

**FRONTIERS OF CHANGE AND GOVERNANCE IN CONTRACTUAL
AGREEMENTS: THE POSSIBLE ROLE OF EXPLOITATION - *UNITING
REFORMED CHURCH DE DOORNS v PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA 2013 5 SA 205 (WCC)***

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SUMMARY

In the South African common law of contract there appears to be support for the open norm of public policy as a general clause to ameliorate the effects of unfair contracts and terms which are contrary to public policy. The courts have on several occasions held that contracts or terms would be regarded as contrary to public policy had they come about where the parties were in an unequal bargaining relationship and this inequality was linked with another factor(s). In this case note it is argued that the element of unequal bargaining position may be contrary to public policy if it is linked with exploitation as the other factor. The element of exploitation was highlighted in the recent court decision of *Uniting Reformed Church, De Doorns v President of the Republic of South Africa 2013 5 SA 205 (WCC)*. In this case the applicant church owned three properties on which were three schools under the control of the State. The church and the State had concluded 20-year notarial leases in respect of each of the properties. A term in the contract provided that after the expiration of the lease period the church would transfer the properties to the State free of charge. After the expiration of the leases the State demanded the transfer of the properties. The church disputed the claim, averring that the term was unenforceable because the parties had been in an unequal bargaining position and that the enforcement of the term constituted expropriation in contravention of the property clause of the *Constitution*. It is submitted that expropriation without compensation is not only contrary to section 25 of the *Constitution* but constitutes exploitation. It is suggested that where exploitation results from an unequal bargaining relationship it provides the "further factor" that, together with the

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inequality in bargaining power, is sufficient to establish that the term or contract is in conflict with public policy. This contributes to giving meaning to the term "public policy". To support this argument, reference is made to the *German Civil Code*, the *Swiss Civil Code*, consumer protection legislation and the philosophy of Wertheimer.

KEYWORDS: *Constitution*; contract law; public policy; inequality of bargaining power; exploitation.