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COMMON-LAW AVOIDANCE

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This article discusses an important trend in recent judgments of our appellate courts, which I call 'common-law avoidance'. Rather than applying established sets of common-law principles, the courts have chosen to substitute them with other sets of norms of their own invention, usually sourced in the Constitution. This marks a departure from the status quo ante, in which it was accepted that the impact of the Constitution on private-law disputes was to be felt through the common law, rather than by displacing it. I discuss three cases that evidence this new pattern, spanning the three branches of the law of obligations: AB v Pridwin Preparatory School*, which implicated the law of contract;* Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*, involving delict; and* Greater Tzaneen Municipality v Bravospan 252 CC*, which raised an issue in the law of unjustified enrichment. I critically assess the trend exhibited in these cases, arguing that it is the result of (among other factors) the courts' preference for the Constitution's more familiar and discretionary standards, and of their increasing difficulties in meeting the demands of the common-law method.*

Common law – Constitution of the Republic of South Africa, 1996 – contract – delict – unjustified enrichment

I INTRODUCTION

This article discusses an important trend in recent judgments of our appellate courts. Rather than applying established sets of common-law principles, the courts have chosen to substitute them with other sets of norms of their own invention. These norms are usually sourced, directly or indirectly, in the Constitution, and the stated reason for using them, in preference to the established common law, is that constitutional principle requires it. But this marks a departure from the status quo ante, in which it was accepted that the impact of the Constitution on private-law disputes

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was to be felt through the common law, rather than by displacing it. Part III of this article presents three cases that evidence this new pattern of 'common-law avoidance'. They come from the three branches of the law of obligations: contract, delict, and unjustified enrichment. Part IV assesses them critically. But first, in Part II, I explain the position that prevailed during the first two decades of the constitutional era, and which these recent cases disrupt.

II BACKGROUND

Plainly, our 1996 Constitution was intended to have a major impact upon all aspects of South African law. The Bill of Rights expressly 'applies to all law', rather than being relevant only to the judicial review of legislation and executive action, for example.[1] And it expressly recognises, in s 8(2), that constitutional rights bind private persons, not only organs of state.[2] In these respects, it went further than the interim Constitution[3] — though this already embodied the directive, now famous as the final Constitution's s 39(2), that the 'spirit, purport and objects of the Bill of Rights' should influence the development of the common law.[4] This cluster of provisions put it beyond doubt that the Constitution could be invoked in private disputes of all kinds, even when no legislation was involved. And the Constitutional Court, as is well known, has asserted an expansive vision of constitutionalism, in which the Constitution underpins and legitimates the entire legal system — so that even private law can be seen as a form of 'applied constitutional law'.[5]

Crucially, though, the Bill of Rights was to impact private-law disputes in a specific way. Its influence was to be felt by *the development of* the common law, rather than by creating a rival body of distinctively constitutional principles.[6] This was already facially apparent from s 39(2), whose text

[1] Constitution of the Republic of South Africa, 1996, s 8(1).

[2] Section 8(2).

[3] Act 200 of 1993.

[4] Section 35(3) of the interim Constitution read: 'In the interpretation of any law and the application and development of the common law …, a court shall have due regard to the spirit, purport and objects of [the interim Bill of Rights]'. Section 39(2) of the 1996 Constitution is a beefed-up version of this provision.

[5] Mattias Kumm 'Who is afraid of the total constitution? Constitutional rights as principles and the constitutionalization of private law' (2006) 7 *German LJ* 341 at 359 (discussing the German model of horizontal application, which heavily influenced our own). At one stage, the Constitutional Court suggested that constitutional issues should be avoided where possible, but that approach 'has long since been abandoned in favourite of its opposite', according to which 'virtually all issues … are, ultimately, constitutional': *Jordaan v City of Tshwane Metropolitan Municipality* 2017 (6) SA 287 (CC) para 8.

[6] We may pause here to note an ambiguity in the term 'common law'. Sometimes, it simply means law made by judges, rather than by legislatures.

showed that the influence of the Bill of Rights on individuals' conduct was to be mediated by the common law. An important, but often overlooked, point is that the same is true of s 8(2). This provision is avowedly more robust than s 39(2): rather than merely requiring the courts to respect constitutional values, it sought to bind the private parties themselves, imposing duties upon them which are correlative to constitutional rights. These differences between the two provisions have drawn a remarkable amount of academic attention.[7] But they should not be allowed to obscure the commonality, which is that s 8(2), no less than s 39(2), has effect not outside the common law but through it. This is made explicit in s 8(3), which says, '[w]hen applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court, in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law … and may develop rules of the common law to limit the right'. And so, while the Bill of Rights would undoubtedly have effect even in purely private disputes, this was to take place in a specific way: by changing the common-law rules first, and then by applying those rules as changed. This has been explained many times, with great clarity, by the main drafter of these provisions.[8]

In that sense, any new remedy that a court devises — even one justified by the Constitution, and which rivals or outflanks a pre-constitutional one — creates new common law by definition. But 'the common law' has another meaning, richer with connotation and correspondingly less precise, in which it refers not merely to judge-made law but to that part of a country's substantive law that has always (or almost always) been considered to be under the primary custodianship of our courts, which have sought to regulate that area comprehensively, and have devised associated techniques of law-creation and development. It is this second meaning that is germane to this article, and which allows a contrast to be drawn between acts of judicial law-making that take place within the common-law tradition and those that do not. Admittedly, there is some danger in using the terminology in this way, namely that it will reify the sense that the common law is hermetically separated from the Constitution. That is not an accurate picture, as this part of the article attempts to explain in detail.

[7] The authorities are endless, though not always illuminating. Among the more influential texts are Alfred Cockrell 'Private law and the Bill of Rights: A threshold issue of horizontality' in *The Bill of Rights Compendium* (1998); Stuart Woolman 'Application' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013); Iain Currie & Johan de Waal *Bill of Rights Handbook* 6 ed (2013) ch 3.

[8] See especially Halton Cheadle 'Application' in Halton Cheadle & Dennis Davis (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (SI 34, 2023) ch 3, the first edition of which appeared in 2002. A similar account was given in Halton Cheadle & Dennis Davis 'The application of the 1996 Constitution in the private sphere' (1997) 13 *SAJHR* 44.

The advantages of this 'indirect' or, as I prefer to say, 'mediated' approach are many.[9] First, it avoids parallelism or bifurcation, in which two competing sets of norms — the pre-existing common law, and a new constitutional system — are in play. Where parallel systems are available, difficult 'choice of law' questions arise about whether, and when, each of them applies. This complicates the litigation process and distracts from the issues of substance. Secondly, and closely relatedly, the mediated approach improves coherence. The legal system should not give two different answers to the same question. But it may do so if two rival sets of norms exist in parallel. Where the Constitution and the common law diverge, therefore, they should be brought into alignment, so that they speak with one voice. Thirdly, the mediated approach encourages courts to justify their new, constitutionalised approach in the form of a legal rule — in other words, a relatively clearly stated norm of general application. This helps to concretise the (often vague) language of the Constitution's rights provisions, and to preserve the many well-known advantages of rule-based reasoning. Fourthly, it allows the legal system to derive continued benefit from our common law, whose rules were built up, after all, over a 2000-year period. Though the wisdom of our inherited stock of rules may be debated, one advantage of continued reliance upon them is hard to dispute: they provide a residual solution while the constitutionalised system is being constructed. No matter how strongly committed our courts are to law reform, they cannot enact a seamless new system of constitutionalised norms in a single case. If the authority of the common-law rules is not preserved, many questions will be left altogether unregulated in the meantime. It is useful, then, to maintain the applicability of the pre-existing common-law's rules, unless and until they are consciously rejected or adapted. That is what the mediated approach does.

All this was understood in the foundational cases. In *Fose v Minister of Safety and Security*,[10] the Constitutional Court's first judgment on this topic, the plaintiff claimed an award of 'constitutional damages' for torture he allegedly suffered at the hands of the police. He based this upon the infringement of his constitutional rights per se, and quite apart from any award to which he was entitled in the common law of delict. The court rejected his claim and criticised his attempt to circumvent the common law in the name of constitutionalism. The common law was itself designed to protect certain rights now entrenched in the Bill of Rights, the court pointed out, and '[i]n many cases the common law will be broad enough'

[9] It is traditional to call our approach 'indirect', but for many reasons this terminology tends to mislead: compare Cheadle op cit note 8 at 3-7, 3-21. 'Mediated' carries less risk of conflating other issues.

[10] 1997 (3) SA 786 (CC).

to give appropriate effect to them.[11] In *Fose* itself, a delictual claim for assault would indeed provide 'a powerful vindication' of the plaintiff's right to bodily integrity.[12] True, the plaintiff wanted the law to provide still stronger protection, in the form of a punitive damages award. But, in the court's unanimous view, the common law's unwillingness to go this far had wisdom behind it, which remained valid in the constitutional era.[13] The court therefore refused to grant a constitutional remedy that outflanked the ordinary delictual one.

The key message of *Fose* was famously underscored three years later in *Pharmaceutical Manufacturers*,[14] where Chaskalson P wrote that he 'cannot accept th[e] contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field.'[15] 'There is only one system of law', he said, and all law in it — including, prominently, the common law — is 'shaped' and 'control[led]' by the Constitution.[16] The rejection of parallelism could hardly have been clearer.

To be sure, *Fose* also said that courts would, in other cases, have to 'forge new tools' to ensure that constitutional rights are adequately vindicated.[17] This reminds us, if a reminder were needed, that the mediated approach is not at odds with legal change. It only requires that change take place in a certain way, namely via the common law, which is, as *Fose* recognised, a 'flexible' system and readily capable of being developed.[18] Hence, if the common law is unjustifiably restrictive of rights, the ordinary course is for the court to develop it to remove the deficiencies. Significant developments of this kind had in fact already taken place under the interim Constitution, prior to *Fose*. The most celebrated was the creation of a new defamation defence of 'reasonable publication' in order to protect press freedom,[19] which common-law rules devised in the apartheid era had unduly restricted.[20] There is little doubt, then, that the courts' duty

[11] Ibid para 58(b).

[12] Ibid para 67.

[13] Ibid paras 69–74 (Ackermann J). Didcott J and Kriegler J wrote separately, but substantially agreed.

[14] *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

[15] Ibid para 44.

[16] Ibid.

[17] *Fose* supra note 10 para 69.

[18] Ibid para 58(b).

[19] *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA), which was preceded by similar developments in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) and *Gardener v Whittaker* 1995 (2) SA 672 (E).

[20] *Pakendorf v De Flamingh* 1982 (3) SA 146 (A); *Neethling v Du Preez* 1994 (1) SA 708 (A).

to develop the common law will sometimes require the creation of new rules, rather than merely the refinement of old ones,[21] and sometimes it will extend to the creation of entirely new causes of action.[22] It would be odd if it were otherwise, since the common law has always allowed judges to develop the common law,[23] and indeed to create new causes of action (that is how the old ones got there). So, the mediated approach is plainly not about the preservation of the pre-existing stock of rules that existed in 1994. It requires only that, when legal developments are considered, the courts do so mindful of the fact that there is an existing body of norms already in place.[24]

Again, the early cases acknowledged this. *Carmichele v Minister of Safety and Security*,[25] decided in 2001, shortly after *Pharmaceutical Manufacturers*, emphasised the rigours that the mediated approach entails. Though the court had little doubt that the Bill of Rights required a broadening of public authority liability in cases of bodily injury, it urged caution in going about it. Giving effect to the Bill of Rights in private law, it said pointedly, 'requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law'.[26] Because '[o]ur law of delict spans many centuries', with debates about its contested concepts still ongoing, it was no easy matter to

[21] Compare *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 16.

[22] See further Johan van der Walt 'Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *SAJHR* 341, discussing *Jooste v Botha* 2000 (2) BCLR 187 (T).

[23] *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) para 22; *Mokone v Tassos Properties CC* 2017 (5) SA 456 (CC) para 41.

[24] This position has been defended many times by others, including, prominently, André van der Walt: see for example his *Property and the Constitution* (2012) 85. As he acknowledges, sometimes the Constitution will require a change that the existing set of norms, even taking a developmental approach, cannot accommodate. For example, despite *Fose*, constitutional damages have been awarded in certain later cases (such as *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA)), thus creating a compensatory remedy that is separate from, and outflanks, the law of delict. These awards are unusual and hotly debated. But there is no need to reject them outright on the basis that they defy the mediated approach. They are reconcilable with it, provided they are used only as a fallback or residual remedy where the common law's own solutions are inadequate (and would remain so even if subjected to reasonable development). Awards of constitutional damages can be justified, in other words, but that must be done with close reference to the existing common-law system. For discussion of the same point in the context of property-law remedies see Van der Walt op cit at 82, 86 and authorities cited there.

[25] 2001 (4) SA 938 (CC).

[26] Ibid para 55.

determine how best to implement the constitutionally required change.[27] Several solutions were possible, some better than others at respecting the existing common law and its characteristic methods. The change must be undertaken, the court said, in the way that is 'most appropriate for the development of the common law within its own paradigm'.[28] This required 'particular expertise and experience' in the common law of delict, and this in turn required that the country's full set of judicial resources be turned to the question.[29] Rather than developing the common law then and there, the court remitted the matter to the High Court, so that it might benefit from full argument and, if necessary, a full appeal process. The associated change to the law of delict took place the following year in *Minister of Safety and Security v Van Duivenboden*.[30] Nugent JA's judgment was rightly hailed as an exemplar of the common law's constitutionalisation.[31] Its counterpart in the law of contract was Cameron JA's judgment in *Brisley v Drotsky*,[32] which held that the existing rules required a fundamental constitutional reworking, but did so by developing longstanding doctrine.[33] The germ of its approach was endorsed and applied by the Constitutional Court five years later in *Barkhuizen v Napier NO*,[34] which described the cardinal principles from *Pharmaceutical Manufacturers* and *Carmichele* as 'axiomatic'.[35]

True, *Carmichele* and *Barkhuizen* couched their reasoning in s 39(2), and the court has been criticised for its persistent over-reliance upon this section, in preference to s 8.[36] But it should not be thought that the mediated approach applies to s 39(2) alone. In *Khumalo v Holomisa*,[37] the Constitutional Court made clear that horizontal application in terms of s 8 was also to be channelled through the existing common law.[38] Given the text of that section, this is thoroughly unsurprising. Other leading judgments of the time saw both sections as components of the same

[27] Ibid para 58.
[28] Ibid para 55.
[29] Ibid.
[30] 2002 (6) SA 431 (SCA).
[31] François du Bois 'Sources of law: Common law and precedent' in François du Bois (gen ed) *Wille's Principles of South African Law* 9 ed (2007) 64 at 65n3.
[32] 2002 (4) SA 1 (SCA).
[33] See further part III(a) below.
[34] 2007 (5) SA 323 (CC).
[35] Ibid para 35.
[36] See for example Stu Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *SALJ* 762; Anton Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *SALJ* 611.
[37] 2002 (5) SA 401 (CC).
[38] Ibid paras 31–3. The court went on to assess the common law of defamation, as it had been developed to include a 'reasonable publication' defence (see note 19 above), and held that it conformed with freedom of expression in s 16 of the Bill of Rights.

general approach: s 8(2) and 39(2) are two distinct triggers, but *what* they trigger is the same, namely a development of the common law along the lines sketched in *Carmichele*.[39] Although the difference between s 8 and s 39(2) might matter for other purposes, on the centrality of the mediated approach they are ad idem.[40]

In summary, according to the position carefully staked out by both the constitutional text and the foundational judgments of the Constitutional Court, the force of the Bill of Rights is to be channelled through the common law, rather than being allowed to circumvent it. And it was well-appreciated, especially in *Carmichele*, that this would require judicial expertise about the common law as well as close care and attention being paid to it. These principles quickly became canonical and indeed commonplace,[41] and were lengthily reasserted by the Constitutional Court deep into the 2010s, in cases such as *Mighty Solutions CC*[42] and *DZ obo WZ*.[43] As we will see in the next part of this article, however, these principles have now come under pressure.

III EXAMPLES

This part discusses three recent judgments in which the court ignored a set of common-law principles that was capable of resolving the case, in preference for a rival set of principles substantially of the court's own invention. As I mentioned, the examples span the three branches of the law of obligations. Collectively, they suggest a concerted move away from the mediated approach that I discussed a moment ago.

[39] See especially *Thebus v S* 2003 (6) SA 505 (CC) paras 23–32, whose re-understanding of the relationship between ss 8 and 39(2) has become orthodox.

[40] Similar (indeed stronger) conclusions have been defended by others, such as Christopher J Roederer 'Post-matrix legal reasoning: Horizontality and the rule of values in South African law' (2003) 19 *SAJHR* 57; Deeksha Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *SAJHR* 351.

[41] For compelling academic treatment, written in the wake of *Carmichele* see Max du Plessis & Jolyon Ford 'Developing the common law progressively — Horizontality, the Human Rights Act, and the South African experience' 2004 *European Human Rights LR* 286.

[42] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) paras 34–44.

[43] *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) paras 27ff. In addition, the Constitutional Court's recent judgment in *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2023 (3) SA 329 (CC) is closely compatible with the approach to constitutional damages sketched in note 24.

(a) Contract

In June 2020, the Constitutional Court decided *AB v Pridwin Preparatory School*,[44] in which the applicant fell into a dispute between the school attended by his two sons. The applicant had been repeatedly verbally abusive towards members of staff and other parents, and the school, after several failed attempts to placate him, purported to terminate the 'parent contract' it had concluded with him. In doing so, the school complied fully with the contract's written terms. But the effect of the termination would be to expel the applicant's sons from the school they had been attending, and the question thus arose whether their constitutional rights placed limits on this exercise by the school of its contractual powers. The court decided, to general acclaim, that independent schools (though they are not organs of state) do owe duties to respect their learners' constitutional rights to an education and to have their best interests considered.[45] How, then, do these rights bear on the contractual relationship between the parties? In particular, do they limit the school's stipulated contractual power to cancel the contract 'for any reason', subject only to the giving of one term's written notice? The court was unanimous that the Constitution did have that effect: regardless of the express terms of the school's power to cancel, it may not discontinue a learner's schooling without following a proper process. This includes a duty to consult with the student affected, which the school in this case had seemingly not done.

The pertinent question, however, on which the court divided, was how to reach this conclusion. The obvious way to determine the effect of constitutional rights on a contractual relationship would have been via the public-policy doctrine, which has deep roots in our law.[46] That it would be the portal for the entry of human rights into contract law was prefigured by pre-constitutional cases,[47] widely anticipated by academics,[48] and

[44] 2020 (5) SA 327 (CC).

[45] Meghan Finn 'Befriending the bogeyman: Horizontal application in *AB v Pridwin*' (2020) 138 *SALJ* 591 at 592–3; Tom Lowenthal '*AB v Pridwin Preparatory School*: Progress and problems in horizontal human rights law' (2020) 36 *SAJHR* 261 at 265–6; Nurina Ally & Daniel Linde '*AB v Pridwin Preparatory School*: Private school contracts, the Bill of Rights and a missed opportunity' (2021) 11 *Constitutional Court Review* 275 at 281–7. See too Charissa E Fawole 'Making the best of the best interests: A commentary of *AB v Pridwin Preparatory School*' (2022) 38 *SAJHR* 128, which applauds the child-centred approach of Khampepe J's concurrence.

[46] *Eastwood v Shepstone* 1902 TS 294 provides an early instantiation.

[47] See especially *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). The power had also been used to assert control over restraint of trade clauses in, for example, *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

[48] Annél van Aswegen 'The implications of a bill of rights for the law of contract and delict' (1995) 11 *SAJHR* 50 at 65–6. See too Gerhard Lubbe 'Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg' (1990) 1

authoritatively endorsed in leading appellate judgments. The best-known is *Barkhuizen*,[49] in which the Constitutional Court had to decide whether a time-bar clause in a consumer insurance contract was consistent with the right of access to court. Though the court did not uphold the complainant's argument on the scanty facts available to it, its judgment laid down a now-famous principle. Its essence is that it allows courts to invalidate a contract term, or prevent the term's enforcement in particular circumstances, if the term (or its enforcement) implicates constitutional rights or values and does so in a way that is manifestly unreasonable or unfair.[50] This is a far-reaching principle and has been invoked countless times since *Barkhuizen* was decided in 2007.[51] Though its details have been disputed, it remains the centrepiece of our constitutionalised law of contract.[52]

The most frequent factual scenario in which the *Barkhuizen* principle has been invoked is the very same one that arose in *Pridwin*: one party seeks to terminate a contract in reliance upon a widely expressed cancellation clause, and the other party opposes this on the basis that it would be contrary to public policy.[53] It was therefore no surprise when the applicant in *Pridwin* based his case upon *Barkhuizen*, and when that is how it was adjudicated in both lower courts.[54] Four judges of the Constitutional Court, led by Nicholls AJ, adjudicated the case in this same way — albeit that they, unlike the lower courts, substantially upheld the applicant's argument, and would have declared the cancellation clause in the school contract invalid.

The majority of the court reached the same result as the minority,[55] but, in striking contrast, did not apply the *Barkhuizen* principle at all. This was because the majority, per Theron J, drew a sharp distinction

Stellenbosch LR 7; Reinhard Zimmermann 'Good faith and equity' in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217 at 258–60, which anticipated (though not in specifically constitutional terms) that the public policy doctrine would prove significant.

[49] *Barkhuizen* supra note 34. It was in certain respects prefigured by Cameron JA's judgments in *Brisley* supra note 32 and in the *Barkhuizen* litigation itself: *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

[50] *Barkhuizen* supra note 34 paras 51, 56; *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) paras 44–8; *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 (5) SA 247 (CC) para 80.

[51] See Dale Hutchison 'From bona fides to ubuntu: The quest for fairness in the South African law of contract' 2019 *Acta Juridica* 99 and authorities cited there.

[52] Compare *Beadica* supra note 50 para 58.

[53] The cases are listed in Leo Boonzaier 'Contractual fairness at the crossroads' (2021) 11 *Constitutional Court Review* 229 at 268–9.

[54] *AB v Pridwin Preparatory School* [2017] ZAGPJHC 186; *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA).

[55] This requires qualification. Though both judgments substantially agreed with the applicant's arguments, they would have issued different orders. The minority would have invalidated the cancellation clause in the parties'

between 'the claim based on public policy', which is 'contractual in nature', and the claim aimed at enforcing the boys' constitutional rights, which 'flow directly from the Constitution and operate independently from the contract'.[56] 'There is no need to determine the public policy challenge', Theron J explained, because the rights on which the applicant relied were constitutional rather than contractual, and should be adjudicated accordingly, in other words 'by applying section 8(2)'.[57] Put differently, the applicant's claim was 'based on the direct application of constitutional rights to the decision of the school', which meant that the public policy challenge, based upon common-law principles developed in *Barkhuizen*, was 'superfluous'.[58] Theron J accused the minority of being confused, having 'conflated' the *Barkhuizen* principle with the application of the Bill of Rights under s 8.[59]

Though both judgments relied upon notable precedents such as *Juma Musjid*,[60] which explains the duties of schools to respect their pupils' constitutional rights, only the minority sought to integrate these with our common law on the invalidation of contract terms. Theron J, by contrast, deliberately did not do this; as she emphasised, '[t]he challenge being adjudicated is not of a contractual nature'.[61] She therefore applied a distinctive constitutional formula.[62] Having construed the constitutional rights in question, the test to be applied was whether, in the specific circumstances, the school had an 'appropriate justification' for terminating the parent contract — a test she borrowed from *Hoërskool Ermelo*,[63] which was about a school's powers in non-contractual contexts. On the facts, and particularly because the school had failed to consult with the boys, Theron J held that its decision to cancel the parent contract lacked an appropriate justification and set it aside.

(b) Delict

In *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*,[64] which was decided by the Constitutional Court in November 2022, the plaintiff

contract but did not finally resolve the dispute in the applicant's favour, since it regarded it as moot. The majority went further, invalidating the school's decision.

[56] *Pridwin* supra note 44 para 103.

[57] Ibid para 107.

[58] Ibid.

[59] Ibid para 102.

[60] *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC), discussed in *Pridwin* supra note 44 paras 81, 86–7 (Nicholls AJ), 174–7, 198–201 (Theron J).

[61] Ibid para 184.

[62] Ibid paras 196–208.

[63] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC).

[64] 2023 (2) SA 31 (CC).

engineering company sought to hold the defendant municipality liable in delict for failing to award it a tender worth R421 million for the construction of a water pipeline. The municipality had instead awarded the tender to a fraudulent bidder who failed to meet the mandatory minimum criteria specified in the bid document. Esorfranki hoped to recover a sum equivalent to the profit it would have made if it had been awarded the tender, as, by its argument, it lawfully should have been. The key issue was therefore whether those aggrieved by a flawed tender process can hold the state liable in delict for pure economic loss.

This issue has already yielded several closely reasoned judgments. As is well known, our test for wrongfulness was generalised, elastic, and explicitly value-laden well before the constitutional era, especially as a result of the landmark case of *Minister of Police v Ewels*.[65] It was anticipated that this would make our law of delict receptive to the impact of constitutional rights.[66] And so it proved: in the early 2000s, *Carmichele* and *Van Duivenboden* triggered a major expansion of the liability of state defendants for their negligent omissions causing bodily injury.[67] Alongside this, a number of claims were brought to test the bounds of the state's liability for pure economic loss resulting from errant tender processes.[68] On the one hand, the tenderer in this situation has suffered a very large loss as a result of the state's breach of its duties under procurement law: that is the basic case in favour of delictual liability. On the other hand, administrative law already provides a remedy for unlawfulness of this kind; the law of delict is reluctant, for sound historical reasons, to enter the field of pure economic loss; and, if it were to do so here, the cost to the fiscus would be enormous. Hence the potential for appellate disputation. In managing these complex issues, our courts tended to distinguish between claims for out-of-pocket

[65] 1975 (3) SA 590 (A).

[66] D P Visser 'The future of the law of delict' in Annél van Aswegen (ed) *Die Toekoms van die Suid-Afrikaanse Privaatreg* (1994) 26 at 37; Van Aswegen op cit note 48 at 60.

[67] See *Carmichele* supra note 25; *Van Duivenboden* supra note 30; and for discussion François du Bois 'State liability in South Africa: A constitutional remix' (2010) 25 *Tulane European and Civil Law Forum* 139.

[68] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA); *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA); *Minister of Finance & others v Gore NO* 2007 (1) SA 111 (SCA); *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA). These are valuably surveyed in Janice Bleazard, Steven Budlender & Meghan Finn 'Remedies in judicial review proceedings' in Geo Quinot (ed) *Administrative Justice in South Africa: An Introduction* 2 ed (2020) 293 at 323–7. Other well-known appellate judgments such as *Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA), *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA), and *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) involved adjacent issues.

expenses and lost profits, where the relevant considerations are somewhat different.[69] But the rule that had emerged by 2006, in principle applicable to both kinds of loss, was that the state will generally *not* be liable in delict, unless its officials' misconduct was 'fraudulent' or 'deliberately dishonest'.[70]

Esorfranki seemed poised to advance this rich line of case law. It sat nicely on the borderline of the rule just mentioned: though fraud on the part of the successful tenderer had been proved, there was disagreement about whether the evidence established the municipality's complicity. And the rule was itself based upon elusive and shifting policy concerns; it had been expressed qualifiedly in previous cases, and was, as ever, open to refinement. Whether Esorfranki would succeed in showing wrongfulness was thus a matter of difficulty. Its claim also faced formidable problems of causation, since it was not easy for it to prove that, if the tender process had not been afflicted by fraud, Esorfranki would have been the winner. But the right way to adjudicate its claim was clearly, one would think, the law of delict.

Esorfranki conducted its litigation on this assumption. First it had brought review proceedings under the Promotion of Administrative Justice Act[71] ('PAJA') to have the tender process declared unlawful and set aside, which proved successful in August 2012.[72] Then, five weeks later, it instituted a delictual claim to recover its lost profits. That claim failed in the High Court,[73] and Esorfranki's appeal to the Supreme Court of Appeal ('SCA') was dismissed, but by the narrowest of margins.[74] Two judges held that Esorfranki was entitled to succeed in its delictual claim. Two judges held it should fail, because it could not establish wrongfulness, factual causation, or legal causation. One judge affirmed the High Court's view that Esorfranki's claim was, in a crucial respect, res judicata, which precluded a finding of wrongfulness, and that the claim failed in any event for want of legal causation. So, there was a rich set of disagreements, with Esorfranki's appeal failing by a 3:2 majority. But all of the judges located their reasoning within the long line of delict cases.

[69] *Olitzki* ibid paras 28–31; *Steenkamp* ibid paras 80–5 (Langa CJ and O'Regan J dissenting).

[70] Compare *Gore* supra note 68 para 88, and for discussion Chuks Okpaluba 'Bureaucratic bungling, deliberate misconduct and claims for pure economic loss in the tender process' (2014) 26 *SA Merc LJ* 387.

[71] Act 3 of 2000.

[72] This order was made by the Gauteng High Court, Pretoria (Matojane J). Esorfranki then appealed to the SCA, where it won a more far-reaching order that also set aside the resulting tender contract: *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21.

[73] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2018] ZAGPPHC 224 (Makgoka J).

[74] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2022 (2) SA 355 (SCA).

In the Constitutional Court, this suddenly changed. Theron J's unanimous judgment did set out the delictual principles, much as I have described them. But then it takes an unexpected turn. It says that the delictual principles are inapplicable, and that Esorfranki's claim based upon them must inevitably fail. The court held that '[t]he appropriate avenue for a claim for compensation for loss sustained as a result of a breach of the precepts of administrative justice is PAJA', rather than the law of delict.[75] This is because PAJA provides for the payment of compensation in s 8(1), which reads in relevant part:

> 'The court or tribunal, in proceedings for judicial review …, may grant any order that is just and equitable, including orders –
>
> …
>
> *(c)* setting aside the administrative action and –
>
> …
>
> (ii) in exceptional cases –
>
> …
>
> *(bb)* directing the administrator or any other party to the proceedings to pay compensation.'

Parliament has thus given courts the power to award compensation under PAJA, which 'is constitutionally mandated legislation, designed to give effect to [the right to just administrative action] in both substantive and remedial terms'.[76] In Theron J's view, this posed a serious problem for Esorfranki's argument. To find that its claim for compensation was actionable in the common law of delict would 'subvert' and 'bypass' the intended statutory scheme.[77] The principle of subsidiarity, according to which relevant legislation must be respected rather than circumvented, thus 'necessitates the conclusion that pure economic loss sustained' through an unlawful tender process 'is not recoverable in delict'.[78] This meant that Esorfranki's case had to fail without more: it had been litigated in delict, but 'it is both constitutionally impermissible and unnecessary', in the court's view, to apply the common law in the teeth of the legislation.[79]

(c) Unjustified enrichment

When a state contract has been concluded in defiance of procurement law, third parties who have suffered loss as a result have sought a remedy in delict, as we have just seen. However, perhaps the more serious difficulty,

[75] *Esorfranki* supra note 64 para 57.
[76] Ibid para 46.
[77] Ibid paras 46, 49.
[78] Ibid para 50.
[79] Ibid para 57.

which has produced an irruption of recent cases,[80] is what to do about the contract itself. Though the contract is unlawful, and hence liable to be set aside in judicial review proceedings, setting it aside carries a host of problems. One of them is that the judicial review application is often brought by the state itself, which is responsible for the contract's illegality in the first place and is often seeking its invalidation for self-serving reasons.[81] Another problem, more pertinent here, is that the interests of the private party to the agreement need to be protected. This party has usually relied on the contract and provided the services specified in it. And the state has often not paid for them (but has decided to wriggle out of the contract instead). Our courts have laboured, unevenly, to provide the disappointed contractor with some recompense.

Greater Tzaneen Municipality v Bravospan 252 CC,[82] decided by the SCA in the same month that the Constitutional Court decided *Esorfranki*, was a recent dispute of this kind. The municipality had contracted Bravospan to provide security services but had done so without following the legally required competitive bidding process. Hence the contract, as the High Court held in prior proceedings, could not stand.[83] The remaining issue in contention, which found its way to the SCA, was whether and how Bravospan should be compensated for the work it had done in the meantime. There was a seemingly obvious route to a remedy: the law of unjustified enrichment. A main function of this branch of law, after all, is mopping up after a failed contract, where it seeks to ensure (as it says on the tin) that neither party is unjustifiably enriched at the expense of the other. Hence, where one party has provided something of value under an agreement that has turned out to be invalid, it ought to have an enrichment claim against the recipient for its value.[84] This is exactly what the High Court in *Bravospan* had found.[85]

Admittedly, obstacles abound. Our law of unjustified enrichment is notoriously constrained. The condictiones deriving from Roman law still clank their chains, and plaintiffs are obliged to work within narrow

[80] Compare *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) para 111n106, and for discussion Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) 688–95.

[81] See for recent discussion Geo Quinot 'The conundrum of self-review — Sanctioning parallel systems of administrative law' (2020) 66 *Loyola LR* 523; Hoexter & Penfold ibid.

[82] [2022] ZASCA 155 ('*Bravospan* (SCA)').

[83] *Greater Tzaneen Municipality v Bravospan 252 CC* [2016] ZALMPPHC 17 (Mokgohloa J).

[84] Compare *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) para 20.

[85] *Bravospan 252 CC v Greater Tzaneen Municipality* [2021] ZALMPPHC 3 (Makgoba JP) ('*Bravospan* (HC)').

ambits.[86] These constraints were highly relevant in *Bravospan*, since our law's unwillingness to provide restitution for services rendered (as opposed to money or property transferred) is a particularly glaring deficiency.[87] The High Court, in finding for the plaintiff, showed no awareness of this.[88] But a more scrupulous court would have had to confront the current state of the authorities, and, in order to find for Bravospan, justify their liberalisation. Fortunately, the court would have received much assistance in doing so. The traditional approach is widely regarded as unsatisfactory; for more than fifty years, academics have argued clamantly for a general enrichment action, which would allow our law to transcend the formal limitations of the old condictiones.[89] In *McCarthy Retail Ltd v Shortdistance Carriers CC*,[90] decided in 2001, the SCA accepted that our law had not yet recognised an action of this kind.[91] But it also said that *Nortje v Pool NO*,[92] the highly controversial authority usually taken to stand in the way of such an action, was 'clearly wrong', and indicated that, when the right case arose, a truly general enrichment action should be brought into being.[93] Moreover, the SCA strongly endorsed the progressive widening of the forms of action, which had already been happening for several decades, notwithstanding *Nortje*.[94] In fact, the Appellate Division had, in 1994, approved a process of abstraction from the existing causes of action in order to expand the scope of recovery.[95] This being so, the viability of a general enrichment action may in truth be a distraction. What matters is that our law of enrichment has been steadily developing so as to afford a remedy in wider and wider circumstances — and that it is universally agreed, by both courts and academics, that this process ought to continue.[96] Indeed, our High Courts had, in two cases, already granted an enrichment

[86] See for discussion J E du Plessis *The South African Law of Unjustified Enrichment* (2012) 1–4, 60–1; Helen Scott *Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer* (2013) 4–7.

[87] D P Visser *Unjustified Enrichment* (2008) 265–8; Du Plessis ibid at 63–5. See also Bleazard, Budlender & Finn op cit note 68 at 320–32.

[88] It quoted a single sentence from a 1946 judgment (which, for reasons that should be obvious from my discussion in this paragraph, is plainly out of date): *Bravospan* (HC) supra note 85 para 20.

[89] The foundational authority is Wouter de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1958) ch 5. See too Visser op cit note 87 at 46–54; Du Plessis op cit note 86 at 1–10.

[90] 2001 (3) SA 482 (SCA).

[91] Ibid para 8.

[92] 1966 (3) SA 96 (A).

[93] *McCarthy Retail* supra note 90 paras 9–10.

[94] Ibid para 8.

[95] *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A).

[96] See, in addition to the sources already cited, Jan-Louis Serfontein 'What is wrong with modern unjustified enrichment law in South Africa?' (2015) 48 *De Jure* 388; Robin Evans-Jones & Martin Fischer 'Unjustified enrichment's

claim for the value of the plaintiff's services on facts materially identical to *Bravospan*'s.[97]

So, if Bravospan was struggling to make out a right to restitution, there was ample scope for the SCA to develop the law of unjustified enrichment in order to help it. The Bill of Rights (which was not discussed in *McCarthy Retail*) might have provided a further impetus.[98] After all, our courts have recognised that, where constitutional rights are infringed, it is imperative that the law provide a remedy;[99] and a party's right to restitution of money paid (if not yet services rendered) is indeed constitutionally protected, under s 25(1).[100] Moreover, where the plaintiff is out of pocket and in a pickle as a result of the state's failure to comply with procurement law, as in *Bravospan*, constitutional principles of state accountability and good governance strengthen the case for a remedy still further, just as they already have in the law of delict.[101] In short, the facts of *Bravospan* cried out for a remedy — and so much the better if, in crafting it, the SCA had provided the law of unjustified enrichment with its long-anticipated *Ewels* moment.[102]

But the SCA, when it heard the defendant's appeal, forsook any development of this kind. Though Molefe AJA rejected the defendant's points in limine and reached the merits of the plaintiff's enrichment claim, she swiftly stopped it in its tracks. This was because 'South Africa is yet to recognise a general claim for unjustified enrichment'.[103] This proposition was settled, according to the SCA, by *Nortje* and *McCarthy Retail*, and goes back to Roman law. For this reason alone, which Molefe AJA did little to elaborate, the High Court's order granting Bravospan's claim for unjustified enrichment 'was therefore not sustainable in law'.[104]

That, then, was the beginning and end of the enrichment claim. But the plaintiff nevertheless succeeded, on a different basis. Molefe AJA said

evolution in mixed legal systems: Confronting *McCarthy Retail Ltd*' (2019) *Acta Juridica* 395 at 415–17.

[97] *Mangaung Metropolitan Municipality v Maluti Plant Hire* [2017] ZAFSHC 55; *Rural Maintenance (Pty) Ltd v Maluti-a-Phofong Local Municipality* [2019] ZAFSHC 186. See also *Special New Fruit Licensing Ltd v Colours Fruit (SA) (Pty) Ltd* [2019] ZAWCHC 83, where the court entertained a claim grounded upon a general enrichment action, but found it was not made out on the facts. See for discussion Bleazard, Budlender & Finn op cit note 68 at 331.

[98] Compare Helen Scott 'Transforming the South African law of unjustified enrichment' (2017) 25 *Restitution LR* 29 at 30–1.

[99] *Fose* supra note 10 para 69.

[100] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC).

[101] *Van Duivenboden* supra note 30 para 20. Scott's discussion of the restitution of unlawfully levied tax is also suggestive: op cit note 98 at 33–5.

[102] Compare the discussion at note 65 above.

[103] *Bravospan* (SCA) supra note 82 para 15.

[104] Ibid.

'it would be manifestly unjust for Bravospan to be afforded no compensation for the services rendered to the municipality' and decided that the Constitution afforded its own power by which a remedy might be provided.[105] This is contained in s 172(1)*(b)* of the Constitution, which empowers a court, once it has declared certain law or conduct to be constitutionally invalid, to 'make any order that is just and equitable'. Section 172 seems most at home in the context of the judicial review of legislative and executive action.[106] But, as the reach of the Constitution has been progressively expanded since 1996, so s 172 has been pressed into service across a wide range of problems.[107] The breadth and flexibility of this power has been insisted upon many times.[108] And it had been used to provide restitution after a failed government contract well before *Bravospan*. In *AllPay (No 2)*,[109] the Constitutional Court held that one of the incidents of its famous 'corrective principle', which it applied to remedy an irregular tender process, is that the law must 'ensure that neither contracting party unduly benefits from what has already been performed'.[110] And in *SITA*

[105] Ibid para 16.

[106] The provision is an adaptation of s 98(5) of the interim Constitution, which set out the powers of the Constitutional Court once it had declared a law to be unconstitutional. It therefore derives from a time when the Bill of Rights was expected to apply only (or mostly) vertically, and the Constitutional Court's jurisdiction was limited. Though certain changes were made to the final version, paras *(b)*(i) and (ii) continue to betray s 172's origins in the judicial review of legislation. In the context of the common law, s 172 was meant to apply in conjunction with s 8(3), rather than as a standalone remedial power: Cheadle op cit note 8 at 3-12.

[107] The fact that s 172(1) is seemingly obviously limited to instances where the court has made a declaration of constitutional invalidity was dispensed with in *Hoërskool Ermelo* supra note 63 para 97; *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* 2010 (5) BCLR 422 (CC) para 32. *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) is another important waymark, for reasons discussed in Michael Dafel 'The directly enforceable constitution: Political parties and the horizontal application of the Bill of Rights' (2015) 31 *SAJHR* 56. The Constitutional Court now describes the provision as 'the primary constitutional memorial of a court's remedial powers': *Mphephu-Ramabulana v Mphephu* 2022 (1) BCLR 20 (CC) para 66.

[108] *Electoral Commission v Mhlope* 2016 (8) BCLR 987 (CC) para 132; *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) para 211. See too *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) paras 81–5, discussing the remedial power in s 8 of PAJA, which is similar (and sometimes understood as the statutory counterpart) to s 172 of the Constitution.

[109] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC).

[110] Ibid para 67n47. In *AllPay (No 2)* itself, however, the use to which the court put the principle was unusual: compare the discussion in *Special Investigating Unit v Phomella Property Investments (Pty) Ltd* 2023 (5) SA 601 (SCA).

v Gijima,[111] the court in fact used this constitutional power to improvise a remedial entitlement on the part of the aggrieved service provider. It specified that its order declaring the procurement contract invalid 'does not have the effect of divesting the [provider] of any rights it would have been entitled to under the contract, but for the declaration', which seems to have been a tortured way of saying that the provider was entitled to be paid for its services.[112] The remedy the SCA ordered in *Bravospan* was substantially the same, though more straightforwardly expressed: the court 'declared that the plaintiff is entitled to compensation for the services rendered to the [defendant]' in terms of their invalid agreement.[113]

Bravospan was therefore illustrative but not unique. It exemplifies a trend that began several years prior, particularly in judgments of the Constitutional Court, on which Molefe AJA relied.[114] But *Bravospan* is unusual in at least one respect: the unjustified enrichment claim was strongly argued, and indeed the High Court had upheld it. In previous cases, the law of unjustified enrichment was omitted without discussion in favour of s 172.[115] In *Bravospan*, by contrast, an enrichment claim was placed front and centre by the parties, as well as by the lower court. The SCA nevertheless decided, mindfully and with reason, to reject it. The case therefore provides a prominent capstone to the courts' refusal to rely upon the law of enrichment, in favour of a distinctively constitutional mechanism.

IV DISCUSSION

These three cases exhibit a pattern. In each of them, there was an available set of well-developed common-law principles, which the court spurned as inapplicable. In their place, the court adjudicated the case according to a relatively novel mechanism that it sourced in the Constitution. It is, of course, integral to this article that this pattern is significant and worthy of attention. Yet courts must often choose between two or more competing methods by which to resolve the case before them. The tussle between direct and indirect horizontal application, which re-emerged in *Pridwin*, is age-old. The principle that statutes must take precedence over the common law, which Theron J invoked in *Esorfranki*, is surely valid. And cases such as *Bravospan* sit on the borderline of contract law and public

[111] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

[112] Ibid paras 52–4 and para 3(b) of the order.

[113] *Bravospan* (SCA) supra note 82 para 23 and para 2(a) of the order.

[114] Ibid paras 17–20.

[115] But see *Shabangu v Land and Agricultural Development Bank of South Africa* 2020 (1) SA 305 (CC) paras 26–8, where Froneman J gnomically acknowledged 'some kind of overlap' between an unjustified enrichment claim and *AllPay*'s corrective principle based on s 172, but applied the latter.

law: the SCA surely had no choice but to choose one source of remedy, rather than the other. Is it fair, then, to regard the choices made in these three cases, despite their differences, as part of a concerted trend, which usefully tells us about judicial attitudes towards the common law? I believe it is fair, and the burden of this part is to show why.

(a) Preliminaries

I start with some ground-clearing. The common-law avoidance in these three cases was not innocuous, I argue, nor was it compelled by the legal materials. We therefore need to explain the trend with reference to deeper factors. There is a lot going on in these three judgments, however, and my treatment of them will be selective.

To begin with, it is worth emphasising that the key moves in these judgments were very surprising. In my account of each of them, I showed there was a rich vein of case law, which began before the constitutional era and underwent major developments during it, and within whose parameters the case fell squarely. Yet the judgments wilfully disregarded it. This is made more striking by the fact that the lower courts had, in all three cases, adjudicated the matter by applying it. Usually, one would expect an appellate or super-appellate court to be wary of radically reconceptualising the issues that had been argued and adjudicated in the preceding stages of the litigation.[116] In these three cases, however, the ultimate tribunal did just that, blazing a trail that the lower courts had not considered. In *Esorfranki*, this would have come as a particular surprise to the parties themselves, since the decisional basis of the judgment was unheralded by their written submissions[117] and not raised by the Constitutional Court's judges at the oral hearing.[118] The plaintiff would have had its first glimmering of the court's fatal objection to their claim, it seems, only when the judgment appeared.[119] Certainly the defendant never took the point on which the case was decided, namely that the delictual cause of action had been ousted altogether by statute. In *Bravospan*, too, the defendant cast no doubt on the

[116] Compare *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 51–2.

[117] The parties' submissions are publicly available on the Constitutional Court's website. They say next to nothing about PAJA. Both parties persist, as one might expect, in debating the meaning and application of judgments such as *Steenkamp* and *Gore* supra note 68. The defendant municipality's only substantial point, in both written and oral argument, was that fraud or dishonesty on the part of its officials was never proved.

[118] A recording of the hearing is available on YouTube.

[119] Naturally, the public record of the proceedings may be imperfect. For example, it is conceivable that the court asked for further written submissions from the parties about this issue after the hearing. But one would expect that to be mentioned in the judgment.

applicability of unjustified enrichment; that this branch of law was a non-starter was a notion apparently raised by the SCA mero motu.[120] This was despite the fact that two earlier High Court judgments, which the SCA nowhere mentions, had reached the opposite conclusion.[121]

Sometimes a court does something unexpected but ultimately persuasive. Indeed, one hopes the appeal process will sharpen the issues in a case, allowing our highest courts to perceive the true stakes in a way the lower courts did not.[122] But that does not aptly describe these three judgments, whose key moves are puzzling. For example, *Pridwin* asserts a dichotomy between a contractual claim, which relies upon the common-law doctrine of public policy, and a constitutional claim, which relies upon the Bill of Rights. The judgment insists that, because the applicant's claim is best characterised as the latter, it cannot be the former. But Theron J's assertion of this strict dichotomy plainly defies, without explanation, the central premise of *Pharmaceutical Manufacturers*.[123] Even on its own terms, moreover, the dichotomy makes little sense.[124] As Finn puts it, the court's reasoning 'conflates … the *origin* of the right in question', namely the Bill of Rights, 'with the mechanism for *how* those rights are to be given expression'.[125] '[I]t is entirely possible', she continues, 'for a right to be sourced in the Constitution, but be given effect in the common law.'[126] Indeed, that is exactly what had happened in *Barkhuizen*. The applicant sought to restrain the exercise of a contractual power, using the common-law public-policy doctrine, on the basis that the exercise of the power would violate his constitutional right of access to court.[127] The court adjudicated the case accordingly.[128] It plainly saw no difficulty in

[120] According to the SCA itself, '[t]he municipality raised only two issues on appeal', namely that the enrichment claim failed to comply with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 or, alternatively, that it had prescribed: *Bravospan* (SCA) supra note 82 para 8.

[121] See again note 97.

[122] Compare *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 67.

[123] Finn op cit note 45 at 599–600. And see Alistair Price 'Contractual fairness: Conflict resolved?' 2021 *Acta Juridica* 321 at 340–1.

[124] Its deficiencies have been widely documented: Finn op cit note 45 at 600–1; Michael Bishop & Jason Brickhill 'Constitutional law' (2020) 1 *Yearbook of South African Law* 227 at 302–4; Boonzaier op cit note 53 at 269–71; Ally & Linde op cit note 45 at 292–3; I M Rautenbach 'Constitution and contract: Indirect and direct application of the Bill of Rights on the same day and the meaning of "in terms of law"' 2021 *TSAR* 379 at 391; Cheadle op cite note 8 at 3-9n35b, 3-19, 3-22.

[125] Finn op cit note 45 at 600 (emphasis in the original).

[126] Ibid.

[127] Section 34 of the Constitution.

[128] *Barkhuizen* supra note 34 paras 45–67. The court discusses its jurisprudence on s 34 at length, especially *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), and holds that an infringement of this right (relevantly, by a contract) is contrary to public policy only if it is unreasonable or unfair in the circumstances.

marrying an argument sourced in a constitutional right with a common-law mechanism for giving effect to it.

Theron J's reasoning in *Esorfranki* fares only slightly better. Her key justification for displacing the law of delict with the provisions of PAJA is what she calls 'the principle of subsidiarity', according to which a litigant may not bypass relevant legislation and rely directly on the common law.[129] The principle itself is indisputably sound; it follows from the elementary feature of our legal system that legislation trumps the common law.[130] But Theron J's use of it is highly suspect. The basic question to be asked, before the legislation bites, is whether it sought to displace the common law on the matter in question. It is highly doubtful, however, that this was s 8(1)*(c)*(ii)*(bb)*'s intention. The provision is famously obscure, buried deep in PAJA's remedial provisions.[131] It says it applies only 'exceptional[ly]'. Other systems of statutory compensation expressly oust the common law; where they do not, as in the case of s 8(1)*(c)*(ii)*(bb)*, the presumption of interpretation is that the common law is preserved.[132] Understandably, therefore, academic writers widely assumed that s 8 and the law of delict would co-exist;[133] and several cases very similar to *Esorfranki* were adjudicated, as I said earlier, in terms of the law of delict.[134] In some of them, the continued applicability of the law of delict, despite s 8, was

[129] *Esorfranki* supra note 64 paras 45–50, citing inter alia the detailed discussion of the principle in the minority judgment in *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC).

[130] The more difficult aspect of the principle of subsidiarity, which produced the division in *My Vote Counts* ibid, is whether a litigant may bypass legislation in order to rely directly upon a constitutional right. Fortunately for us, this issue is not relevant here.

[131] It was excerpted in part III(b) above.

[132] See Alistair Price 'State liability and accountability' 2015 *Acta Juridica* 313 at 322–3 and authorities cited there. Of course, it is in a certain sense true that PAJA has been held to 'codify' and therefore oust the common law: see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 22, 25 (which Theron J cites in *Esorfranki* supra note 64 para 45n65). But what PAJA codifies is the common law of judicial review of administrative action. To assume, as Theron J does, that it thereby also ousts the common law of delict is to beg the question.

[133] Price defends this view explicitly (ibid at 323). A similar approach is at least tacit in, for example, Bleazard, Budlender & Finn op cit note 68 at 327–30; Hoexter & Penfold op cit note 80 at 817–25.

[134] See again the 'tender cases' cited above at note 69. Indeed, if it is really true, as Theron J says at para 57, that PAJA is the appropriate avenue for any 'claim for compensation for loss sustained as a result of a breach of the precepts of administrative justice' — a wider way of expressing the principle — then a slew of further judgments adjudicated in the law of delict were also barking up the wrong tree.

endorsed explicitly.[135] Indeed, in *Simcha Trust v De Jong*,[136] a leading 2015 case in which the plaintiff had sought compensation in reliance on PAJA instead of delict, the SCA unanimously said this:

> 'When counsel on behalf of [the plaintiff] was asked why it did not pursue a delictual remedy, he surprisingly, but without much conviction, submitted that it could be deduced that s 8(1)*(c)*(ii) had the effect of displacing that remedy. I do not intend to engage with that contention, save to say that it is entirely without merit.'[137]

Thus *Esorfranki*, at its pivotal moment, endorses a claim which, according to our thitherto leading judgment, is 'entirely without merit'.[138]

To be fair, Theron J did offer an additional justification, which is perhaps where our focus should fall. She said the law of delict had to be ousted in order to avoid 'two parallel systems of law'[139] — the very admonition I discussed earlier, drawn from *Pharmaceutical Manufacturers*. This explanation cannot be dismissed out of hand. The co-existence of s 8(1)*(c)*(ii)*(bb)* of PAJA and the delictual remedies had undoubtedly been uneasy. The respective roles of each, and the interplay between them, were subjects of much speculation.[140] The same was true, also, of the co-existence of s 172's emergent right to recover the value of services performed under an unlawful procurement contract, on the one hand, and the ancient principles of unjustified enrichment, on the other hand,

[135] See, for example, *De Jong v Trustees of the Simcha Trust* 2014 (4) SA 73 (WCC) para 25, which was for some time the most considered judicial discussion of the point.

[136] 2015 (4) SA 229 (SCA).

[137] Ibid para 32.

[138] As in *Pridwin*, however, Theron J does not own up to the fact that her approach is unprecedented. She does not mention this passage of *Simcha Trust* (but does cite a different point from it at para 55). Rather, she suggests that the matter had been left open in our law, because 'PAJA was not in force at the time that the claim for damages was instituted in *Steenkamp*' (*Esorfranki* supra note 64 para 44), which is the foundational Constitutional Court judgment on this issue (and was cited above at note 68). She takes up Sachs J's suggestion in *Steenkamp* that, once PAJA does come into force, its remedies should be taken to 'cover the field', thus ousting the law of delict (paras 99–101). Sachs J's view might have its attractions, but Theron J's revival of it in *Esorfranki* is odd — not only because it fails to address judgments such as *Simcha Trust*, which long post-date PAJA, but also because Sachs J's judgment did not carry the support of any of his colleagues. The majority's view on the interaction between delict and PAJA, expressed by Moseneke DCJ at para 30, was that 'the remedies envisaged by section 8 are in the main of a public law and not private law character', and thus 'attract different considerations'; the availability of a remedy in the law of delict therefore had to be assessed on its own terms, unaffected by PAJA. It was in part because of this passage of *Steenkamp* that the co-existence of s 8 and the law of delict came to be widely assumed.

[139] *Esorfranki* supra note 64 para 46.

[140] See again the authorities cited at note 133.

which came to a head in *Bravospan*. The overlap was messy, and some prior judgments had drawn eclectically upon both.[141] Hence, there was a case to be made in favour of unification.

Does this not mean, then, that the courts' professed desire to avoid parallelism can be taken at face value? I doubt it, for reasons that will emerge throughout the remainder of this article. For now, notice two puzzles that it raises. The first is that the court has, in adjacent contexts, flagrantly subverted PAJA, despite deafening academic and judicial criticism.[142] By constructing its own 'principle of legality', sourced in s 1*(c)* of the Constitution, it can review exercises of public power on substantially the same grounds as PAJA, but without having to deal conscientiously with the legislation's detailed and difficult provisions. In this respect, the court's willingness to circumvent PAJA by enacting its own principles of review in parallel to it is, if anything, becoming more brazen.[143] The second puzzle is similar, and already obvious. It is that Theron J's judgment in *Pridwin* avowedly produced parallelism rather than avoided it. She chose to craft a new way of testing the constitutionality of purported contractual cancellations, which now operates alongside the old one, and aggravated the bifurcation by leaving their respective spheres of operations mysterious.[144] The point here is not to make a glib accusation of hypocrisy. It is only to say that these two related puzzles make it hard to take *Esorfranki*'s proclaimed deference to PAJA, and its stated aversion to parallelism, at face value. One would like to know why the court insists on these principles only in some contexts, and not others. Once again, therefore, a deeper explanation is needed.

[141] See, for example, *AllPay (No 2)* supra note 109 para 29 and footnote 47, which bases itself primarily upon the remedial provisions of the Constitution but notes an analogy with the law of enrichment; *Shabangu* supra note 115; and *Bravospan* (HC) supra note 85 paras 20–1.

[142] The criticism is now decades-old, but for relatively recent examples see Radley Henrico 'Subverting the Promotion of Administrative Justice Act in judicial review: The cause of much uncertainty in South African administrative law' 2018 *TSAR* 288; Quinot op cit note 81 at 546–51; Hoexter & Penfold op cit note 80 at 168–78. Judges have taken notice of the problem in, for example, *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) paras 33–9 (Cachalia JA); *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) para 37 (Froneman J).

[143] See for example *Electronic Media Network Ltd v e.tv (Pty) Ltd* 2017 (9) BCLR 1108 (CC) and *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* 2023 (1) SA 1 (CC), both of which failed to apply PAJA despite its (at least arguable) applicability and ignored the criticisms of this approach. See also *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 (4) SA 1 (CC) para 114, where the court offered a risible defence of its past acts of PAJA-avoidance.

[144] *Pridwin* supra note 44 para 130.

Let us return, then, to the judgment in *Pridwin*, where Theron J offers a quite different justification for her act of common-law avoidance. As we saw, she says that her approach, which breaks with the public-policy doctrine deployed in *Barkhuizen* and sets up an alternative cause of action in parallel, is entailed by s 8(2) of the Constitution.[145] She is quite right that the majority in *Barkhuizen* based itself upon s 39(2) of the Constitution,[146] whereas the applicant in *Pridwin* used s 8(2). And it is also true that *Barkhuizen*'s choice in this regard was problematic. The most lasting criticism, attributable to Stu Woolman, was mentioned in part II.[147] It is that *Barkhuizen* exemplifies a general over-reliance on s 39(2) which has had negative implications for judicial reasoning. Whereas s 8 demands that courts give rigorous content to constitutional rights, s 39(2) refers to relatively amorphous values.[148] The effect of using the latter is therefore that the duties imposed by the Bill of Rights are left flaccid and indeterminate. Theron J endorses these criticisms in *Pridwin* and concludes on the basis of them that '[t]his Court should not avoid direct horizontal application' — in other words application via s 8(2) — 'where it appears to be the most appropriate means of resolving a constitutional dispute'.[149] Relying upon s 8 is what she then does, of course, and some commentators have welcomed this as a helpful reorientation.[150]

Maybe it is. But it is also a basic error to think, as Theron J does, that the switch to s 8 justified a circumvention of the existing common-law rules. Section 8, no less than s 39(2), requires an approach mediated by the common law, in which courts do not concoct parallel remedies when a perfectly adequate one exists already. And the drawbacks of over-relying upon s 39(2) in no way affect this. That courts should develop rigorous rights-content does nothing to diminish the fact that, having done so, they should then 'apply, or if necessary, develop, the common law' to give effect to it. That is what s 8(3) instructs, and what judgments such as *Khumalo v Holomisa* affirmed.[151] In *Pridwin*, this meant channelling the Bill of Rights through the law of contract's existing mechanisms,[152] which is what the minority did. The majority, by contrast, threw the baby out with the bathwater. It thought that, by substituting s 39(2) with s 8(2), it thereby also had to substitute the existing common-law doctrine with a

[145] See notes 61–2 above.
[146] *Barkhuizen* supra note 34 paras 23–30, 35–6.
[147] Woolman op cit note 36.
[148] Or, more precisely, to the 'spirit, purport and objects' of the Bill: see text at note 4.
[149] *Pridwin* supra note 44 para 130.
[150] Lowenthal op cit note 45 at 273; Bishop & Brickhill op cit note 124 at 302–3.
[151] Supra note 37.
[152] See for fuller discussion Ally & Linde op cit note 45 at 287–99.

new, purely 'constitutional' mechanism. But the inference is fallacious, and *Pridwin* therefore breaks with the mediated approach quite wrongly.

(b) Conservatism and the common law

Despite the involved discussion in part IV(a), its ambitions were modest. It tried to give a flavour of the quality of the courts' reasoning, or lack thereof, in order to suggest that we should look beyond it. The judges' stated reasons for avoiding the common law are far from convincing. Their choice to do it seems, therefore, to have a different driving force. With the ground-clearing now complete, we can develop a more convincing explanation of what that is. And *Pridwin*, I suggest, despite the fallacies in its reasoning, helps to point us in the direction of it.

For there is admittedly some further context to consider, which I have glossed over thus far. The further context is that some participants in the debate load the choice between methodologies of horizontal application with much higher ideological stakes than I did in part IV(a). This featured at a pivotal moment in Theron J's judgment. She relied upon extra-curial writings by one former justice of the Constitutional Court, Dikgang Moseneke, and by one incumbent, Mbuyiseli Madlanga,[153] who concurred in her judgment in *Pridwin* and was centrally involved in the court's preceding decisions foregrounding s 8(2).[154] Both cast aspersions on the courts' neglect of s 8(2) and (3) and concomitant retreat to s 39(2), which they present as a failure to take the horizontal application of the 1996 Bill of Rights sufficiently seriously.[155] The purpose of s 8(2), after all, was precisely to strengthen horizontal application.[156] Under the interim Constitution, which contained only the precursor to s 39(2), horizontal application had been held to be impermissible, or at any rate fairly limited.[157] Against this background, s 8(2) sought to put the matter beyond doubt: to show that the final Constitution unquestionably went further. And if courts now fail to use that section, but instead retreat to s 39(2), they are failing to fulfil the Constitution's clear mandate. Or so the

[153] Dikgang Moseneke 'Transformative constitutionalism: Its implications for the law of contract' (2009) 20 *Stellenbosch LR* 1; Mbuyiseli Madlanga 'The human rights duties of companies and other private actors in South Africa' (2018) 29 *Stellenbosch LR* 359.

[154] In particular, he authored *Daniels v Scribante* 2017 (4) SA 341 (CC), perhaps the foundational judgment to re-emphasise s 8.

[155] Related views have been expressed in the past by other Constitutional Court judges: J C Froneman 'Legal reasoning and legal culture: Our "vision" of law' (2005) 16 *Stellenbosch LR* 3 at 11–12. But Madlanga's recent criticism is far more severe than both Moseneke's, which sets out the available views without adjudicating between them, and Froneman's, which is expressly diffident.

[156] Compare notes 2–4 above.

[157] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

argument goes.[158] Theron J takes it up in *Pridwin*, saying that it helps to justify her robust use of s 8(2), and to distance herself from the alternative approach, favoured in *Barkhuizen* and (in a different form) by the *Pridwin* minority, who channelled their constitutional argument through the common law of contract.[159] The passage in which she offers this justification has a recurring theme. Section 8(2), she says, has a 'transformative purpose'.[160] It has 'transformative aims'.[161] It embodies, she says twice, a 'transformative mission'.[162] It recognises 'demands for transformation' of private relations.[163] It is part and parcel of the Constitution's 'transformative project'.[164] It contains a 'transformative injunction'.[165]

This passage of Theron J's judgment, though not remarkable for its subtlety, does help to put a clear hypothesis on the table: the court has broken with the mediated approach because doing so is, in its view, more 'transformative'. To be sure, this aspect of Theron J's reasoning does nothing to address the fallacy I discussed in part IV(a). Whereas her judgment might help to remind us that over-relying on s 39(2) is anti-transformative *in the sense that Woolman identified*, namely that it allows courts to avoid developing rigorous rights content, it does nothing to show that it is anti-transformative to channel constitutional rights, once they have been robustly developed using s 8(2), *through the existing common law.* Assessed as an attempt to demonstrate the perils of the mediated approach, in other words, this passage of *Pridwin* falls flat. Yet, there are important

[158] Madlanga's version of it is highly contestable. A crucial step in his criticism is to imply that those who prefer s 39(2) over s 8(2) do so because they want to insulate private actors from constitutional duties altogether: Madlanga op cit note 153 at 366–8. This association may have contained a half-truth at the time of *Du Plessis* supra note 157, for the reasons Madlanga gives, but it is misconceived when applied today. It accounts poorly for what the court itself was doing in cases such as *Carmichele* and *Barkhuizen*, which, whatever their faults, were clearly using s 39(2) to extend the reach of the Bill of Rights, including (in the case of *Barkhuizen*) the duties of private actors. It also accounts poorly for the fact that, on the approach that has been orthodox in our jurisprudence since 2001 (discussed above at note 39), s 39(2) triggers a constitutional development of the common law even where s 8(2) does not (namely where no constitutional right is infringed but there is nevertheless a shortfall in the common law's conformity to constitutional values), and thus widens rather than tempers the Bill's impact. And it fails to account, finally, for the range of academic writers who expressly deny that horizontal application via s 39(2) would be less progressive than under s 8, such as Van der Walt op cit note 22 and Roederer op cit note 40. These views may be wrong, but it is unhelpful to misrepresent them.

[159] *Pridwin* supra note 44 paras 118–31.

[160] Ibid para 120.

[161] Ibid para 121.

[162] Ibid paras 127, 129, quoting Moseneke op cit note 153 at 12.

[163] Ibid para 131.

[164] Ibid para 128, quoting Moseneke op cit note 153 at 7.

[165] Ibid para 121, quoting Madlanga op cit note 153 at 368.

reasons to attend to it even so. For it is possible for a conclusion to be true even if the argument given for it is unsound. Moreover, it is possible for the judges' belief in its truth, even if mistaken, to have real effects on their decisions. This passage of *Pridwin* raises both possibilities.

So then: is the mediated approach too conservative? The majority in *Pridwin* said so almost expressly, as we have just seen, seeking to justify its common-law avoidant conclusion on the basis that it was more transformative than the old. Other judges of the Constitutional Court have since endorsed these sentiments.[166] And the SCA in *Bravospan*, from a different perspective, implied something similar, now outside the context of horizontal application. The purpose of its discussion of *Nortje* and *McCarthy Retail* was to show that the law of unjustified enrichment was too static and inflexible to respond to the urgent need for a remedy, thus clearing the way for a different solution based directly upon s 172 of the Constitution.[167] *Pridwin* and *Bravospan* thus trade upon a familiar thought: remaining faithful to the common law amounts to a defence of the status quo, which will prevent or temper the project of constitutional transformation; to take that project seriously, by contrast, requires us to appeal to the Constitution directly, untrammelled.

Much has been written about the supposed rivalry between the common law and the Constitution, and I have no desire to rehash it. I make only a few observations. First, to say that the common law is necessarily conservative risks various oversimplifications. It is true there is a certain stereotype, deriving mostly from the seventeenth and eighteenth centuries, according to which scholars of the common law think its rules are primordial and timeless.[168] One still sees this stereotype wheeled out in South Africa — usually by hostile critics, seeking a quick way to dismiss some or other opponent as a brainless defender of the status quo. Their doing so is made easier by our common law's history. Many of its rules can be traced back to

[166] In *King NO v De Jager* 2021 (4) SA 1 (CC), Victor AJ, writing in support of the majority, embraces the idea that a commitment to 'transformation' requires the use of 'direct application' under s 8(2), and relies upon *Pridwin*, whose logic she substantially repeats. The case is an interesting counterpart to *Pridwin*, since it involved the question whether (and how) the doctrine of public policy should be used to test the constitutionality of terms in a testamentary trust. Mhlantla J's minority judgment applies that doctrine in terms of s 39(2), and para 47 can be read as a riposte to the majority's tendentious account of what transformation requires: she writes that developing the common law is what '*true* fidelity to the ethos of the transformative constitutional project' requires (emphasis supplied).

[167] See again text at notes 103–105 above.

[168] See for discussion Gerald J Postema 'Classical common law jurisprudence (Part I)' (2002) 2 *Oxford University Commonwealth LJ* 155. As Postema's discussion shows, the subtlety of even these classical views should not be underestimated. But one can at least see their connection with a now-unattractive view of the common law as a body of ancient rules that judges do not themselves create.

ancient Rome; others, to eighteenth-century Holland or nineteenth-century England. One may be tempted to paraphrase Holmes, who wrote 'it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV'.[169] In addition, the roots of our common law are undeniably colonial. For those seeking to present themselves as agents of change in the era of post-apartheid, then, the opportunities for lampooning our common law are abundant. But the caricatures should not be taken too seriously (nor should it be forgotten that Holmes saw the common-law method as the solution to his problem, not the cause).[170] For in truth the common law's most striking feature, as the best modern theorists have emphasised, is not its fixity but its 'special revisability'.[171] The most celebrated common-law judges all over the world — Atkin, Cardozo, Denning — are celebrated not for resisting change but for driving it forward. Every system, including South Africa's, has its canonical quotations about the need to ensure the common law's constant renewal.[172] And so on.

Indeed, thinking of the common law simply as a stock of first-order rules — in other words, rules that determine the parties' rights and duties — is liable to mislead. True, it does contain first-order rules, but it also contains *second-order* rules, which govern the way in which the first-order rules are refined and replaced. Certainly, once one reaches the SCA or Constitutional Court level, each and every pre-constitutional precedent is capable of being overruled, if the case for doing so is made convincingly.[173] But the second-order rules give scope for judicial creativity that goes far beyond this. They also include the power to distinguish, which is enjoyed by all courts all of the time, as well as more subtle processes of analogical reasoning. Hence, far from providing an immutable set of prescriptions, the common law provides a framework within which to make new rules, and to revise and discard the old. This gives judges a remarkable amount of power to make law, and always has. The Constitution has now enhanced

[169] Oliver Wendell Holmes 'The path of the law' (1897) 10 *Harvard LR* 457 at 469.

[170] Hence his book-length application of the common-law method in *The Common Law* (1881).

[171] Joseph Raz 'Law and value in adjudication' in his *The Authority of Law* (1979) 175. See also Frederick Schauer 'Is the common law law?' (1989) 77 *California LR* 455.

[172] *Blower v Noorden* 1909 TS 890 at 905; *O'Callaghan NO v Chaplin* 1927 AD 310 at 327; *Pearl Assurance Co v Union Government* [1934] AC 570 at 579.

[173] Our doctrine of stare decisis has always been less constraining than in comparable jurisdictions, in particular because horizontal precedent is only qualifiedly, rather than absolutely, binding: see H R Hahlo & Ellison Kahn *The South African Legal System and Its Background* (1968) ch VII. In the constitutional era, this means the SCA can overrule its own precedents (or those of the Appellate Division) if they are clearly wrong. The Constitutional Court can of course do the same.

this power by imposing a duty upon judges to exercise it.[174] This is one way, among others, in which the common law's second-order rules have been revised in the constitutional era in order to strengthen the cause of reform.[175] No doubt some judges will use their powers more than others, and those who preserve the status quo may on occasion deserve criticism. But the common law itself does not commit them to doing so.

All this bears closely on the three cases I discussed in part III. In respect of all of them, major common-law developments had already been undertaken, starting before the constitutional era and greatly accelerating during it. In *Pridwin*, the court had available to it the *Barkhuizen* principle, which was created in order to allow courts to prevent the infringement of constitutional rights by contracts. In *Esorfranki*, the court had available to it the law of delict's famously flexible wrongfulness test, which had already been much used to expand the scope of recovery for not only bodily injury but also pure economic loss caused by government misconduct. And in *Bravospan*, finally, the SCA had available to it the law of unjustified enrichment, whose liberalisation had been endorsed by high judicial authority in both the pre- and post-constitutional eras, and was nascently being used to provide a remedy in exactly the same circumstances as *Bravospan* itself. These, then, were the constitutionally augmented common-law mechanisms that the courts chose *not* to use. Their preference to chart a new course cannot be justified on the basis that the common law had proved static.

Nor can it be justified on the basis that these mechanisms were inadequately rights-protective. It is quite clear that, had the courts used the common law, rather than avoiding it, the results in these cases would, or could, have been no different. This point has already been made many times in relation to *Pridwin*, in both the minority judgment[176] and by academic commentators.[177] To integrate its reasoning with the common law, the court would merely have had to spell out the implications of the school's constitutional duties for the validity of the cancellation clause, or its enforcement in the particular circumstances, using the *Barkhuizen*-enhanced doctrine of public policy. In *Bravospan*, there is no doubt that

[174] See especially *Carmichele* supra note 25 para 39.

[175] For example, the aforementioned reasonable publication defence was first created by decisions in some divisions of our High Court (see again note 19 above), which rejected the authority of *Neethling* supra note 20, a unanimous Appellate Division precedent from just three years earlier. In doing so, they simultaneously changed our first-order rules in order to protect constitutional rights and changed our second-order rules to make it easier for courts to continue doing so.

[176] *Pridwin* supra note 44 para 219 (Cameron and Froneman JJ); see also para 67 (Nicholls AJ), approving Langa CJ's remarks in *Barkhuizen* supra note 34 para 186.

[177] Finn op cit note 45 at 601–2; Boonzaier op cit note 53 at 273; cf Ally & Linde op cit note 45 at 299n135.

the law of unjustified enrichment was ripe for development, the path forward having been luminously laid out by scholars over the preceding half-century and indeed already walked by our own High Court. The SCA merely had to approve what the High Court had done, rather than reversing course. Applied to these cases, then, the claim that the common law stood in the way of transformation does not ring true. In each of them, there was a readily available common-law mechanism to make the commitments of the Constitution effective.[178]

What is true is this: in the common-law method, one does not work with a blank canvas. When seeking to develop the law, one has to use an existing web of interlocking principles, which derive from past decisions. Hence, in the famous image, the common-law judge has to look back to go forward.[179] If one wants to change a common-law rule, one first has to understand what it is. This in itself can be a difficult task, since common-law rules, unlike statutory rules, are not always clearly expressed in language, and often must be pieced together from several judgments, which may conflict.[180] And a given rule can be changed in any number of ways to deal with a particular problem.[181] In fact, there are often several rules that one might change, in which case each one of them — and thus the entire system — must be properly understood in order to weigh up one's options. Once the court makes a modification, moreover, that decision itself becomes part of the stock of rules with which other judges will have to reckon. To assess whether the rule is likely to be a good one requires a sure grasp of its long-term implications for diverse future cases. For these and other reasons, effective common-law development requires a high degree of specialist knowledge on the part of judges. And the form of justification called for by the common-law method is formidable. A wealth of authorities must be traced, their texts carefully parsed and interpreted, and debate must be had about how to refine them. This practice is complex and time-consuming, and the conditions to support it may be difficult to sustain.

All this has a vital implication. The common-law method, as I have argued, allows much scope for, and indeed facilitates, law reform. Yet it can nevertheless pose a serious obstacle to courts in seeking to get where

[178] *Esorfranki* is in a different category, since the consequence of the court's exercise in common-law avoidance was to send the plaintiff packing, without considering how to effectuate its constitutional rights at all.

[179] See Postema op cit note 168 at 155, discussing John Selden's *Jani Anglorum Facies Altera*.

[180] John Gardner 'Some types of law' in Douglas E Edlin (ed) *Common Law Theory* (2007) 51 at 66–72. The rules disclosed by those judgments can also be expressed at different levels of abstraction, and selecting from amongst those levels of abstraction complicates the exercise of interpretation.

[181] Compare *Carmichele* supra note 25 paras 57–8.

they want to go. This is because of the justificatory demands it imposes upon judges, which can be met only with expert attention to ancient strands of precedent and to the intricate wider web into which they have been spun.

We can therefore already see the germ of the explanation why courts might prefer to avoid the common law: they thereby avoid its justificatory demands, rather than having to meet them. But that temptation usually does not win out, of course; the common law's first- and second-order rules are valid and binding, not readily open to circumvention. And so, a number of further questions arise before the recent trend in favour of common-law avoidance can be understood. Three seem to me most pertinent, and frame the remaining parts of this article. First, and most elementarily, when is there an available alternative to applying the common law? Secondly, what might make that alternative appealing, and pull judges to it? Thirdly, what might make the justificatory demands of the common law so formidable that judges are pushed away?

(c) Appealing alternatives

The first question is relatively easily answered. Despite the binding force of the common law, and even in a dispute to which the common law would otherwise apply, a court has a chance to avoid it when there is also some *other* plausible set of norms that might govern the case instead. An obvious example is legislation. Wherever legislation is a source of law, judges will have to construe its field of application; and if it can be given a broad reading, so that it would govern a dispute previously thought to be governed by the common law, then an act of common-law avoidance becomes possible. A decision such as *Esofranki* can therefore exist, in principle, in any legal system. But these sorts of 'choice of law' questions, as I called them much earlier, are more pervasive in constitutional systems such as ours. That is because our Bill of Rights provides a standing source of norms that serves as the fundamental yardstick against which to judge all aspects of the legal system. It is always available, so to speak, offering to serve as an alternative way of thinking about how the case before the court ought to be decided. To be sure, the whole point of the mediated approach is to prevent this constitutional perspective from rivalling or supplanting the common-law one; the two perspectives are meant to be cooperative and mutually illuminating. I will return to this point later. For now, I have sought to establish only a basic, logically prior one: a court might avoid the common law, in principle, if (and to the extent that) another set of norms is plausibly available by which the case may be decided.[182] That is the elementary condition to make common-law avoidance possible.

[182] A corollary is that courts can aggravate choice of law problems *by* engaging in novel acts of common-law avoidance. A rival set of norms, not previously thought

Of course, the more important and intriguing question is not about the mere possibility that courts will avoid the common law, but its actuality. What factors make it more likely that courts will in fact opt for common-law avoidance — even to the contentious and surprising extent that we saw in the cases in part III, and even though the mediated approach is purposed at preventing it? That brings us back to the pull and push factors to which I alluded a moment ago. I begin with the pull factors, which make the alternatives to the common law appealing to judges. To understand these, it is worth elaborating on certain consequences, for the adjudication of my three case examples, of the courts' avoidance of the common law.

The first involves spelling out something that has been latent throughout the article. In all three of the cases I discussed in part III, the courts not only avoided the common law, but avoided *private law*. Instead of having to adjudicate the case according to the relevant set of private-law principles, they replaced them with quintessential parts of constitutional and administrative law. The effect of their act of avoidance in *Pridwin* was that the case could be decided without any attention to contract law, but rather according to the Bill-of-Rights duties owed by schools. In *Esorfranki*, the law of delict was avoided in favour of the remedial provision of an administrative-law statute. And in *Bravospan*, the law of unjustified enrichment was substituted with the remedial provisions of the Constitution itself. Reminding ourselves that these judgments were acts of private-law avoidance, not merely of common-law avoidance, applies a different spin.[183] It draws attention to the particular subject areas in which the courts have tended to skirt around the demands of the common-law method.

plausible, is thereby made so, with the result that the question obtrudes whether it, or rather the existing common-law mechanism, ought to be applied. Often this will generate confusion about the correct pathway, to the detriment of the issues of substance. That is almost certainly what will follow *Pridwin*, particularly because the distinction that Theron J draws between the constitutional and common-law pathways is 'tenuous' and 'provides limited guidance' about which will or should be used in future: Bishop & Brickhill op cit note 124 at 303–4. And though *Esorfranki* professed to be avoiding parallelism, rather than creating it, there will now be a host of awkward questions to be asked about the borderline between s 8 of PAJA and the law of delict. To mention only the most obvious, what happens if the state decision is reviewed (as many are) under the common-law principle of legality, rather than PAJA? Does the law of delict still then govern the claim for compensation, on the basis that s 8(1)*(c)*(ii)'s ouster is not applicable?

[183] Does it also imply a limit to the trend of common-law avoidance? Is it only in cases that sit on the borderline between private and public law, such as procurement law, that the courts can or will recast the issues so as to shift them from the former area to the latter? Possibly. And yet the logic of Bill of Rights adjudication has wide application, as cases such as *Pridwin* show: a court inclined to avoid the common law can very often offer an alternative constitutional solution.

Secondly, and moreover, the common-law avoidance in these cases allowed the courts deciding them to operate in a framework that may have seemed simpler and more tractable. For notice, once the common law was avoided, just how modest, manageable, and immediately familiar the set of applicable principles became. By avoiding the common law of contract in *Pridwin*, the court was able to base its entire course of reasoning upon a handful of its own judgments, none of them older than 11 years. Two easily stated tests from *Hoërskool Ermelo* and *Juma Musjid* provided essentially the entire solution to the case,[184] which was helped along by various points already made in *Daniels v Scribante*,[185] a 2017 judgment authored by Madlanga J (who now sat in *Pridwin*). There was no need to engage seriously with contract doctrines forged over the preceding century, nor even the tricky precedent of *Barkhuizen*, which, despite its Constitutional Court provenance, could be understood only within a wider web of intricate and perhaps uncongenial SCA precedents and extra-curial commentary. In *Esorfranki*, the court was able to transform the case into one about s 8 of PAJA, a statute very well-known to it, rather than one about a set of delict cases decided before any of the current generation of justices was on the bench. And in *Bravospan*, relatedly, Molefe AJA could directly apply the post-*AllPay* cases on s 172, which both the SCA and Constitutional Court have been using with regularity, indeed more or less interchangeably with PAJA's s 8.[186] Rather than traversing 70 years and more of unjustified enrichment case law, Molefe AJA was able to wipe the slate clean: on her approach, the relevant case law starts with *AllPay (No 2)* in 2014.

Finally, the effect of avoiding the common law in all three cases was to displace its relatively rule-based approach with something far more flexible and discretionary. This was most obvious in *Bravospan* and *Esorfranki*. In both cases, the court avoided the intricate criteria of the law of unjustified enrichment and delict respectively in favour of a famously open-ended standard: both s 8(1) of PAJA and s 172 of the Constitution say the court

[184] See again notes 60–3 above. The court discussed *AllPay (No 2)* supra note 109 as a contrast case.

[185] Supra note 154.

[186] The two provisions are treated as essentially the same: this goes back to *Bengwenyama* supra note 108, but see more recently *Central Energy Fund Soc Ltd v Venus Rays Trade (Pty) Ltd* [2020] ZAWCHC 164 paras 333–66, which reads the two together. For recent applications of s 172 see for example *AllPay (No 2)* supra note 109; *Gijima* supra note 111; *Buffalo City* supra note 80; *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO* 2020 (4) SA 375 (CC); *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* 2021 (4) SA 436 (SCA); *Mphephu-Ramabulana* supra note 107; *Central Energy Fund Soc Ltd v Venus Rays Trade (Pty) Ltd* 2022 (5) SA 56 (SCA); *National Education Health and Allied Workers Union v Minister of Public Service and Administration* 2022 (6) BCLR 673 (CC).

'may make any order that is just and equitable', and in respect of both of them the court has refused to structure this sweeping language.[187] When a case can be located within these provisions, therefore, the court deciding it acquires a very wide discretion, free of any concrete justificatory standard. True, it still needs to say something about why it regards a particular outcome as just and equitable on the facts before it. But there is no system of intermediating rules to take account of when doing so. One might therefore say that the courts deciding these cases 'avoided the common law' in two senses. First, they avoided the first-order rules of the common law that might have borne on the case at hand. Secondly, they avoided the common-law method and the duties it entails, in particular the duty to justify their decisions according to rules of general application.

In sum, the courts' acts of common-law avoidance discussed in part III took the cases out of an intricate web of past precedents and concomitant justificatory duties, and placed them within an unbridled discretion, sourced in s 172, which it has jealously guarded. Rather than having to grapple with the doctrinal complexities of both delict and unjustified enrichment, one can decide the remedies that will follow a failed procurement contract by applying a three-word formula.[188] In *Pridwin*,

[187] See note 108 above.

[188] To be clear, it remains possible in principle for s 8 of PAJA and s 172 of the Constitution to be reintegrated with the principles of delict and unjustified enrichment, rather than supplanting them. True, it has now been settled that these two provisions, and not the common law, are the ultimate source of the courts' power to award compensation and restitution following administrative-law breaches. But the common law might have continued validity as a set of intermediating rules, determining when and how those powers may be exercised. Though that is not the view taken in *Esorfranki* and *Bravospan*, the judiciary could undo this damage over time. All that the courts would need to do, when the issues in *Esorfranki* and *Bravospan* re-arise, would be to use the existing common-law rules *within* the bounds of s 8 and s 172 respectively. These sections, instead of being seen as a rival to private law's existing remedial structure, could provide that structure's statutory and constitutional underpinning: they authorise courts to continue applying the long-established common-law principles (with the wide language of the sections being read as confirmation that courts should incrementally expand their remedial arsenal). That would give a plausible meaning to the sections, avoid parallelism, allow continued benefit to be derived from the rules of the common law, and respect the process of iterative development. Indeed one might argue, optimistically, that some of our judges were already undertaking this process of harmonisation in certain cases (such as *AllPay (No 2)* supra note 109, *Shabangu* supra note 115, and *Central Energy Fund* (HC) supra note 186, which drew parallels between the powers in s 8 of PAJA and s 172 of the Constitution and the common-law remedies). However, it seems unlikely that our judiciary as a whole will commit itself to this approach. This is not only because precedents such as *Esorfranki* and *Bravospan* would now stand in the way, but for all the other reasons I have discussed throughout this article: it seems unlikely that the various factors that have led us to this point, and caused a wilful destabilisation of the common-law rules, would now evaporate.

similarly, the law of contract was made irrelevant, and the case came to turn on whether the school's decision had, in the particular circumstances, an 'appropriate justification'. As a result, the resolution of these cases was made so much easier.[189]

(d) Competence and culture

I made the obvious point earlier that the common law does not preclude legal change. Indeed, the common law has changed profoundly in the areas implicated by the cases I discussed in part III, and would almost certainly have licensed the result that the court reached in each of them. However, I suggested that the common law nevertheless places an obstacle in the way of judges seeking to change the law or reach the result that they think is right. For they must justify their decision in accordance with the specific demands of the common-law method. To overcome that obstacle, judges need a close appreciation of the common law's history and system, and the ability to justify their decision congruently with it. And that, in turn, requires a distinctive kind of experience and knowledge. All that was discussed previously.

From it, a crucial point follows. Whether a judge's reformist ambitions will be inhibited by the common-law method depends on how capable they are of meeting the justificatory demands it imposes. A skilled common lawyer, well-acquainted with the body of doctrine and able to integrate a novel decision with it, can use the common law in service of reform. Its justificatory demands can be readily overcome. The components of the mediated approach — constitutionally motivated legal change, and fidelity to the scheme of the existing common law — will not be in serious tension. But to a judge without that same proficiency, things will look rather different. Without a firm grasp on the existing rules, they cannot be reshaped. Nor can one justify and integrate a novel decision conformably

[189] Of course, one need not share the courts' view of the matter. One might feel that the consequences of avoiding the common law I have just highlighted, far from showing its attractiveness, only highlight its dangers: it leaves judicial reasoning almost entirely unconstrained by law. But that does not diminish its potential to explain the behaviour of the judges doing it — provided, perhaps, that we remind ourselves of certain factors in the background. For example, it has become commonplace to celebrate 'substantive' reasoning, rather than the 'formal' reasoning with which the common law is sometimes associated (see, among many possible examples, Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 168; Froneman op cit note 155; Pius Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch LR* 351 at 356–7). Deciding things flexibly and case-by-case, guided only by the judge's sense of justice and equity, is often presented by our courts as admirably broad-minded. It is not hard to see how, with this way of thinking in place, the courts' use of wide discretionary powers, at the expense of the common law, can be rationalised as a kind of progress.

with them. The obstacle posed by the common law will be formidable, perhaps seeming to block the way to reform altogether. The mediated approach will be incapacitating.

Might this perhaps apply to South Africa's appellate courts in 2024? Perhaps we should start in 1995, when the situation was relatively transparent. The Constitutional Court was created precisely in order to have a different and complementary outlook to the existing judiciary, which required a reformist stimulus.[190] That the court dealt in constitutional and human-rights law, and the rest of the judiciary in the common law, was baked into the constitutional scheme.[191] With this came a division of expertise. The court recognised as much in *Carmichele* in 2001, and was accordingly diffident about its own capacity to develop the common law; the High Court and the SCA had to be enlisted to provide the common-law expertise that the Constitutional Court itself lacked.[192] In time, the jurisdictional separation proved unworkable, and threatened to reify a sharp constitutional–common law divide that the Constitution's deepest commitments sought in truth to eliminate.[193] Through the court's own steady broadening of its jurisdiction, which received official sanctification by an amendment to the Constitution,[194] it became a generalist court, regularly adjudicating all manner of private-law matters. The pressure on its expertise thereby grew, as was noticed early on.[195] But the question is: has there been a true reckoning with this fact? The court's personnel had been chosen, and its ethos forged, under the earlier assumptions. And though it is a large question whether judicial appointments have addressed the court's skills gap, the most visible indications are that they have not even tried to.[196]

[190] Richard Spitz & Matthew Chaskalson *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2000) ch 11.

[191] For example, the (unamended) s 167(3) gave the Constitutional Court jurisdiction in 'constitutional matters' only. Section 98(2) of the interim Constitution was broadly similar.

[192] See text at notes 25–29 above.

[193] Compare Cora Hoexter & Morné Olivier (eds) *The Judiciary in South Africa* (2014) 16–17, 375–7.

[194] Constitution Seventeenth Amendment Act of 2012, which came into force on 23 August 2013. Its key change was to s 167(3) of the Constitution. The court became entitled to hear a matter that 'raises an arguable point of law of general public importance', without any subject-matter limitation.

[195] See eg Carole Lewis 'Reaching the pinnacle: Principles, policies and people for a single apex court in South Africa' (2005) 21 *SAJHR* 509 at 522.

[196] Recent studies of judicial appointments in South Africa do not consider these issues (though this may itself suggest that the Judicial Service Commission has failed to prioritise them): see eg Alison Tilley & Zikhona Ndlebe 'Judicial appointments in South Africa' (2021) 10 *British Journal of American Legal Studies* 457; Chris Oxtoby 'The appointment of judges: Reflections on the performance of the South African Judicial Service Commission' (2021) 56 *Journal of Asian*

As a result, the early difficulties may have persisted. It is no coincidence that two of the three cases that prompted Woolman's critique of the court's reasoning in 2007 were in the private common law.[197] The criticism deepened during the 2010s, when key private-law judgments such as *Lee v Minister of Correctional Services*,[198] *Botha v Rich NO*,[199] and *Makate v Vodacom (Pty) Ltd*[200] showcased obvious weaknesses — not because the pro-plaintiff results were insupportable, but because the court so obviously struggled to knit them with the common law. Precedents were treated amateurishly. In each case, a single passage of a previous decision was plucked from its context and glibly presented as a guide to the resolution of the case before the court; other precedents, which seemed obviously incompatible, were ignored.[201] And the question, 'How did these decisions change the law?' admitted of no ready answer; it was difficult to discern the principle by which the case was decided, if indeed there was one.[202] The adverse reaction was therefore predictable and justified. And today, as the court's post-amendment diet of cases has diversified further, it is perhaps unsurprising that the court seems ill-equipped to deal with the specialist fields it is now entering.[203]

and African Studies 34. Tilley & Ndlebe observe (at 472) that 'the technical competence of candidates tends to be assumed', and that the Commission has 'no systematic approach' to the issue. An episode in 2019, in which former Chief Justice Mogoeng, acting as chair of the Commission, suppressed a line of questioning about the candidates' expertise in private and commercial law, may suggest something worse: see Boonzaier op cit note 53 at 238–9.

[197] Woolman op cit note 36, discussing *Barkhuizen* supra note 34 (contract law) and *NM v Smith* 2007 (5) SA 250 (CC) (actio iniuriarum).

[198] 2013 (2) SA 144 (CC).

[199] 2014 (4) SA 124 (CC).

[200] 2016 (4) SA 121 (CC).

[201] *Lee* supra note 198 deployed an offhand remark from *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) to imply that the rules of factual causation were 'flexible', and thus could effectively be ignored in so far as they stood in the way of the court's preferred result. *Botha v Rich NO* supra note 199 applied a principle drawn rough-handedly from *Barkhuizen* supra note 34, failing to mention the incompatible interpretation of that principle that had been given in *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA). The majority judgment in *Makate* supra note 200, as the minority pointed out (at para 109), was based upon 'a single sentence in a judgment of Lord Denning' in the English Court of Appeal, which was inconsistent with the South African case law and indeed the law in Denning's own jurisdiction.

[202] Compare Helen Scott 'The death of doctrine? Private law scholarship in South Africa today' in Jürgen Basedow, Holger Fleischer & Reinhard Zimmermann (eds) *Legislators, Judges, and Professors* (2016) 223 at 245, which makes a similar point with reference to certain other judgments. One of them is *K* supra note 21, which may have been an early manifestation of the difficulties.

[203] See especially Lauren Loxton 'The dangerous powers of South Africa's "Super Appellate Court"' (2023) 13 *Constitutional Court Review* 291;

But the issue transcends the incumbent judges. Much of the work of common-law reasoning must be done by advocates, for example, and if they do not do it the judge is at sea. In addition, if previous courts, by whose decisions one is bound, have failed to reason conscientiously, that compounds the difficulties.[204] How is the judge to integrate her own decision with common-law materials, and justify it according to common-law methods, when the precedent that she is bound to apply has done neither?

One must also look beyond the individual actors in the legal system and consider the subtle, or at times not-so-subtle, influence of the forms of reasoning and habits of thought that enjoy general esteem — what is sometimes called 'legal culture'. The most important feature of ours is that common-law reasoning is no longer the only game in town. The Bill of Rights provides an alternative means through which judicial decisions may be justified: they can be defended on the basis that they provide a remedy for the infringement of the plaintiff's constitutional rights, for example, or effectively bear out constitutional values. This new justificatory standard may be greatly beneficial. The crucial benefit envisaged by the Constitution's drafters was that the common law would be subject to a comprehensive 'constitutional audit',[205] which would help to drive forward its development and ensure its conformity to human rights standards. The downside, or potential downside, is that the Bill of Rights, rather than complementing other valuable forms of reasoning, can come to serve as a substitute. Once Bill of Rights analysis has been given its place of prominence, as in our scheme it must be, it can start to be used, not merely as a standard against which to test the common law's approach, but as a rival method of justifying outcomes. Again, the mediated approach aims to avoid this, but the integration of the two perspectives is not self-executing. In practice, it may be unrealised. Courts may, having appealed to constitutional standards to justify their decision, see their job as done,

also D M Davis 'The Constitutional Court and competition law' (2022) 35 *Advocate* 46.

[204] To be sure, this point cuts both ways. Courts that have special common-law expertise ought to use it to develop the common law with sensitivity to the Constitution. For if they instead dig in their heels, and resist constitutional influence altogether, then the result is predictable: the other parts of the judiciary will have to undertake their reforms without help from the common-law's main experts, and by the lights of those experts will probably do a bad job. In my view, this kind of intransigence from the SCA has contributed to our predicament: see Edwin Cameron & Leo Boonzaier 'Venturing beyond formalism: The Constitutional Court of South Africa's equality jurisprudence' (2020) 84 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 786 at 833–4; Boonzaier op cit note 53 at 246–7, 253–4.

[205] *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C) at 87E.

and fail to consider the common-law rules that bear on their decision.[206] Sometimes, these intermediating doctrines will present obstacles to the court's decision; at other times, they may assist in giving effect to it. Either way, if courts start to treat appeals to a constitutional standard as conclusive, the common-law materials are likely to be ignored or brushed aside.

And if this sort of thing starts to happen often enough, how do savvy practitioners appearing before the courts react? The answer is obvious: they do not bother citing common-law precedents to the court, especially when they are unfavourable to their client, and appeal directly to the Constitution instead.[207] That is likely to produce a poorly reasoned judgment, ill-at-ease with existing doctrine. And when future courts come to interpret and apply that judgment, they are already at a disadvantage in seeking to integrate their own judgment with the common law. Such feedback loops mean that, once the courts start to loosen their grip on intermediating principles of the common law, it can be hard to regain.

Where does that lead ultimately? Could it be that, after a point, a court decides it will rather avoid the private common law where possible, avoid the parsing of arcane lines of precedent stretching back decades, avoid the attempt to knit its desired result to them, avoid the embarrassing mishaps and resulting academic assault, and retreat to a more familiar and tractable constitutional method of adjudication instead? If so, then we have our explanation for the pattern exemplified by the three cases I discussed in part III. So understood, common-law avoidance is a new way in which our judiciary has reacted to an old predicament. It has always been challenging to integrate the constitutional scheme with the demands of common-law reasoning. And as the challenge has become more formidable, how tempting it must be to avoid it altogether.

[206] Arguably this has happened even in the court's relatively staid common-law judgments, such as *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC), which is analysed in Alistair Price 'The contract/delict interface in the Constitutional Court' (2014) 25 *Stellenbosch LR* 501; Emile Zitzke 'Constitutional heedlessness and over-excitement in the common law of delict's development' (2015) 7 *Constitutional Court Review* 259 at 281–3. The court determined whether the defendant's conduct was delictually wrongful from first principles, as it were, to the neglect of the decided cases. The judgment thus exhibits what Zitzke calls 'constitutional over-excitement', where judges 'use the Constitution as the sole source of law, as if common law … do[es] not exist': 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamina* 185 at 224.

[207] Again, it is quite possible that an opposite problem exists simultaneously: namely, that certain practitioners of the old school, who continue to see the constitutional principles as unwelcome, cite common-law precedents only. This, too, may have the result that courts are given no assistance in integrating the two systems.

(e) Implications and objections

Though common-law avoidance may be attractive to the judges who engage in it, my own point of view, unsurprisingly, is different. Common-law avoidance is objectionable because it defies the mediated approach that is built into our Constitution and jurisprudence and, more importantly, because it forsakes the excellent reasons why that approach was adopted in the first place. These advantages of the mediated approach, it is worth emphasising, do not reflect nostalgia for an allegedly untainted common law. I am not making the private lawyer's commonly made, or commonly perceived, complaint about constitutional lawyers meddling with the common law, which should rather be left as it is. The true point, in a way, is the opposite.[208] The common law should *not* be left as it is, but rather grasped and reshaped, by judges with the skills and resources necessary to progress it. Otherwise, the common law is left to stagnate, its own resources for legal change are not utilised, and it cannot serve the legal system in the way that it ought to, because it has not been properly engaged with.

This depressing state of affairs is well-illustrated by *Bravospan*. In it, the SCA forsook a long-sought development of the common law on the basis of a reading of the authorities that is unforgivably complacent. Molefe AJA retreated to the most restrictive readings of *Nortje* and *McCarthy Retail* possible, presenting the law of unjustified enrichment's limitations as fossilised and unchangeable. On this basis, she concludes that there cannot be a general enrichment action in our law, and that the High Court's award in favour of Bravospan was unsustainable. But that is not what *McCarthy Retail* says. It is the opposite of what it says. The SCA held there that a general enrichment action *should* be brought into being, once the right case arose, and condemned *Nortje*'s contrary view as mistaken.[209] Given this strong and clear endorsement of the liberalisation of our law of unjustified enrichment, one leading academic wrote in 2008 that it was 'inconceivable' that the SCA would 'go back on this intention'.[210] But the unthinkable has now happened. And, remarkably, *McCarthy Retail* itself has been cited in support of it.

The SCA's spurious reasons for shirking the common law do not end there. Quite apart from its butchering of *McCarthy Retail*'s true import, the SCA ignores other judgments that might have been placed alongside it, and which would have showed that the liberalisation of our enrichment remedies is alive and well.[211] Finally, there was, as always, the prospect

[208] Van der Walt op cit note 24 at 82.

[209] See text at notes 90–4 above.

[210] Visser op cit note 87 at 53.

[211] *Willers* supra note 95. See also the endorsement of the development of a general enrichment action, repeating *McCarthy Retail*, in *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) para 23.

of developing the common law in light of the Constitution. After all, in Molefe AJA's view it would be 'manifestly unjust' if Bravospan were not awarded compensation for the breach of its constitutional right to administrative justice.[212] Despite this, and despite the clear injunction from *Carmichele* that courts have an obligation to develop the common law,[213] doing so was nowhere considered.

The impression created by this short passage of *Bravospan* is therefore uncomfortable. The SCA is not even trying to interpret the decided cases faithfully, still less to progress them. It is trying to side-line the common law as quickly as possible, so that it can get straight to its preferred constitutional mechanism.

In these ways, *Bravospan* illustrates vividly the lessons of earlier parts of this article. It is admittedly intriguing, however, that *Bravospan* is a judgment of the SCA. According to a certain classic image, deriving from the early years of the constitutional era, the SCA is the custodian of the black-letter law, protecting it from the Constitutional Court's meddlesome influence. But *Bravospan* suggests something new and different. If the SCA's avoidance of the common law is to be explained, then I suggest we have to turn to the wider features of our legal system and legal culture that I mentioned above. Or perhaps it shows that the Constitutional Court, from its apex position, has managed to influence lower courts, including the SCA, relatively successfully. Judges of both courts evidently now see value in the common law's circumvention.

None of this is to deny that our courts will rely upon the common law most of the time. Where the common-law rules, even without further development, provide a justification for the court's preferred outcome, then there is no reason for it to shirk them. This, in essence, is how one can account for the fact that, on the very day the court decided *Pridwin*, in which it flagrantly circumvented the common law of contract, it also decided *Beadica*,[214] which engaged scrupulously with that same body of law.[215] Indeed, the same judge, Theron J, authored both. That she did so might seem to cast doubt on my argument. What value could she have perceived in avoiding the common law, as I claimed she did in *Pridwin*, if she nevertheless fulsomely applied it in *Beadica*? But the challenge is deceptive, and in truth has a simple answer. The court handled the cases differently because the common law presented an obstacle in only one of them. In *Beadica*, there was evidently no antagonism between the restraining influence of the common law and what Theron J wanted to achieve.

[212] See again note 105.

[213] *Carmichele* supra note 25 para 39, discussed at note 174 above.

[214] Supra note 50.

[215] The strangeness of this pairing has been widely discussed: see the sources cited in note 124.

She was content to dismiss the applicants' complaint, which is the result that her surprisingly conservative reading of the common law produced. A similarly complacent approach in *Pridwin*, by contrast, in which the whole court was determined to find for the applicants, would not have served her purposes in the same way. To uphold the applicant's complaint consistently with the common law, Theron J would have had to progress it creatively. She would have had to show why, despite the existence of a seemingly valid contract whose terms licensed the school's conduct, that conduct was nevertheless unlawful. True, the *Barkhuizen* principle would have allowed her to meet this challenge, as I argued earlier. But that would have meant getting stuck into the common-law sources — indeed the very sources the court had been accused of butchering in the past.[216] Rather than undertake this challenge, the finnicky common law was avoided, in favour of a constitutional mechanism that gave a shortcut to the desired outcome. In *Beadica*, then, the common law was convenient, but in *Pridwin* it was not. So understood, the two decisions are not discordant.

Indeed, I would go further: they should be read together, as inter-dependent parts of a clear overall strategy.[217] When one does so, the two judgments jointly replicate the lesson of *Bravospan*. The very fact that the court had a distinctively constitutional tack available to it (see *Pridwin*) is what allowed it to take so complacent a reading of the common law (see *Beadica*). The court had no reason to progress the common law in *Beadica*, in other words, with all the difficulty that would entail, because it knew *Pridwin*'s constitutional shortcut was available instead. Hence the two decisions, despite their differences, are mutually reinforcing. In both of them, the court reached its desired result, which, in *Pridwin*, was a novel and bold one. Of course, neither decision reaches a bold result *by developing the common law.* But that is exactly what one expects of a court which finds the common law inhibiting and intractable. The easiest course is to minimise confrontation with the common law — and then strike out elsewhere.[218]

[216] See in particular *Botha v Rich NO* supra note 199. The court would have been intensely aware of the fallout from this judgment, since it was squarely at issue in *Beadica* supra note 50.

[217] Compare Boonzaier op cit note 53 at 272–4.

[218] As these remarks help to show, my argument can ultimately be reconciled with Frank Michelman's view that common-law rules have a certain 'gravity', such that courts treat them as a baseline for what is just and reasonable, perhaps more than they ought to, and struggle to escape their pull even when the Constitution requires it: see his 'Expropriation, eviction, and the gravity of the common law' (2013) 24 *Stellenbosch LR* 245. All I would add is that the gravitational pull may be particularly strong in respect of judges who lack common-law expertise, and that, precisely because of its strength, judges may be tempted to do something drastic to escape it. Common-law avoidance is the result.

V CONCLUSION

This article has sought to analyse an important trend in recent appellate judgments, which I have called 'common-law avoidance'. Part III set out the three case illustrations — *Pridwin*, *Esorfranki*, and *Bravospan* — discussing both the common-law principles that were available to the court and the way in which it chose instead to avoid them. Part IV sought to understand the trend's causes. The courts' acts of common-law avoidance are not innocuous or entailed by the legal materials, I argued, but rather suggest a surprising and significant judicial choice driven by deeper factors. The rest of the article then sought to explain what these are. Avoiding the common law becomes possible when an alternative set of norms is available to decide the case, as in our constitutional system it so often is; and it becomes actual when the constitutional mechanism has decisive attractions, to the judges adjudicating the case, that the common law does not. On the evidence of my three case illustrations, the constitutional mechanism will be attractive when it is familiar, tractable, and confers a wide discretion. And the common law will become correspondingly unattractive when judges are ill-equipped to meet its justificatory demands. In my view, this aptly explains the three cases.

Common-law avoidance is troubling. It also leaves our whole project of constitutionally driven law reform in a predicament. The hope of our Constitution's drafters was that the virtues of our common law could be harnessed in the new era, helping to discipline judicial decision-making while also supplying plentiful resources for change. But with a common-law avoidant judiciary, that hopeful vision is out of reach.