

Striking a Balance between Certainty and Flexibility: The Role of Ubuntu in South African Contract Law

Authors : Yeukai Mupangavanhu

Abstract : The paper examines the concept of ubuntu and the extent to which it can play a role in ensuring fairness and justice in contractual relationships. Courts are expected to balance sanctity of contract and fairness. Public policy is currently a mechanism which is used by courts when balancing the above two competing interests. It, however, generally favours the freedom and sanctity of contract. The question which is addressed in this paper is whether the concept of ubuntu is an alternative mechanism that may be used to mitigate the sometimes harsh and unfair consequences of the doctrine of freedom and sanctity of contract. A comparative study and case analysis is the methodology that is used in this article. Unfairness in contracts is generally related to the problem of inequality in bargaining power underscored by deeply entrenched social and economic inequalities that are a consequence of apartheid and patriarchy. The transformative nature of the constitution demands the inclusion of African legal ideas and values in the legal order. There is a need for the harmonisation of western ideals which are based on the classical model of law of contract with relevant African principles. In order to attain a transformative legal order that promotes a societal transformation and enhances the lives of everyone courts cannot continue to frown upon African values. Ubuntu has the potential of steering the law of contract in a more equitable direction. The substantive rules of contract law undoubtedly need to be infused with the notion of ubuntu. The reconciliation of Western and African values is at the heart of legal transformation.

Keywords : fairness, sanctity of contract, contractual justice, transformative constitutionalism

Conference Title : ICCL 2017 : 19th International Conference on Contract Law

Conference Location : Rome, Italy

Conference Dates : December 11-12, 2017