FROM THE PUBLISHERS

CONTRACTING UNDER THE CONSTITUTION

Christie’s Law of Contract in South Africa
Seventh Edition
GB Bradfield
Lexis Nexis (2017)
789pp

Habent sua fata libelli: books have their own fates. Over a period of many years Johannes Wilhelmus Wessels – better known, anglicised, on his elevation as Sir John Wessels – put to good use the ‘ease with dignity’¹ he enjoyed in torpid Bloemfontein afternoons. The first systematic work on the South African law of contract was in the making. But by 1923 Wessels himself gave up on the task. A.A. Roberts KC, a Union (and later, Canadian) law adviser, took over the manuscript. The Law of Contract in South Africa appeared at last in 1937, with a second edition 13 years later. Both were vast, in two volumes. In 1981 Richard Hunter (Dick) Christie QC² produced the first edition of a book intended to be the third edition of Wessels. Already in 1950 Roberts complained that he “had hoped to rewrite certain portions of the book” but “it was extremely difficult to find anyone in the country with the ability, time and willingness to assist”.³ Three decades on, Christie decided that the nettle had wisely not been grasped by Roberts: instead Christie wrote a new book.

Through six subsequent editions, Christie on Contract has proved “a very present help in times of trouble”⁴ to practitioners. In this respect it calls to mind the one lawbook said to be found in every wakis in the 1838 exodus from the Cape Colony: Johannes van der Linden’s Koopmans Handbook.⁵ The Z.A.R. Constitution of 1858 made the whole book, to the extent it did not conflict with the Constitution, laws or Volksraad decisions, “het Wetboek in dezen Staat”.⁶

Christie on Contract did not quite achieve that. But it almost immediately became the go-to reference on contract for a busy practitioner. In the simple and wholly accurate assessment of Professor Dale Hutchison, it was “the most comprehensive work to date on the law of contract in South Africa”.⁷

The latest edition, produced (like its predecessor) by Professor Graham Bradfield of the University of Cape Town, retains the work’s compendious coverage of the law of contract, but covers the latest (as at September 2016) cases and statutory developments on matters ranging from electronic signatures to contractual formalities, the perennial issue of interpretation, reciprocity in contract, economic duress and many more matters.

One should be singled out. It is the lingering issue of good faith in contract, and the effect of the Constitution on it. Bradfield offers⁸ a useful survey of the confusing and inconsistent judicial dicta invoking ‘constitutional values’ which continue to pile up. He shows that much is to be laid at the door of Ngcobo J’s convoluted judgment in Barkhuizen v Napier,⁹ compounded by subsequent obiter pronouncements in minority judgments by Moseneke DCJ¹⁰ and Yacoob J in Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd.¹¹ Bradfield rightly draws attention to the masterly reconstruction (in Bredenkamp v Standard Bank of South Africa Ltd¹²) of what Ngcobo J must have intended to say in Barkhuizen, Harms DJP warning that “[m]aking rules of law discretionary or subject to value judgments may be destructive of the rule of law itself.”¹³ The law of contract should not, in the name of constitutional values or (as invoked in Everfresh by Yacoob J) the concept of ubuntu, regress to the chancellor’s foot.

“Bradfield offers a useful survey of the confusing and inconsistent judicial dicta invoking ‘constitutional values’ which continue to pile up.”
This edition has a reinforced claim to be every commercial practitioner’s ‘cudae mecum’. It is however not perfect. Bradfield notes at the outset that, despite his changes, “the work remains very much that of the late Richard Christie”.14 There’s, however, the rub.

True, Bradfield has tempered the analytical weaknesses of the early editions. Christie had been defiant in this regard: he said his work was “based squarely”15 on South African caselaw, dismissing what he called a theoretical approach: this for him entailed mere “verbal formulae”,16 “useless baggage”,17 “knife-edged technicalities”,18 and worse. Instead, he advanced a Denningesque invocation of the prophet Isaiah: “For precept must be upon precept, precept upon precept, line upon line, line upon line; here a little, and there a little”.19

Bradfield in marked contrast has sought to support the work with a conceptual buttress. His first chapter provides a helpful exposition of developed theories of contract, then gives a summary of the Roman, Roman-Dutch and modern South African concepts of contract. To a degree this addresses the important criticisms of Justice Carole Lewis20 and Professors Gerhard Lubbe21 and Dale Hutchinson22 of earlier editions.

What weakens Christie on Contract in its updated form, however, is that the conceptual underpinning is not carried through. The mode of writing of the earlier editions is largely retained. There are still far too many extended quotations from cases – when what is needed is to extract the point, state it shortly, and then anchor it by reference in a footnote. This failing is debilitating in a leading text.

Surprisingly, a number of other obviously valid criticisms of earlier editions have not been met. Why still trot out at length truisms such as that an acceptance may be inferred from conduct – in fact (relying on the same authority) doing that twice?23 Why note that Solomon J “went so far as to say” that every contract comprises an offer and acceptance, that “more strictly accurate” is a paraphrase by Watermeyer J, while Van den Heever JA “takes this a stage further”?24

The preponderance of Rhodesian cases – Christie had previously published a work called Rhodesian Commercial Law, later renamed Business Law, which probably explains this – has abated. But several without particular value are still cited. An example is Bulawayo Municipality v Bulawayo Indian Sports Committee.25 It is a footling decision by a single judge citing earlier South African cases, without particular insights of its own. It appears to have been applied by just one court since, and this only en passant. (More dispariting, the case does not even support the proposition for which it is cited.)26

These are defects in Christie on Contract carried through by the current author’s deference to its progenitor. Habent sua fata libelli. But the book’s strengths remain, and it is usefully modernised. It is an indispensable and comprehensive work for the practitioner at sea in contract, and looking for a landmark on what Lord Sumner once called the comfortable coast of precedent.

Those whom the white water of litigation wash up in higher courts would however be well advised now to stow, too, Van der Merwe et al’s Contract: General Principles.27 That work is, for this reviewer, the best single text currently in the field: the methodological successor to De Wet and Yeat’s Kontraktereg en Handelsreg,28 and in which the penetrating analysis of principle still eluding Christie on Contract is to be found. It offers lighthouses as well as landfalls.

Jeremy Gauntlett

Notes
1. “There was a time when occupants of the Bench enjoyed a measure of orium cum dignitate which enabled them to engage in research and formative work”: R.P (Toon) van den Heever “Regtsgeleerd Practicaal en Koopmans Handboek; Published in Amsterdam in 1810. Its full title was Wessels’ Law of Contract in South Africa (2nd ed 1950 by A.A. Roberts KC vol 1 p vi.
5. Published in Amsterdam in 1810. Its full title was Regtsgeleerd Practicaal en Koopmans Handboek; ten dienste van regters, practizijns kooplieden, en allen, die een algemeen overzicht van regtskennis verlangen. In his Voorberigt Van der Linden defends the need for his work on the ground that De Groot’s Inleidings “voor onkundigen veel te duister was”. See D.H. van Zyl Geskedenis van die Romeins-Hollandsse Reg (1979) 396.
8. At 16-23.
9. 2007 (5) SA 323 (CC). The book misspells the name of Ngcobo J (later CJ) five times in two pages (19 and 20) – even in a quote from a reported judgment.
10. Not J, as Bradfield has it.
11. 2012 (1) SA 256 (CC) at [72] and [22] to [24] respectively.
12. 2010 (4) SA 468 (CC).
13. At [39].
14. Preface, [v].
15. Preface to the first edition, [v].
17. 14.
18. 534.
23. 97 and 138, citing each time Timoney and King v King 1920 AD 133 at 141.
24. Each of these was pointed out by Lubbe op cit at 179; each is still retained (at 36).
25. 1956(1) SA 34 (SR), cited at 61 fn 232.
26. This is that the taking of some action inconsistent with the intention to perform may be an anticipatory breach – while the case in fact dealt with an ‘unequivocal repudiation’ (37A) of a current obligation in a lease.
28. Die Suid-Afrikaanse Kontraktereg en Handelsreg (5de uit 1992 Butterworths Durban) by J.C. de Wet and A.H. van Wyk produced, after De Wet’s death, with what the preface acknowledges was the indispensable assistance of Professor Lubbe.)