is usually a time consuming one. Furthermore, the construction industry constitutes a set number of contractors who register on a database and continuously tender for government contracts as their main source of income. Infrastructure delivery as the goal of the industry is defined as "the combination of all planning, technical, administrative and managerial actions associated with the construction, supply, renovation, rehabilitation, alteration, maintenance, operation, or disposal of infrastructure."[61] Moreover, the industry's Code of Good Conduct prescribes norms such as fair treatment, respect, cultural sensitivity, social responsibility and avoidance of abuse of power. A clear duty is placed on construction contractors to form long-term relationships. Therefore, construction procurement is undoubtedly of a relational nature. What remains is a recognition by the law that the process and the consequent contract is of relational nature and an amendment of the law in order to provide for the specific requirements of relational procurement.

It has been noted that classical contract law, due to its formal and doctrinal nature does not adequately provide for long-term contracts based on social norms to operate within its strict framework. There is thus a need for an alternative system of law to regulate these contracts. A relational procurement law under which construction procurement will resort is a plausible solution to this problem. The relational framework has already been adopted in the CIDB Code of Conduct which applies to all participants in the construction procurement process. This is further enumerated in the new Standard for Infrastructure Delivery which is binding on all construction contractors. What is required is a recognition of construction procurement as a separate category of contracts deserving of a separate regulatory framework. In addition to this, empirical studies have proven that contractors rely more often than not on the "unwritten" agreement between themselves rather than the written agreement. There is therefore already a tendency to operate on a relational level amongst each other.

Although it is submitted that a relational procurement law is necessary, it is also acknowledged that classical contract law has a contribution to make to the new legal framework for construction procurement. As such the proposition is that a balance between a formal and relational contract is found in terms of which parties can operate. The purpose of the formal contract being merely a safety net in the event of a breakdown in the relationship.

When it comes to enforcement of a construction procurement relation and its norms, the courts have already acknowledged that there exists a need for the realisation of substantive justice. In other words, as Sachs J in *Barkhuizen v Napier* noted, a principled criteria should be applied in contract law with sensitivity to the way in which public affairs should be regulated to ensure fairness in an open and democratic society.[62] Furthermore, the court in *South African Forestry Company Limited v York Timbers Limited* held that the notion of fairness may be imported into a contract in which the express intentions of the parties are ambiguous. All contracts should in such a case be assumed to have been negotiated in good faith.[63]

If a procurement relational theory were to be developed, it should be referred to as merely relational procurement law as opposed to a relational contract law since no contract has been concluded yet. It is further submitted that the internal norms would be those set out in section 217 of the Constitution, namely, fairness, equity, transparency, competition and cost-effectiveness. Along with this will be the norms required by the Code of Good Conduct and any other norms the parties themselves determine. The external norms to the relation will be those prescribed by the professional associations which contractors belong to. A court, in enforcing these norms, would determine whether the situation which presents itself indeed constitutes a construction procurement relation, then determine what the internal norms are, and lastly what the external norms were intended to be.

In further support of the proposition of a relational procurement law, section 39 of the

61 National Treasury Instruction 04 of 2015/2016 3.
62 Paragraphs 50–52.
63 Paragraph 32.

Constitution places an obligation on the courts to develop the common law in line with the Bill of Rights. The courts are further permitted to take account of foreign law. The common law, meaning the classical contract law, may therefore be developed based on the American relational contract theory. Additional rights in the Bill of Rights which may be realised are section 9, the right to (substantive) equality, and section 33 of the Constitution which provides for the right to just administrative action which must be reasonable, meaning rational and proportional. Furthermore, section 195 of the Constitution which regulates public administration, requires that it should be performed ethically and regulated in a manner which ensures and promotes ethical values. Therefore, from a constitutional point of view, importing relational theory into South African law may assist in realising the broader goal of a transformed society. This is evidenced by the fact that relational theory is based on the same principles as those of the South African Constitution. Therefore, in applying relational procurement law, it is ensured that the values of equality, dignity, freedom, fairness, reasonableness and lawfulness are fulfilled.

It is submitted that the Constitution is a relational document, therefore the values and spirit in terms of which all individuals, corporations and public bodies must act are aligned with those of relational theory. The incorporation of relational procurement law into South African law is therefore a solution to the achievement of not only a well-regulated area of law but also a gateway to ensuring fulfilment of Constitutional goals.