Chapter 4

The Nature of the South African University-Student Contract

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Abstract

Relationships underscore education. One of these relationships is between the universities and students. The exact nature of this university-student relationship has been wrought with historical uncertainty in jurisdictions like the United States. The approach to the university-student contract in the United States developed from applying the *in loco parentis* doctrine to the bystander approach, which eventually recognised the contractual nature of the university-student contract. From a South African perspective, the university-student relationship has always been underscored by contractual principles, however, in the post-constitutional era there are additional considerations as to the exact scope and application of the university-student contract. The first is to determine whether the university-student contract would be classified as a private or public contract. In private contracts, normal contractual principles and doctrines apply, as well as compliance with specific legislative mechanisms such as the Protection of Personal Information Act 4 of 2013, the Consumer Protection Act 68 of 2008, and the National Credit Act 34 of 2005. On the other hand, a public contract would exist either if the university were an organ of state, or where the university wields public power under section 1(b) of the Promotion of

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Administrative Justice Act 3 of 2000 (PAJA), which is typically the case of a public university. Insofar as PAJA is applicable, public universities will be required to comply with the procedural fairness of decisions as set out in section 3 of PAJA. This chapter comes to the conclusion that, although the university-student relationship may have certain commercial elements embedded within its operation, it certainly is not solely a commercial transaction. Added to the consideration of whether a private or public contract exists, the terms of such a contract (whether express, tacit, or implied) would also regulate the relationship between the student and the learning material (or the knowledge transfer and skills acquisition), the relationship between the teacher and the student (or the pedagogical and methodological approach to teaching and learning), as well ensuring the constitutional rights of a student, which cannot necessarily be labelled as purely a commercial transaction. Rather, the university-student relationship is more akin to a *sui generis* contract and cannot be viewed as a purely commercial transaction.

1. Introduction

Relationships underscore education. There has been much focus placed on the microcosmic teaching and learning relationships, such as the relationship between the student and the learning material (or the knowledge transfer and skills acquisition),[2] as well as the relationship between the teacher and the student (or the pedagogical and methodological approach to teaching and learning).[3] However, it would be impossible to accomplish

2 This being the knowledge transfer and skills acquisition in the teaching and learning process. Take, for instance, Van Niekerk "Exploring the difficult dialogues technique as a tool for value-added law teaching and learning" 2019 *Stell LR* 138-151; Louw and Broodryk "Teaching legal writing skills in the South African LLB curriculum: The role of the writing consultant" 2016 *Stell LR* 535-553; Snyman-Van Deventer and Swanepoel "Teaching South African law students (legal) writing skills" 2013 *Stell LR* 510-527; Greenbaum "Teaching legal writing at South African law faculties: A review of the current position and suggestions for the incorporation of a model based on new theoretical perspectives" 2004 *Stell LR* 3-21.

3 This being the pedagogical and methodological approaches undertaken in the teaching and learning process. Take, for

the ideals, goals, and functions set out in the microcosmic teaching and learning level without the proper functioning of the macrocosmic teaching and learning relationships, which includes the governmental, legislative, and regulatory relationships within educational structures. One of these macro-level teaching and learning relationships is the relationship between the higher educational institutions (HEIs) and the student, which may be classified for the purposes of this chapter as the university-student relationship.[4]

In some jurisdictions, like the United States, the exact nature of the university-student relationship has historically been wrought with uncertainty and has, only recently, been viewed as possessing a commercial contractual nature. Although South Africa has similarly, both in the pre-constitutional and post-constitutional era, confirmed that the university-student relationship is underpinned by the principles of contract, the exact nature of the university-student contract in the post-constitutional period has the added complication of distinguishing the type of contract applicable (*eg* whether it is a public or private contract), as well as compliance with several legislative provisions.[5]

This chapter intends to consider the different ideological approaches to the university-student relationship by considering the positions of the United States and South Africa and thereby illustrate the dimensions and complexities of the university-student contract. This chapter illustrates that the university-student contract is not a purely commercial undertaking in the

instance, Lumina "Students' perceptions of the problem method in law: Implications for teaching practice" 2005 *Stell LR* 349-364; Greenbaum (n 1); Hutchison "Recontextualising the teaching of commercial transactions law for an African university" 2021 *Acta Juridica* 275-296.

4 The Higher Education Act 101 of 1997 (hereafter "the HEA") makes reference to several types of higher educational institutions (HEIs), however, for the purposes of this chapter focus is placed specifically on the university structures.

5 Examples of applicable legislation in private university-student contracts may include, for example, the Protection of Personal Information Act 4 of 2013, the Consumer Protection Act 68 of 2008, and the National Credit Act 34 of 2005.

United States and the South African contexts, but can rather be described as a *sui generis* contract.

2. The position in the United States

The university-student relationship has historically been contentious and wrought with uncertainty in jurisdictions like the United States. As early as the 1900s, the university-student relationship rested on the contractual relationship between the university and the parents of the student.[6] One of the terms of this contractual relationship was that the university would assume the parental role in relation to the student,[7] which was bundled into the doctrine of *in loco parentis.*[8] According to Claassens, the concept of *in loco parentis* means "[i]n place of the parent",[9] and the use of this doctrine in describing the university-student relationship meant that the university did not only assume the role of the parent, but also acted as a type of guardian of the student.[10] In other words, the university was "entrusted by the parents" to take responsibility for the wellbeing of the student until they reach the age of majority at 21 years of age.[11] In this, the parents delegated their parental duties to the university,[12] who could (as a functioning *quasi* parent) enforce disciplinary measures against the student.[13] In this, the application of the *in loco parentis* doctrine in universities was not too dissimilar to its

6 Buchter "Contract law and the student-university relationship" 1973 *Indiana Law Journal* 253.
7 *Ibid.*
8 Zwara "Student privacy, campus safety, and reconsidering the modern student-university relationship" 2012 *Journal of College and University Law* 419-432. This was particularly the case in the 1960s and 1970s in the United States.
9 Claassens *Claassen's Dictionary of Legal Words and Phrases* 2022. See also *Bradshaw v Rawlings* 612 F. 2d 135 – Court of Appeals, 3rd Circuit (1979) 140.
10 Jebe and Park "The student-university relationship and access to student online activity" 2019 *Connecticut Public Interest Law Journal* 45-56.
11 Claassens (n 8).
12 See *Furek v University of Delaware* 594 A. 2d 506 - Del: Supreme Court (1991) 517.
13 Buchter (n 5) 253; Lewis "The legal nature of university and the student--university relationship" 1983 *Ottawa Law Review* 249-252.

application in primary and secondary schools, and was also not too far removed from a parent's responsibility to make decisions about the wellbeing of their child.[14] Ultimately, the *in loco parentis* doctrine provided a wider discretionary scope for universities, and fostered what has been described as a one-sided relationship.[15]

The paternalistic approach imbued in the *in loco parentis* doctrine was, however, short-lived.[16] The civil rights and human rights movements in the 20th century brought a greater focus on individualistic rights and autonomy of student decision-making and, consequently, embraced a more liberal approach to university-student relationships.[17] This liberal approach is, at its heart, contractual in nature,[18] and includes terms like the registration or payment of university fees of the student.[19] It also created a legal mechanism for students to be bound to the university's policies and procedures, as well as disciplinary measures.[20] This eventually became known as the bystander approach, as universities were not actively involved in student decisions or lives but were only obligated to perform their contractual duties,[21] which were seen as being commercial in nature and nothing more.[22] This commercial approach also facilitated the perception that universities function as business enterprises.

There appears to be a general acceptance that the university-student relationship starts with, and is underpinned by, contractual principles.[23] Put differently, the university-

14 Jebe and Park (n 9) 56. See also its limited application in high school settings in the *Furek* case 517.
15 *McCauley v University of the Virgin Islands* 618 F. 3d 232, 245.
16 The *McCauley* case 245 notes that the public university has moved on from *in loco parentis* and evolved into something very different to this model. See also *Nero v Kansas State University* 861 P. 2d 768 - Kan: Supreme Court (1993).
17 Jebe and Park (n 9) 56-57. See also Zwara (n 7) 432.
18 Jebe and Park (n 9) 56. See also Buchter (n 5) 254.
19 Lewis (n 12) 254.
20 Lewis (n 12) 255.
21 Jebe and Park (n 9) 57. Zwara (n 7) 434.
22 Zwara (n 7) 435.
23 See Birtwistle "University student admissions a simple matter of contract" 2003 *Education Law Journal* 25.

student relationship is, at the very least, partly contractual,[24] and there are some elements of contract theory that are embedded in this relationship. However, the engagement and duties between a university and student are much wider than simply being contractual,[25] which is summarised in *Slaughter v Brigham Young University* as follows:[26]

> It is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that 'contract law' must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. There are other areas of the law which are also used by courts and writers to provide elements of such a framework. These included in times past *parens patriae,* and now include private associations such as church membership, union membership, professional societies, elements drawn from 'status' theory, and others. Many sources have been used in this process, and combinations thereof, and in none is it assumed or required that all the elements of a particular doctrine be applied. The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. It may also be different at different schools.

Therefore, the duties of a university are not necessarily limited to the contractual obligations agreed to between the parties. These

24 See, for example, *Ross v Creighton University* 957 F. 2d 410 Court of Appeals, 7th Circuit (1992) 412; *Carr v St. John's Univ., New York* 17 AD 2d 632 - NY: Appellate Div. 2nd Dept. 1 634; *Zumbrun v University of Southern California* 25 Cal. App. 3d 1 - Cal: Court of Appeal 2nd Appellate Dist. 5th Div. 19; *Wickstrom v North Idaho College* 725 P. 2d 155 - Idaho: Supreme Court 1986; *Steinberg v Chicago Medical School* 371 NE 2d 634 - Ill: Supreme Court (1977); and *DeMarco v University of Health Sciences* 352 NE 2d 356 - Ill: Appellate Court, 1st Dist. (1976).

25 *Slaughter v Brigham Young University* 514 F. 2d 622 - Court of Appeals 10th Circuit (1975).

26 the *Slaughter* case 623.

additional obligations on universities would not necessarily be incorporated into the university-student contract,[27] but are linked to the values and rights embedded in the constitution and could include the university's duty to ensure a student's right to safety, privacy, and the protection of a student's right to free speech (to name but a few). This recognition of the wider duties of universities has brought about what one may call a transitional phase of the university-student relationship in the United States.[28] The exact nature of this relationship still requires legal clarity as to exactly what the scope of the duties of universities is towards students.[29] One may even argue that the contemporary university-student relationship exists somewhere in between the *in loco parentis* doctrine and the bystander approach, thereby placing the university in the functionary role of an educational facilitator.[30] Universities are, however, unique in their function and,[31] in a sense, one may call the contract between universities and students a form of a *sui generis* contractual engagement, which is not too different to the approach undertaken in South Africa.

3. The position in South Africa

3.1 Introductory comments

The South African courts have recognised the contractual nature that underpins the relationship between universities and students, which was confirmed in several judgements, including *Schoeman v Fourie*,[32] *Sibanyoni v University of Fort Hare*,[33] *Mkhize v Rector, University of Zululand,*[34] *Lunt v University of Cape Town*,[35] and *Mokgoko v Acting Rector, Setlogelo Technikon.*[36] Most of these cases

27 Jebe and Park (n 9) 57; Zwara (n 7) 436, notes that what exactly this duty is, remains unclear.
28 See, for example, Zwara (n 7) 419.
29 Zwara (n 7) 436.
30 *Ibid.*
31 *Ibid.*
32 *Schoeman v Fourie* 1941 AD 125 136.
33 *Sibanyoni v University of Fort Hare* [1985] 3 All SA 89 (Ck) 102.
34 *Mkhize v Rector, University of Zululand* [1986] 1 All SA 254 (D) 256.
35 *Lunt v University of Cape Town* [1989] 3 All SA 269 (C) 273-234.
36 *Mokgoko v Acting Rector, Setlogelo Technikon* [1994] 4 All SA 121 (B) 127.

(save for the *Mokgoko* case) were decided in the pre-constitutional era of South Africa, but have, nevertheless, established valuable principles for regulating the university-student relationship. For instance, drawing from the principles established in *Sibanyoni*, one may say that the terms in the university-student contract are that universities agree to provide tuition (and, where relevant, accommodation) to students,[37] and students, in turn, agree to follow the rules and policies of the university and pay tuition fees.[38] Further to this, but under the interpretation of the University of Zululand Act,[39] the *Mkhize* case also found that the contract was one that occurred on an annual basis and that the university was free to decide whether a student would be re-admitted in an academic year.[40] In fact, "[i]n the absence of … an implied term [to the contrary], there would be no reason why an applicant for admission or re-admission should be in any better position than an applicant for membership of a club".[41] In other words, our courts have viewed the university-student contract as fixed, one-year contracts that are renewable and are consecutive in nature.[42]

Since then, the constitutional era in South Africa and the promulgation of the Higher Education Act[43] (HEA) has changed the teaching and learning landscape in South Africa and, consequently, the university-student relationship (which will be discussed in the sections that follow).

3.2 Private and public contracts

Zwara is correct in stating that higher educational structures come in all shapes and sizes,[44] and such diversity is recognised in the HEA. The HEA regulates tertiary education in South Africa,[45] and therein provides learning conditions for knowledge

37 See, for example, the *Sibanyoni* case 102.
38 *Ibid*.
39 the University of Zululand Act 43 of 1969.
40 the *Mkhize* case 256.
41 *Ibid*.
42 the *Mokgoko* case 127.
43 The Higher Education Act 101 of 1997.
44 Zwara (n 7) 419.
45 See the HEA.

creation and transfer.[46] The HEA envisages different tertiary educational structures, including public and private institutions under HEIs,[47] which may include public and private universities, university colleges, and Technikons. As this chapter addresses the university-student contract, the focus is placed specifically on universities under the HEA.

Traditionally, in a South African context, the legal relationship between universities and students is contractual in nature (see point 3.1 above).[48] Yet, the type of decision-making power exercised by a university will influence the type of contract that would be concluded between a university and a student. Contractual relationships may be broadly grouped into private contracts and public contracts.

Private contractual engagements are, as the name suggests, those contracts that are between private citizens (including natural and juristic persons) and a governmental body is not a party to the contract. Private contracts are underpinned by substantive contract theory, wherein the individual rights and duties are expressed in the contract or legislative provisions. Cornelius describes the nature of private contracts as being *ad hoc* legislation *inter partes*.[49] These private contracts are primarily regulated by the common law principles of contract, which are amended by legislation and developed by case law.[50] Some of the more prominent legislative interventions in private contract, which may be applicable to the university-student contract, are the Protection of Personal Information Act (POPIA), the Consumer

46 Preamble of HEA.
47 s 1 definition of "higher institutional education" of the HEA. See also ch 7 recognising private higher institutional education entities and ch 3 recognising public higher institutional education entities.
48 s 1 definitions of "university" and "providing higher education" of the HEA, which notes that it is a higher educational institution that provides services at an undergraduate and postgraduate level in the fields of (i) registering students, (ii) being responsible for the provision of a higher education curriculum, (iii) the assessment of student performance, and (iv) conferring higher education qualifications on students.
49 Cornelius "The complexity of drafting" 2004 *TSAR* 692.
50 Hutchison and Pretorius *The Law of Contract in South Africa* Oxford University Press (2022) 11-12.

Protection Act (CPA) and the National Credit Act (NCA).[51] Furthermore, the Constitution has also influenced the operation and functioning of private contracts. Unlike public contracts, the constitutional values and ideals do not apply directly to private contractual engagements,[52] but, rather, the values of the Constitution (as expressed in the Bill of Rights) apply indirectly through the mechanism of public policy.[53]

In contrast, public contracts have at least one government body (often referred to as an organ of the state or a juristic person wielding public power) that is a party to the contract. As a result, public contracts have, in addition to compliance with substantive contract theory, the added dimension of ensuring that public power is properly exercised and not abused. In addition, public contracts that relate to the procurement of goods and services are heavily regulated by means of legislative requirements.[54] In the context of the university-student contract, however, the university is the entity that provides the service and, as a result, the procurement legislative provisions would not be applicable to student engagements. Put differently and in summary, public contracts are one part private (subject to substantive contract theory) and one part public (subject to administrative law).[55] Typically, a public university will include both private and public elements to the university-student relationship, as well as any relationship with persons that are paying for the student's tuition

51 Buchter (n 5); Protection of Personal Information Act 4 of 2013 (POPIA); Consumer Protection Act 68 of 2008 (CPA) and National Credit Act 35 of 2005 (NCA).

52 See *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC). See also Hutchison and Pretorius (n 48) 14-17.

53 See the *Barkuizen* case and the *Beadica* 231 case. See also Hutchison and Pretorius (n 49) 14-17.

54 Broad-Based Black Economic Empowerment Act 53 of 2003; Preferential Procurement Policy Framework Act 5 of 2000; Promotion of Administrative Justice Act 3 of 2000 (hereafter "PAJA"); Promotion of Access to Information Act 2 of 2000; Prevention and Combating of Corrupt Activities Act 12 of 2004; and Public Finance Management Act 1 of 1999.

55 Quinot, Anthony, Bleazard *et al Administrative Justice in South Africa* (2021) 3, which defines administrative law as the "quest for balancing rights, interests and obligations, in the determination of which public and legal policy play a central role".

fees (such is the case with a minor student where their parent or guardian pays for tuition fees).

3.3 The application of PAJA

To determine whether the university-student contract is public or private in nature, one would have to first consider whether the university is an organ of state or whether such a university has exercised public power, as well as the origin of such power. Herein, the Promotion of Administrative Justice Act (PAJA) provides guidance as to whether a contractual engagement would be public or private in nature.

PAJA is the legislative mechanism to regulate administrative action with the intention of ensuring that such action is "lawful, reasonable and procedurally fair".[56] Section 1 of PAJA describes an administrative action as an instance where:[57]

> ... any decision taken, or any failure to take a decision, by-
>
> (a) an organ of state, when-
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect....

If a university falls within the ambit of either section 1(a) or 1(b) of PAJA, then the university-student contract would be considered public in nature and subject to the provisions of PAJA. There is, however, some uncertainty as to the exact nature of public universities. Whilst some courts have viewed public universities as a juristic entity performing a public function under section 1(b)

56 preamble of PAJA.
57 s 1 definition of "administrative action" of PAJA.

of PAJA,[58] there appears to be growing support for the argument that public universities are, rather, organs of state in terms of section 1(a)(i)-(ii) of PAJA.[59] This position has been confirmed, for example, in the 2018 Constitutional Court judgement of *Harrielall v University of KwaZulu-Natal* and, more recently, in the 2022 judgment of *Chairperson, Council of the University of South Africa v Afriforum NPC.*[60] Also, in *Mzansi Fire & Security v Durban University of Technology*, the court found that public universities are organs of state in instances where a university procures security services (and, arguably, any other services).[61] In 2023, the Supreme Court of Appeal in *Dyantyi v Rhodes University* ruled that public universities exercise public power in terms of section 1 of PAJA and consequently are considered organs of state.[62]

Regardless of the technicality of whether a university would fall within the ambit of section 1(a) or 1(b) of PAJA, it appears that public universities will have an administrative element attached to their contractual relationships as a supplier of higher education and in the procurement of services and goods. After all, Chetty J describes public universities as being established by statute and funded by the state,[63] which would naturally require some form of accountability for the use of such monies. This means that students registered at a public university would conceivably have the procedural rights afforded under section 3 of PAJA.[64] This notwithstanding, not all actions of a public university would fall within the ambit of PAJA. Take, for instance, *University of the Free State v Afriforum*, in which the amendment of the university's language policy was not considered to be administrative in

58 *Eden Security Services CC v Cape Peninsula University of Technology* 2014 ZAWCHC 148. See also *Mbuthuma v Walter Sisulu University* 2020 (4) SA 602 (ECM) par 45-48.
59 See *Mzansi Fire & Security (Pty) Ltd v Durban University of Technology* 2022 (5) SA 510 (KZD) par 20; *Harrielall v University of KwaZulu-Natal* 2018 (1) BCLR 12 (CC) para 15; and *Chairperson, Council of the University of South Africa v Afriforum NPC* 2022 (2) SA 1 (CC).
60 the *Harrielall* case par 15; the *Afriforum* case.
61 the *Mzansi* case.
62 *Dyantyi v Rhodes University* 2023 (1) SA 32 (SCA) par 19-20.
63 the *Mzansi* case par 32.
64 the *Dyantyi* case par 19-20.

nature.[65] Whereas disciplinary action against students,[66] and tenders and procurement actions of public universities, have been seen as administrative in nature and therefore must comply with the requirements for procedural fairness under PAJA.[67] To determine whether PAJA is applicable, Toni AJ notes that "[a] primary indicator used by the courts in determining the nature of the power to be exercised by a repository of public power is the source of the power",[68] and that "[w]hen a power is sourced in legislation, it is likely to be administrative in nature. Substantial constraints on the power would be an indication that the power is administrative in nature".[69] A further consideration lies in whether public funds are used by one of the contracting parties.[70]

In the post-constitutional case of *Mohuba v University of Limpopo*, the court confirmed that that the relationship between a student and a university is not entirely private or public in nature, but seemingly consists of a combination of these elements.[71] Ultimately, determining whether the university-student contract is public or private in nature is not related to whether the contract is concluded by a private or public university, but rather rests upon the source of the power that the university wields and whether such power is derived from the contract between the parties or whether it is derived from legislation.[72] In other words, the question is whether the parties exercise their powers out of the contract (which indicates a private contract) or out of legislation (which indicates a public contract).[73] The answer to this question is factual and determinable on a case-by-case basis. Although many functions of public universities would likely fall within the ambit of either section 1(a) or 1(b) of PAJA (and thereby place at

65 the *Afriforum* case par 16, 18.
66 the *Dyantyi* case par 19-20.
67 the *Mzansi* case.
68 *Mbuthuma v Walter Sisulu University* 2020 (4) SA 602 (ECM) par 39, referring to *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059; [1999] ZACC 11) para 143.
69 the *Mbuthuma* case par 39.
70 adapted from principles in the *Mzansi* case par 32.
71 *Mohuba v University of Limpopo* (730/2022) [2023] ZASCA 139 (27 October 2023) par 18.
72 See *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T).
73 See the *Cronje* case.

least some elements of the university-student contract as a public contract), there may be an argument to be made that private universities could also conclude public contracts insofar as they are acting within the terms of section 1(b) of PAJA (as the private university's power is still found within the legislative function of the HEA).

3.4 Further complexities

As the university-student relationship has, in part, a contractual nature, the CPA provides specific requirements that may be relevant to such contractual engagements.[74] Take, for instance, the fact that the university-student contract must be in plain and understandable language.[75] Further, the terms of the university-student contract must not be unfair or unreasonable as contemplated under section 48 of the CPA.[76] What is of interest is the apparent inconsistency between the HEA and the CPA. In terms of regulation 43 of the CPA, there is a presumption that certain contractual terms would be unfair and unreasonable under section 48. An example of where a provision would be presumed unfair and unreasonable may be found in regulation 44(3)(b), which relates to the limitation of liability of a supplier (in this case the university), which would be, *prima facie*, unfair where:[77]

> [a contractual provision] exclude[es] or restrict[s] the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a debt owed to the supplier against any claim which the consumer may have against the supplier.

74 s 1 of the CPA notes that services include "the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002)". See also s 5(1)-(2) of the CPA, in which it appears that educational services are contemplated as one of the services that would be protected under the CPA.
75 s 22 of the CPA.
76 s 48 of the CPA.
77 reg 44(3)(b) of the CPA.

This means that an exemption clause limiting the university's liability in the instances of breach would be, *prima facie,* unfair and unreasonable under section 48 of the CPA. However, the HEA provides a blanket limitation of liability to universities in terms of section 67, which states that "[t]he State, the CHE and any person appointed in terms of this Act are not liable for any loss or damage suffered by any person as a result of any act performed or omitted in good faith in the course of performing any function contemplated in this Act". If one were to interpret section 67 of the HEA as applying in a purely private contractual engagement, then there may be the contention that section 67 of the HEA is exempt from regulation 44(3)(b) as the limitation of liability relates to omissions due to "good faith". However, acting in good or bad faith is not necessary to determine contractual breach. Put differently, although bad faith may be an indicator of breach, it is not a requirement for breach. Therefore, a university that acts in good faith may still, on the face of the contract, be in *mora* regardless of whether a person acted in good faith. As section 67 provides an overarching limitation to liability for universities, it would be implied in university-student contracts and would consequently be in conflict with regulation 44(3)(b) of the CPA, thereby triggering a *prima facie* unfair and unreasonable term under section 48 of the CPA.

This conflict between section 67 of the HEA and regulation 44(3)(b) of the CPA may, however, be resolved through legislative interpretation. In this, the CPA also provides that, should there be a conflict between its provisions and that of another piece of legislation (in this case the HEA), and the conflict cannot be reconciled, then the provision to the best provision of the consumer (in this case the student) would prevail.[78] However, this would only apply if one could sustain the argument that section 67 of the HEA relates to private contractual engagements. In a public contract setting, the interpretation may be somewhat different. The deluge of case law on the interpretation of the HEA is one of the sources of uncertainty in university-student contracts, which may be further complicated by attempting to reconcile the application of the HEA and the CPA in public and private contracts.

78 s 3, 4 of the CPA.

4. Concluding thoughts

The modern approach to the university-student relationship is underpinned, at least in part, by contractual principles, and in some instances has been viewed as a commercial transaction.[79] The university-student contract generally regulates fees, the discipline of students, student conduct, and general student matters.[80] However, both the United States and South African positions have illustrated that the university-student contract is more than simply a commercial contract. Rather, it is something unique and more akin to a *sui generis* contract which holds unique rules and application. In South Africa, the classification of a university-student contract as a private contract will require additional considerations, such as unequal bargaining power, the application of contracts of adhesion (where students are required to sign contracts upon registration with the university),[81] and the application of legislative protections set out in POPIA, the CPA, and the NCA. However, the university-student contract may also be classified as a public contract, wherein students are afforded the right of procedural fairness under section 3 of PAJA.

Although the university-student relationship may have certain commercial elements embedded within its operation, it certainly is not solely a commercial transaction. Added to the consideration of whether a private or public contract exists, the terms of such a contract (whether express, tacit, or implied) would also regulate the relationship between student and the learning material (or the knowledge transfer and skills acquisition), the relationship between the teacher and the student (or the pedagogical and methodological approach to teaching and learning), as well as ensuring the constitutional rights of a student. Rather, the university-student relationship is more akin to a *sui generis* contract, and cannot be viewed as a purely commercial transaction.

79 Buchter (n 5) 262.
80 See Buchter (n 5) 254.
81 See also Buchter (n 5) 265. See also Dodd "Non-contractual nature of the student-university contractual relationship" 1985 *University of Kansas Law Review* 701-714.