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# **The role of good faith in the South African law of contract**

by

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## SUMMARY

In South Africa, courts and academia frequently refer to contracts as *bonae fidei* agreements. Often this term is invoked without further explanation or reflection on what the meaning of this term is. Upon closer inspection it seems that the phrase “*bonae fidei* contract” has largely become devoid of any meaning.

This study embarks upon a critical analysis of case law leading up to the remarks of the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC), with the aim of determining what the role of good faith in the South African law of contract is and how this concept is approached by South African courts. A brief overview of the historical origins of the concept is given and the English law is considered as a foreign jurisdiction in order to gain understanding of how the concept is dealt with elsewhere.

This study does not propose to undertake an in-depth study of consumer protection legislation. The justification for this decision lies in the fact that moving beyond this scope will prove to be too wide a field of study; hindering the in-depth discussion and evaluation of the common law and moving beyond the research aims of this dissertation.

A critical analysis of South African case law indicates that it is unlikely that the courts in South Africa will adopt a general defence based on good faith that would empower courts to set aside otherwise enforceable agreements. The principle of good faith now forms part of the umbrella defence of public policy: it is finally accepted that public policy is invested in equitable contractual relationships and not only in upholding the principle of *pacta servanda sunt*.

This study shows that good faith has a more active role to play in the law of contract as there is a duty upon courts to develop the common law so as to bring it in line with constitutional norms and values. This study illustrates the importance of open-ended concepts such as good faith and *ubuntu* to achieve a greater degree of equity and justice between contracting parties.

The conclusion is reached that public policy is informed by the reigning ideology of the day: the contract law of South Africa must reflect its adherence to upholding and promoting the values and norms underlying the Constitution. If courts step up and uphold the constitutional mandate to develop the common law to bring it in line with constitutional values and norms, there will be very little need for legislative interference.

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## 1 Introduction

The core ethic of the law of contract may be identified as either the belief in individualism or an avowal to co-operativism. Adherence to either paradigm determines the acceptance or rejection of a doctrine of good faith.<sup>1</sup>

The much disputed role of good faith underwent a series of developments in the twentieth century. The specific role that good faith now plays in the law of contract can only be understood with reference to the historical development of the concept. Good faith has long been the subject of many academic writings and court decisions, but it appears to be a topic of an elusive nature since, despite much academic attention, the matter cannot yet be regarded as settled.

The recent remarks of the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*<sup>2</sup> indicate that the matter will certainly enjoy attention in future, where important questions regarding the role of good faith will have to be addressed.<sup>3</sup> If this proves to be the case, the main question that arises is whether the current approach of the courts is in fact the best way to deal with the concept of good faith. There are various indications that the current position is not satisfactory.<sup>4</sup> If it is found that the current role of good faith is open to further development, the best way forward must be determined and much can be learned in this regard from a comparative study of English law.

The possibility that the role of good faith remains uncertain or unclear must be investigated as the conclusion reached could have far-reaching consequences for how a similar question will be dealt with in the future. This also leads to the question of legislative interference and whether it is necessary to give statutory content to this otherwise vague principle.

This study will focus on determining what the current state of good faith in South African law of contract is, where no legislation is applicable to the matter. Several other questions will also need to be considered in the scope of this study in order to reach a sensible and useful conclusion. The approach of the courts will have to be

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<sup>1</sup> Hawthorne (2006) *Fundamina* 71. See Pretorius (2003) *THRHR* 638 in general for an insightful  
<sup>2</sup> 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

<sup>3</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) 264,268 and 270.

<sup>4</sup> Barnard (2005) 3-4.

determined in order to establish whether the current position is satisfactory. This in turn will lead to a consideration of the question whether further development is necessary, and if so, which direction is best suited for South African contract law.

## **2 A brief historical overview of the concept of good faith**

### **2 1 *Bona fides* in historical context**

The role of abstract values such as good faith and equity in South African contract law must be determined and evaluated with reference to the historical development of South African law.<sup>5</sup> In this section a brief discussion of the roots of the concept of good faith will follow. Good faith or *bona fides* was relevant to both the Roman and the Roman-Dutch law systems, although it fulfilled somewhat different functions under each system.

In order to fully understand the importance of the role of good faith in modern South African law it is useful to track the development of the role of good faith through these two systems that had such a profound influence on South African Law.<sup>6</sup> This will also, to a certain extent, illustrate how normative concepts such as good faith have been influenced by dominating philosophical perceptions in different eras.<sup>7</sup> The content of the modern concept of good faith may also need to be determined or evaluated with reference to the meaning attached to this principle during different times in history.<sup>8</sup>

### **2 2 *Bona fides* in Roman law**

One must act well, as among good men, and without fraudulence.<sup>9</sup>

The *ius civile* governed the law applicable to Roman citizens.<sup>10</sup> All contracts were initially regarded as *negotia stricti iuris*, meaning contracts based on strict law with a prescribed *formulae* procedure.<sup>11</sup> The law was characterised by strict formalism and

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<sup>5</sup> Brand (2009) *SALJ* 71; Thomas *et al* 61 and the section quoted from *Master v African Mines Corporation Ltd* 1907 TS 925 928; Hutchison 11.

<sup>6</sup> Du Plessis (2002) *THRHR* 397; Hawthorne (2006) *Fundamina* 72.

<sup>7</sup> Du Plessis (2002) *THRHR* 397; Thomas *et al* 105-106 mentions that the law cannot be separated from society. The law will thus be impacted by ideologies and the constitutional dispensation of the society which it serves.

<sup>8</sup> Du Plessis (2002) *THRHR* 398.

<sup>9</sup> Cicero *M De Officiis* (1560) III 70, discussed by Du Plessis (2002) *THRHR* 400.

<sup>10</sup> Thomas *et al* 27.

<sup>11</sup> Thomas *et al* 28. Also see Brownsword *et al* 11-12.

ritual utterances and denied remedies where there was no strict adherence to the prescribed procedure.<sup>12</sup> This frequently led to injustices and a need for development was recognised.<sup>13</sup>

Roman law developed to such an extent that the principle of *iudicia bonae fidei* was accepted: actions based on good faith could be upheld.<sup>14</sup> A judge could thus adjudicate contractual matters with reference to the criterion of good faith. This meant that the court had the power to vary or amend the rights and obligations of the parties to the contract with reference to concepts such as justice, fairness and reasonableness.<sup>15</sup> The judge in a matter could legitimately consider individual circumstances and he enjoyed extended capacity when considering the “facts of the case.”<sup>16</sup> This also meant that a general defence of bad faith, otherwise known as the *exceptio doli generalis*, was accepted.<sup>17</sup> The *exceptio* gave a judge an equitable discretion to decide a case according to considerations of what is fair and reasonable.<sup>18</sup>

Du Plessis is of the opinion that the concept “*bona fides*” was well defined and understood in Roman law and held no threat to legal certainty or the sanctity of agreements. He does, however, emphasise that the social context of the Roman system of law was quite unique and this had a profound effect on how a principle such as *bona fides* was understood and utilised.<sup>19</sup>

“*Fides*” had a wide meaning with religious, ethical and legal connotations.<sup>20</sup> The legalisation of this concept was influenced by the Greek concept of “*fides*” (*pistis*) which also had ties to religious and moral obligations.<sup>21</sup>

Religion was one of the pillars of *pacta servanda sunt* (sanctity of contract) as there was a strong link between honouring promises and the virtues emphasised by religion.<sup>22</sup> Moral virtues of honesty and good conscience were reflected in the

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<sup>12</sup> Du Plessis (2002) *THRHR* 398. Also see Thomas *et al* 27.

<sup>13</sup> Zimmermann 218.

<sup>14</sup> Du Plessis (2002) *THRHR* 398. In this regard also see Samuel 86-87.

<sup>15</sup> SALC Working Paper (1994) para 2.1.

<sup>16</sup> Du Plessis (2002) *THRHR* 398.

<sup>17</sup> Brand (2009) *SALJ* 72.

<sup>18</sup> Zimmermann 219.

<sup>19</sup> Du Plessis (2002) *THRHR* 398-399.

<sup>20</sup> Du Plessis (2002) *THRHR* 399; Barnard (2005) iv.

<sup>21</sup> Du Plessis (2002) *THRHR* 399.

<sup>22</sup> Du Plessis (2002) *THRHR* 400-402. Also see Thomas *et al* 26.

concept of good faith. This is indicative of the intricate relationship between the cornerstones of the Roman law of contract and the informative function that religion fulfilled at this stage of legal development.

In these initial stages of development, *bona fides* referred to a standard of conduct that the contracting parties had to abide by. It was used as a criterion to determine whether the expectation of a reasonable man in a contractual relationship had been breached.<sup>23</sup> The community's idea of fairness and equity also played a role in determining the scope and meaning of *bona fides* but was not equated with public policy.<sup>24</sup>

### **2 3 The role of *bona fides* in Roman-Dutch Law**

Roman-Dutch law, a term introduced by Simon van Leeuwen in the 17<sup>th</sup> century, refers to the acceptance of principles of Roman law in the law of the Netherlands and especially in the law of the province of Holland.<sup>25</sup>

All contracts at this stage were regarded as *bonae fidei* and no distinction was made between *negotia bonae fidei* and *negotia stricti iuris*.<sup>26</sup> Contracts were based on the principle of good faith, but more emphasis was placed on consensus between the parties during negotiations. This led to the adoption of the consensus theory: the enforceability of a contract was now determined with reference to the moment at which consensus was reached.<sup>27</sup> This also emphasised the accepted principle that all informal agreements were binding as long as consensus was reached between the contracting parties.<sup>28</sup>

Good faith was acknowledged in Roman-Dutch law as Roman-Dutch law was regarded as an inherently equitable system, but the principle of good faith no longer had the power to limit or extend the rights or duties of contracting parties as had been the case under Roman law. Considerations of fairness and equity could not override the more "substantive" principles of Roman-Dutch law.<sup>29</sup>

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<sup>23</sup> Du Plessis (2002) *THRHR* 399.

<sup>24</sup> Du Plessis (2002) *THRHR* 399.

<sup>25</sup> Van Zyl 303; Thomas *et al* 64 and 70.

<sup>26</sup> Zimmermann 220; Hutchison 12.

<sup>27</sup> SALC Working Paper (1994) paras 2.1 – 2.2.

<sup>28</sup> Zimmermann 219.

<sup>29</sup> Du Plessis (2002) *THRHR* 405.

In the writings of Hugo de Groot on this issue, the influence of his regard for human reason as source of law is clearly evidenced.<sup>30</sup> He defined equity, a concept closely related to good faith, comprehensively as a regulatory concept that served a limiting function. This meant that it could be used to intervene where application of the substantive principles of the law would lead to an injustice or to address an inequality in performance.<sup>31</sup> This idea of good faith and equity as regulatory and limiting concepts were adopted by various jurists who were influential in developing the Roman-Dutch law and so gained wide support.<sup>32</sup>

Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ornelas*<sup>33</sup> made the following remark regarding the role of good faith in the classical Roman-Dutch law:

The parties were bound to everything which good faith reasonably and equitably demanded.<sup>34</sup>

This admittedly does not elucidate exactly what was expected of contracting parties but the judgment in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*<sup>35</sup> is more helpful in determining what exactly the role of good faith in Roman-Dutch law was. The court stated in this case that it conferred upon courts extensive powers to read terms into agreements if considerations of justice so require.<sup>36</sup>

What can be surmised from the discussion above is that good faith had a more limited role in Roman-Dutch law than it had in Roman law. This is most probably due to the different social context and the absence of a strict legal procedure in the Roman-Dutch law. The writings of Hugo de Groot had a profound impact on the role and continued existence of the principles of good faith and equity by not allowing these principles to be sidelined. It is due to his focus on these abstract values that they also influenced the thoughts and works of other Roman-Dutch authors whose works have been received into South African law.

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<sup>30</sup> Du Plessis (2002) *THRHR* 405.

<sup>31</sup> De Groot H *Prolegomena juri Hollandico praemittenda* § 3 in Feenstra "Een handschrift van de inleiding van Hugo de Groot met de onuitgegeven Prolegomena juri Hollandico praemittenda" 1967 *TR* 444, as discussed by Du Plessis (2002) *THRHR* 406.

<sup>32</sup> See for example the works of Dionysis van der Keesel, Johannes Voet, Ulrik Huber and Johannes van der Linden on this subject.

<sup>33</sup> 1988 (3) SA 580 (A).

<sup>34</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 601.

<sup>35</sup> 1980 (1) SA 645 (A) 652.

<sup>36</sup> *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 652. Also see Zimmermann 220.



### 3 The South African legal system

#### 3.1 General

The discussion above is especially relevant insofar as it serves as a starting point when evaluating the current state of good faith in South African law. The term “Roman-Dutch law” in the South African context is generally understood to refer to the common law of South Africa.<sup>37</sup> The reason for this is that it is mainly the seventeenth century law of the province of Holland that was received into South African law because of the unique history that South Africa has.<sup>38</sup>

The Dutch East India Company established a refreshment post in 1652 at what would later be known as the Cape of Good Hope.<sup>39</sup> As commerce between previous inhabitants of the area and the European traders blossomed, the need arose for a system according to which disputes should be adjudicated. It was decided that the law of the province of Holland would be the applicable law and that everyone, even those people who had occupied the land before the Dutch Settlers, would fall under its jurisdiction.<sup>40</sup> The law of Holland was thus used by officials as it regarded the Cape as a *res nullius* and disregarded the customs and laws of the inhabitants of the area.<sup>41</sup>

Mention should be made here of the periods of British occupation, as several areas of the South African law were particularly heavily influenced by the English law.<sup>42</sup> When courts were faced with commercial law disputes, it was common practice to consider the English law as supplementary to the Roman-Dutch law as the English law was more developed and better suited to deal with changing economic times.<sup>43</sup>

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<sup>37</sup> Fagan 41.

<sup>38</sup> There are academics who are proponents of a broader view, namely that the Roman-Canon law was equally influential, but the narrower view has found support in express *dicta* of the Appellate Division. The court’s decision in the *Tjollo Ateljees (Edms) Bpk v Small* 1949 (1) SA 856 (A) is one such example. For a general discussion see Fagan 41-49, as the depths and relevance of this debate fall outside the scope of this research project. Also see Brand (2009) SALJ 71.

<sup>39</sup> Fagan 35; Thomas *et al* 95.

<sup>40</sup> Fagan 38-39.

<sup>41</sup> Fagan 40.

<sup>42</sup> Such as the procedural law, company law and the law of trusts. See Fagan 56.

<sup>43</sup> Fagan 57. Also see Thomas *et al* 97-100.

The principles of Roman-Dutch law were not disregarded; it was in fact still considered as the primary source of substantive law.<sup>44</sup>

The discussion above shows that the South African legal system was influenced by both the English law and the Roman-Dutch law.<sup>45</sup> A natural consequence of this is that not all rules and principles from either system could be received as they sometimes contradicted each other. It will thus be relevant to consider the opinions of the South African courts regarding which principles of good faith had been received into South African law.

### **3 2 Good faith in early South African law**

It is often stated by our courts and academic writers that South African law is inherently equitable or that all contracts in South Africa are regarded as *bonae fidei*.<sup>46</sup> The courts have refrained from defining this phrase authoritatively and this has contributed to confusion on the matter. It is of fundamental importance to establish what is meant by this phrase, and whether it has become devoid of any meaning.

South Africa received the limited concept of good faith from the Roman-Dutch law for purposes of its contract law. The problems experienced by the Roman-Dutch system, namely that it was ill-defined and vague and its role not completely certain, accompanied it to South Africa.<sup>47</sup> Furthermore, the courts were unwilling to vary the terms of an agreement based solely on the notion of it being contrary to good faith.<sup>48</sup>

In these early times it was accepted that the objectives of a doctrine of good faith were at odds with the public policy,<sup>49</sup> the latter being in favour of absolute freedom of contract and *pacta servanda sunt*. This position would soon become unpopular. It would later become trite that good faith informs public policy and the one cannot be regarded as completely separate from the other and the concepts are by no means mutually exclusive.

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<sup>44</sup> Brand (2009) SALJ 72.

<sup>45</sup> Du Plessis (2002) THRHR 397. This is referred to as a “hybrid legal system.” Also see Thomas *et al* 7 and Du Plessis 73 for further discussion on the mixed legal nature of South African law.

<sup>46</sup> *Meskin v Anglo-American Corporation of SA Ltd* 1986 (4) SA 793 (W) 804. Du Plessis (2002) THRHR 407, Pretorius (2003) THRHR 643.

<sup>47</sup> Du Plessis (2002) THRHR 412.

<sup>48</sup> *Burger v Central South African Railways* 1903 TS 571. Also see Zimmermann 240.

<sup>49</sup> Zimmermann 241.

The reverence reserved for the principle of sanctity of contract would become more and more popular as it had the added advantage of promoting legal certainty. The commercial community was thus heavily invested in the protection and promotion of *pacta servanda sunt*.<sup>50</sup>

At this stage of development there was still a vivid distinction between good faith and public policy. The case of *Neugebauer & Co v Hermann*<sup>51</sup> serves as a useful illustration. In this case a buyer colluded with other potential buyers at an auction with the object of buying the goods for less than the price they were likely to reach at a “no-reserve” auction.<sup>52</sup> The court refused to hold the seller bound to the agreement expressly stating that it was not a question of being against public policy, but rather a question of the requirements of good faith.<sup>53</sup>

This decision creates the impression that good faith might be something more than merely considerations of public policy. Where buyers conspire to deprive a seller of a benefit as was done in this case the court likens the conduct to fraud upon the seller. The court declined to enforce the agreement because the requirement of good faith was not met.<sup>54</sup>

The distinction between good faith and public policy was less apparent in the English law where the focus was on the distinction between law and equity. The distinction in English law between courts of law and courts of equity was not received in South Africa.<sup>55</sup>

Initially, it was believed that this distinction meant that the Cape Supreme Court - as it then was - could exercise an equitable jurisdiction in the matters before it as there was no separate court that would give thought to considerations of equity. This “equitable discretion” referred to the ability of a court to decide a matter with reference to abstract values outside the so-called substantive law.<sup>56</sup> This was not

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<sup>50</sup> Salanié 144, 146-147.

<sup>51</sup> 1923 AD 564.

<sup>52</sup> *Neugebauer & Co v Hermann* 1923 AD 573. This type of auction is also sometimes referred to as “auction without reserve” or “without reserve auction”. These terms can be used interchangeably.

<sup>53</sup> *Neugebauer & Co v Hermann* 1923 AD 573.

<sup>54</sup> *Neugebauer & Co v Hermann* 1923 AD 570-573. A discussion of the fine line between fraud and good faith does not fall within the ambit of this study. See Zimmermann 242 for a more detailed discussion.

<sup>55</sup> Zimmermann 217.

<sup>56</sup> Values such as fairness, reasonableness, good faith, and justice.

taken to mean that the court could erode the fixed rules of Roman-Dutch law.<sup>57</sup> The concepts of good faith and equity being closely related in this context, it stood to reason that good faith was received in South African law under the auspices of the courts' equitable jurisdiction.

The vagueness of a concept such as good faith is illustrated by Zimmermann, who is of the opinion that good faith infused the law of contract with "an equitable spirit."<sup>58</sup> One is left with a feeling of unease, as it is clear that there is *some* function to be fulfilled by good faith, but the reach of this "equitable spirit" is unclear.

South Africa has taken a traditionalist approach to abstract concepts, such as good faith, in the past.<sup>59</sup> According to the traditionalist approach, good faith is not a substantive rule or requirement, used to alter agreements between parties. The traditional view emphasises the vagueness of a term like good faith, undermining any serious contribution it might have to legal development while focusing on the legal uncertainty it might cause.<sup>60</sup> In terms of this school of thought the role of good faith is subtle, performing the role of informing existing legal principles where these principle so allow.<sup>61</sup>

In direct contrast to the traditionalist approach, the modernist approach exists. This approach has much in common with the modern Dutch approach of *redelijkheid en billikheid*.<sup>62</sup> In his writings Neels, who can be regarded as the developer of this approach, shows that although good faith is not recognised as a substantive contractual rule, it has wider application than merely fulfilling an informative function.<sup>63</sup> According to him, good faith also serves a supportive and corrective function and is used by South African courts to bring about more equitable results between contracting parties.<sup>64</sup> The suggestions by the South African Law Commission were indicative of an even more radically modernist approach.<sup>65</sup>

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<sup>57</sup> Zimmermann 217.

<sup>58</sup> Zimmermann 128.

<sup>59</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 601.

<sup>60</sup> Du Plessis (2002) *THRHR* 409.

<sup>61</sup> An example of this would be where *ex lege* terms are read into a contract.

<sup>62</sup> Neels (1998) *TSAR* 711.

<sup>63</sup> Neels (1998) *TSAR* 706 and Neels (1999) *TSAR* 695.

<sup>64</sup> Neels (1999) *TSAR* 697.

<sup>65</sup> The SALC's report and recommendations will be discussed in more detail below.

The traditionalist view was favoured by South African courts and reigned supreme for several decades. Section 3.3 will take a closer look at the victories of the traditionalist approach over the modernist approach. The victories for the modernist approach were few and far between, but will also be analysed to determine what impact advocates of this approach had had.

It should be kept in mind throughout the following sections that in South Africa the terms “good faith” and “*bona fides*” were not strictly defined, but was accepted to have a wider meaning than mere honesty or the absence of bad faith.<sup>66</sup> It included, or was determined with reference to, other abstract notions such as justice, reasonableness, fairness, and equity.<sup>67</sup> The exact dividing lines between these concepts were not established.

The role of good faith underwent a series of developments in the 1900’s with several landmark cases that were of vital importance. As is the case in all areas of the law today, the influence of the Constitution and the changes that it brought about is worthy of in-depth attention.<sup>68</sup> Case law leading up to the adoption of the Interim Constitution will be discussed below.

### **3 3    *The development of the role of good faith up to 1994***

In our system of society paternalism is not a characteristic of the economic relations of men nor of the common law which mirrors those relations.<sup>69</sup>

The doctrine of freedom of contract was regarded as a cornerstone of South African law of contract and was heavily relied upon by South African courts. The doctrine encompasses several different notions, such as the notion that parties must be able to freely negotiate the terms of their agreement, decide with whom they wish to contract, be free to decide not to contract, and of specific importance is the notion that full effect should be given to agreements.<sup>70</sup>

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<sup>66</sup> Brand (2009) *SALJ* 73.

<sup>67</sup> Brand (2009) *SALJ* 73.

<sup>68</sup> The impact of the Constitution will be discussed in section 4 below. Specifically see paragraph 4.4.

<sup>69</sup> Millner (1957) *SALJ* 183.

<sup>70</sup> Hawthorne (1995) *THRHR* 163; Tladi (2002) *De Jure* 308.

It has been acknowledged that the doctrine cannot be regarded as being absolute.<sup>71</sup> There is a need for rules and concepts in contract law that can mitigate the sometimes harsh and unfair working of the doctrine of freedom of contract.<sup>72</sup> The exact manner in which to mitigate the working of a doctrine with such potentially unfair consequences has not been established.

In the 1900s there was a struggle between the acceptance of a general defence based on good faith and accepting good faith as an underlying principle. This struggle could clearly be seen in case law.<sup>73</sup> On the one hand the courts did not want to favour a paternalistic approach which would mean interfering with voluntary contracts. On the other hand it was acknowledged that the notion of good faith and equity required that certain terms or agreements not be enforced, despite being included in an otherwise valid contract.<sup>74</sup>

As early as 1903 the court stated that the South African law of contract does not recognize the right of a court to release a contracting party from a valid agreement merely because the court finds the terms to be unreasonable.<sup>75</sup>

This can be regarded as indicative that South Africa followed the classical 19<sup>th</sup> century contract law. According to this model, the private autonomy of the parties to the agreement and freedom of contract were of paramount importance.<sup>76</sup> Furthermore, it also indicates the popularity of the traditionalist approach at this stage.

Zimmermann is of the opinion that this fixation on legal certainty and the importance of freedom of contract and all it encompasses explain the lack of academic attention in respect of the role of good faith for several decades. Public policy was regarded as requiring the strict enforcement of otherwise valid agreements and thus the role of good faith was severely limited.<sup>77</sup> Zimmermann does, however, argue that good faith has shaped the South African law of contract in various subtle ways within the

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<sup>71</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 36; Hawthorne (2004) *THRHR* 295.

<sup>72</sup> Tladi (2002) *De Jure* 309; Christie & Bradfield 14.

<sup>73</sup> See for example *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3SA 580 (A) and the minority decision in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA).

<sup>74</sup> Christie & Bradfield 12; Pretorius (2003) *THRHR* 641.

<sup>75</sup> *Burger v Central South African Railways* 1903 TS 571 576.

<sup>76</sup> Zimmermann 240; Christie & Bradfield 15-16.

<sup>77</sup> Zimmermann 241.

framework of existing legal concepts and the importance of these developments should not be underestimated.<sup>78</sup>

In 1979, Lötzt considered whether the South African law allows a judge to use fairness as a criterion when asked to decide on the validity or enforceability of a contract.<sup>79</sup> Lötzt argued that a doctrine of good faith can be used as a mechanism to promote honesty and diminish the opportunity for one party to unreasonably promote his own interests.<sup>80</sup>

The same issue received further attention when it came under investigation in Working Paper 54 of the South African Law Commission. The suggestion put forth by the SALC in this regard was indicative of a modernist approach. The SALC suggested that courts be given the power to test contractual terms or entire contracts against a criterion of good faith.<sup>81</sup> The suggestion was met with alarm from the commercial community and was amended in an attempt to preserve legal certainty and autonomy.<sup>82</sup> The final suggestions of the SALC on this point were never incorporated into legislation, and the popular opinion amongst academics is that it is unlikely that it will be incorporated in the future.<sup>83</sup>

Case law after 1903 did not necessarily reflect the courts' rejection of a general discretion to refuse to enforce inequitable contracts. On several occasions the *exceptio doli generalis* was pleaded with varying degrees of success.<sup>84</sup>

The case of *Bank of Lisbon & South Africa Ltd v De Ornelas*<sup>85</sup> is of particular significance in the demise of a general defence based on good faith. The majority of the court refused to acknowledge a substantive contractual defence based on good faith.<sup>86</sup> The court expressly stated, after careful analysis of the authorities, that the *exceptio doli generalis* was not received into Roman-Dutch law and thus was not

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<sup>78</sup> Zimmermann 241.

<sup>79</sup> Lötzt (1979) as cited by Lerm (2008) 1179.

<sup>80</sup> Lötzt (1979) 11-12 as cited by Lerm (2008) 1179.

<sup>81</sup> SALC Working Paper (1994) para 1.15.

<sup>82</sup> SALC Report (1998) para 2.2.1.13.

<sup>83</sup> Brand (2009) SALJ 77; Zimmermann 257.

<sup>84</sup> *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W).

<sup>85</sup> 1988 (3) SA 580 (A).

<sup>86</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 608. Also see Christie & Bradfield 16 and Hawthorne (2004) THRHR 297.

received in South African law.<sup>87</sup> Good faith, as a principle forming part of the South African law, was not expressly rejected; rather it was found to be an informative norm that merely influenced substantive rules and principles of the South African law of contract.

Glover succinctly explains the reasoning of the court by citing two main reasons for the demise of the *exceptio doli generalis*.<sup>88</sup> Firstly, the court found that the *exceptio* did not form part of the Roman-Dutch law and thus it could not have been received into the South African law. Secondly, this general defence was criticised for creating legal uncertainty and for undermining the long accepted notion that the court must not descend to the arena to settle the conflict between the parties.<sup>89</sup>

Despite much criticism by the academia,<sup>90</sup> the majority decision did create a binding precedent and had to be followed by lower courts.<sup>91</sup> The legal position was that the court laid the *exceptio doli generalis* to rest and that no general equitable remedy was available to the courts to decide not to enforce an otherwise valid agreement.<sup>92</sup>

At this stage it was also generally accepted that the objectives of a doctrine of good faith was at odds with public policy; the latter being in favour of freedom of contract and *pacta servanda sunt* and the former undermining these principles.<sup>93</sup> It would soon become clear that the issue was not quite that simple and was not yet ready to be laid to rest.<sup>94</sup>

In *Sasfin (Pty) Ltd v Beukes*<sup>95</sup> the court had to decide on the enforceability of a cession agreement, the terms of which was heavily balanced in favour of the cessionary.<sup>96</sup> The court directed its attention to the question whether the terms of the cession agreement offended against public policy and thus deemed it necessary to

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<sup>87</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 603.

<sup>88</sup> Glover (2007) SALJ 450.

<sup>89</sup> Glover (2007) SALJ 450.

<sup>90</sup> Lubbe & Murray 391; Hawthorne & Thomas (1989) *De Jure* 146, 148-149, 154; SALC Report (1998) para 2.2.1.8.; Zimmermann 255-257. It is also noteworthy that the minority (as per Jansen JA) felt compelled to expressly disagree on this point. See p612, 616-617 of the judgment.

<sup>91</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 603; Glover (2007) SALJ 450.

<sup>92</sup> Christie & Bradfield 12-13; Hawthorne & Thomas (1989) *De Jure* 146, 154; Zimmermann 235; Hawthorne (2004) *THRHR* 297.

<sup>93</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9.

<sup>94</sup> Pretorius (2003) *THRHR* 643.

<sup>95</sup> 1989 (1) SA 1 (A).

<sup>96</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7, 10-13.



decide on the contents and requirements of public policy.<sup>97</sup> A very different approach from the one in *Bank of Lisbon and South Africa Ltd v De Ornelas*<sup>98</sup> was followed even though the cases were decided mere months apart by the same court.

In *Sasfin (Pty) Ltd v Beukes*<sup>99</sup> the court offered the following as explanation on how public policy functions:

Agreements which are clearly inimical to the interest of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.<sup>100</sup>

Smalberger JA hurries to emphasise that although no court may shy away from this duty of refusing to enforce a contract that is contrary to public policy, it must only do so in circumstances where substantial harm to the public is of consequence. Where an agreement is so unjust as to be incompatible with the public interest, it should not be enforced, but this injustice must go further than merely offending the sense of fairness “of a few judicial minds.”<sup>101</sup>

Although, as mentioned, the emphasis of the *Sasfin*-case fell on considerations of public policy and the requirements thereof, the decision is of relevance to this study since the court mentions the importance of “doing simple justice between man and man.”<sup>102</sup> This is a restatement of the essence of the principle of good faith, and is an indication that legal systems will always need a mechanism to ensure justice and a degree of fairness in the interactions between people.

As is the case in all areas of the law today, the influence of the Constitution and the changes that it brought about is of utmost importance. The development of the role of good faith and case law decided after 1994 will be discussed to illustrate the role that good faith can play in a modern, democratic legal system and to evaluate how the matter has been dealt with in recent years.

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<sup>97</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7.

<sup>98</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A).

<sup>99</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8.

<sup>100</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8 and the reference to F du Bois Wille’s *Principles of South African Law* 7<sup>th</sup> Edition 324.

<sup>101</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9.

<sup>102</sup> *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9. The phrase was first used by Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544.

## 4 The development towards “constitutional contract law”

### 4.1 Background

The acceptance of an egalitarian Constitution paved the way for a new social and political dispensation.<sup>103</sup> It was clear that the radical changes it brought about would not only affect the public law sphere; private law would also have to be brought in line with the values of a new democratic society. The values underlying this new constitutional dispensation would affect change in all areas of the law, though in the private sphere development would be occur in a more incidental manner.

The contribution of the principle of good faith, in steering South African contract law in a more equitable direction, has been questionable. It cannot be refuted that there is a need for a mechanism to ensure some measure of fairness between contracting parties, and it is possible that the principles of good faith can, in the future, provide this mechanism.<sup>104</sup>

The development of the role of good faith continued with the dawn of a new constitutional era. It would be fair to assume that the development would take on a different direction and that the values of fairness, equality, and dignity had breathed new life into the campaign for a modernist approach, but this was not initially the case. Only fairly recently there seemed to be a movement away from the principles of freedom of contract and autonomy of the contracting parties towards social consciousness and social responsibility.<sup>105</sup> With this movement the stage is set for good faith to start playing a more prominent role in the law of contract in a post-constitutional era.<sup>106</sup>

It seems clear that most academics anticipated an influx of constitutional norms and values into the law of contract.<sup>107</sup> Authors predicted that abstract norms and values would become more important and would play a more prominent role in South African law of contract since the adoption of the final Constitution.<sup>108</sup> The element of

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<sup>103</sup> Tladi (2002) *De Jure* 306; Davis (2008) *SAJHR* 318.

<sup>104</sup> Davis (2008) *SAJHR* 32; Pretorius (2003) *THRHR* 642.

<sup>105</sup> Zimmermann 255; *South African Forestry Co (Pty) Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 340-342; Pretorius (2003) *THRHR* 642.

<sup>106</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

<sup>107</sup> Hawthorne (1995) *THRHR* 157; Neels (1998) *TSAR* 702; Van Aswegen (1995) *SAJHR* 50, 66-67.

<sup>108</sup> Hawthorne (2004) *THRHR* 294.

surprise came from the time frame that materialised. The reform of this area of law took much longer than most authors expected and predicted.<sup>109</sup>

## **4 2 The Interim Constitution**

The advent of a new constitutional era in South Africa is, of course, inextricably linked to the adoption of a new supreme Constitution and a justiciable Bill of Rights.<sup>110</sup> Much of the initial attention of academics focussed on the pressing question whether the Bill of Rights will have only vertical application, or if it will apply both vertically and horizontally. This question is important to determine the role and impact of the Bill of Rights on private law and specifically for this study, on the law of contract. In *Du Plessis v De Klerk*<sup>111</sup> the Constitutional Court decided that the Bill of Rights will apply horizontally, meaning that it will affect relationship between private parties. The provisions of the Bill of Rights could be invoked against another private party, but only in an indirect manner.<sup>112</sup>

## **4 3 The 1996 Constitution**

The same question regarding the possibility of direct or indirect horizontal application of the Bill of Rights under the final Constitution was dealt with by the Constitutional Court. In *Barkhuizen v Napier CC*<sup>113</sup> the majority of the court expressed the opinion that where horizontal application is concerned, provisions should be invoked in an indirect manner only.<sup>114</sup>

In the 1996 Constitution two clauses are of particular importance and deserve more in-depth consideration. Section 2 is colloquially referred to as the supremacy clause and makes it clear that all law, including the law of contract, is subject to the Constitution.<sup>115</sup> The other clause, known as the interpretation clause, places a duty

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<sup>109</sup> Since the adoption of the Interim Constitution, several articles were published on the influence that the Bill of Rights will have on private law and specifically on the law of contract. See for example Van der Vyver (1994) *THRHR* 378; Hawthorne (1995) *THRHR* 157; Van Aswegen (1995) *SAJHR* 50.

<sup>110</sup> Chapter 3 in the Interim Constitution.

<sup>111</sup> 1996 (3) SA 850 (SCA). Also see Van der Vyver (1994) *THRHR* 379.

<sup>112</sup> Hutchison 36; Bhana & Pieterse (2005) *SALJ* 869.

<sup>113</sup> 2007 (5) SA 323 (CC).

<sup>114</sup> *Barkhuizen v Napier CC* 2007 (5) SA 323 (CC) 332-333. The majority of the court was of the opinion that it would not be appropriate to test the constitutional validity of a contractual term directly against the Constitution. The minority chose to leave the possibility open but agreed that *usually* application in an indirect manner would be most appropriate. Also see Bhana & Pieterse (2005) *SALJ* 870; Rautenbach (2009) *TSAR* 614; Barnard (2005) 142-143 and Sutherland (2008) *Stell LR* 391.

<sup>115</sup> Hutchison 35.

upon the court to develop all law, including the common law, in accordance with the object, spirit and purport of the Constitution.<sup>116</sup> This section expressly refers to the values underlying the Constitution and which must be promoted by all developments of the common law.<sup>117</sup> These values are human dignity, equality and freedom.<sup>118</sup>

Zimmermann remarked in 1996 that it is unlikely that the last word regarding the role of good faith has been spoken and this proved to be true.<sup>119</sup> The question has been revisited several times.<sup>120</sup> This section will try to illustrate that, despite a lot of attention in the last decade, the matter still cannot be regarded as settled, especially in light of this constitutional mandate that rests upon South African courts to develop the common law.

Certain questions remained unanswered. These questions include whether good faith has a different role to play than similar concepts such as reasonableness, fairness, and justice,<sup>121</sup> and if it does have an independent function to fulfil, what the extent of the function is. It had to be determined whether parties are merely required to be honest, as opposed to behaving in a fraudulent manner, in their dealings with one another or whether the bar set at a higher standard; whether an objective or a subjective enquiry should be used and whether the contracting parties should be required to afford consideration to the interests of the other contracting party.

Some advances have been made regarding some of these questions by our courts, but most have been left unanswered, and the position remains unsatisfactory.<sup>122</sup> A selection of cases struggling with what the precise role and function of good faith is will be discussed.

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<sup>116</sup> Section 39 of the Constitution; Hawthorne (2003) *SA Merc LJ* 271.

<sup>117</sup> Section 39 of the Constitution.

<sup>118</sup> Section 39 of the Constitution.

<sup>119</sup> Zimmermann 256; Christie & Bradfield 16; *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) ; *Barkhuizen v Napier* CC 2007 (5) SA 323 (CC); *Everfresh Virginia Markets (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

<sup>120</sup> *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (A), *Brisley v Drotzky* 2002 (4) SA 1 (SCA), *Barkhuizen v Napier* CC 2007 (5) SA 323 (CC), *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA) and *Everfresh Virginia Markets (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) to name but a few landmark cases.

<sup>121</sup> Hutchison 30.

<sup>122</sup> Hawthorne (2003) *SA Merc LJ* 271.

#### **4 4 The role of good faith in the new constitutional era**

Davis refers to the “overwhelming underdevelopment” of the law of contract under the new constitutional dispensation.<sup>123</sup> A case that serves as a perfect illustration of this, and where there certainly was some scope available to the court to give effect to the values of the Constitution, presented itself in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*.<sup>124</sup> Unfortunately, the case was decided without any reference to the Constitution. Both the majority and the minority decisions are broadly compatible with the values of the Constitution, but had the court explicitly chosen to develop the principles of the law of contract in accordance with the Constitution, a much more valuable precedent would have been set.

The minority decision in this case, written by Olivier JA, was responsible for giving this case its landmark status.<sup>125</sup> According to the minority decision it was necessary to revisit the current role of good faith and public policy. Olivier JA found that the function of good faith was to give effect to the community’s sense of fairness, reasonableness and “appropriateness” (“behoorlikheid”) where a contractual matter arose.<sup>126</sup>

The court’s comment that the South African legal system is not static comes close to acknowledging that the law of contract, and the legal convictions of the community, will be influenced by the values of Constitution.<sup>127</sup> The minority decision chooses to link the values of the Constitution to public interest or public policy as this is also not static or closed and changes from time to time.<sup>128</sup>

It is also found that good faith is a sub-component of public policy and that the application of the principle of good faith is in the public interest.<sup>129</sup> The court went ahead to apply considerations of public policy to the dispute at hand, explicitly stating

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<sup>123</sup> Davis (2008) SAJHR 324.

<sup>124</sup> 1997 (4) SA 302 (SCA).

<sup>125</sup> Glover (1998) THRHR 329.

<sup>126</sup> *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 318-319; Glover (1998) THRHR 330.

<sup>127</sup> *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 319; Glover (1998) THRHR 330.

<sup>128</sup> *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 320-321; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 SA 874 (A).

<sup>129</sup> *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 318. Note the shift here from the previous position where it was held that public policy required the enforcement of agreements and deference to the doctrine of freedom of contract.

that it was free to apply the principle of good faith as well, as it formed part of the considerations of public policy.<sup>130</sup>

After *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*<sup>131</sup> the position was unclear: the minority judgment led to several contracts being rendered unenforceable upon the application of a general remedy of good faith by the courts.<sup>132</sup> This position was held to be untenable, and was in fact criticised by the Supreme Court of Appeal.<sup>133</sup> The suggestion put forth by Olivier JA did not find favour with the court.<sup>134</sup>

The court was awarded an opportunity to reconsider the views of the minority in the *Eerste Nasionale Bank*-case in *Brisley v Drotsky*.<sup>135</sup> The court ultimately decided that good faith did not enable a court to decide to set aside an otherwise valid contract as it was not a “free floating” basis to interfere with an agreement reached voluntarily.<sup>136</sup>

In this case reference was made to the Constitution and the mandate that rested upon courts to develop the law in accordance with its aim and objectives and to give effect to the values underlying the Constitution. This appeared to be mere lip service and almost a comment made in passing.<sup>137</sup>

The concurring judgment of Cameron JA - as he then was - paid greater attention to the mandate of the Constitution and acknowledged that public policy is now rooted in the Constitution and the values it enshrines.<sup>138</sup> Interestingly, Cameron JA feels comfortable with the decision of the majority because contractual autonomy and the principle of freedom of contract inform the value of dignity.<sup>139</sup> The emphasis placed on *pacta servanda sunt* is thus reconcilable with constitutional values such dignity

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<sup>130</sup> *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 324 and 326.

<sup>131</sup> 1997 (4) SA 302 (SCA).

<sup>132</sup> *Miller & another NNO v Dannecker* 2001 (1) SA 928 (C); *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C)

<sup>133</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 12-19; Brand (2009) SALJ 78.

<sup>134</sup> Christie & Bradfield 16.

<sup>135</sup> 2002 (4) SA 1 (SCA). Olivier JA wrote a minority judgment, choosing to again focus on the important role that good faith can play in the South African contract law and emphasising that reasonableness should be as important as legal certainty (Specifically see p 30-31 of the judgment).

<sup>136</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 14-15; Christie & Bradfield 16

<sup>137</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 15; Glover (2007) SALJ 451.

<sup>138</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 33-34. Also see Sutherland (2008) *Stell LR* 393.

<sup>139</sup> It should be mentioned that, had the case been pleaded differently and/or sufficient evidence been placed before the court, Cameron JA might have decided differently. This point is discussed by Sutherland (2008) *Stell LR* 393.

and freedom.<sup>140</sup> Cameron JA also states that a balance between contractual freedom and considerations of justice and reasonableness must be struck, as this is the essence of what the Constitution requires.<sup>141</sup>

As mentioned, much emphasis was placed on the importance of legal certainty and the principle of *pacta servanda sunt*.<sup>142</sup> The court also expressly rejected the possibility of a general, wide discretion to refuse to enforce an otherwise valid contract to the courts, stating that it would lead to intolerable uncertainty and arbitrariness. Arguably, too much weight was attached to *pacta servanda sunt* and legal certainty.<sup>143</sup>

*Brisley v Drotsky*<sup>144</sup> dealt with a standard form contract for the lease of premises for residential purposes. The fact that a standard form contract was present is in itself of importance: it is indicative that the terms of the contract were probably not properly negotiated by the parties and thus the question arises whether there was even a freely negotiated agreement at all.<sup>145</sup>

The court gave a clear indication that the role of good faith was merely an underlying principle of the law of contract that informs its substantive rules and doctrines.<sup>146</sup> This did not stop future litigants from trying to convince the court to award greater importance to the principle of good faith.

The court was again approached to decide on the role of good faith in *Afrox Healthcare Ltd v Strydom*.<sup>147</sup> One of the issues in the *Afrox*-case was very similar to that raised in the *Brisley*-case, namely whether good faith can be used by the court to refuse to enforce a certain term included in the contract between the parties.<sup>148</sup>

The court restated that good faith is an informative consideration underlying the existing substantive rules and doctrines and not a substantive ground or defence

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<sup>140</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 35.

<sup>141</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 36.

<sup>142</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 15-16; Pretorius (2003) *THRHR* 644.

<sup>143</sup> Davis (2008) *SAJHR* 324. Also see Hawthorne (2003) *SA Merc LJ* 275 and Pretorius (2003) *THRHR* 644.

<sup>144</sup> 2002 4 SA 1 (SCA) 10.

<sup>145</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 16-17. Also see *Barkhuizen v Napier CC* 2007 (5) SA 323 (CC) 369-370.

<sup>146</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 15-16. The court is supporting the submission of Prof D Hutchison made in *Brownsword et al* 230-231.

<sup>147</sup> 2002 (6) SA 21 (SCA).

<sup>148</sup> Brand (2009) *SALJ* 81.

enabling the court to set aside a contract or refuse to enforce a contractual term.<sup>149</sup> Hawthorne refers to the decision in the *Afrox*-case as the “zenith of condonation of aggressive capitalistic entrepreneurship.”<sup>150</sup> It appears that legal certainty and commercial and economic interests again tipped the scales in favour of the traditionalist approach.<sup>151</sup>

Hawthorne also criticises the fact that the court acknowledged the widespread use of modern standard form agreements without pausing to determine the effect of a standard form contract on consensus. The notion of freedom to contract and party autonomy is actually undermined by the use of standard form agreements. It is interesting that the court paid very little attention to the fact that a standard form agreement, the terms of which was not truly negotiated, was present in this case.<sup>152</sup>

A much more satisfactory judgment by the Supreme Court of Appeal can be found in the case of *South African Forestry Co Ltd v York Timbers Ltd*.<sup>153</sup> This case illustrates how good faith can play a fundamental and informative role in the development of the principles of law of contract, especially in certain types of contracts or in specific types of contractual relationships.<sup>154</sup> Of importance is the statement by the court that courts in South Africa possess the power to limit or broaden the rights or obligations of parties to a contract in accordance with considerations of fairness, reasonableness, justice, and good faith.<sup>155</sup>

*Silent Pond Investments CC v Woolworths (Pty) Ltd*<sup>156</sup> is another case where the principles of good faith had an important role to play. In this case the parties expressly stated in their agreement that they would observe utmost good faith in their relationship.<sup>157</sup> The court found that a specific obligation was created and where a party acted in a manner that disregarded this obligation, that party could be indicted from continuing with the said behaviour.<sup>158</sup> Although this is a decision by a

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<sup>149</sup> *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) 40-41; Bhana & Pieterse (2005) SALJ 876.

<sup>150</sup> Hawthorne (2004) THRHR 299.

<sup>151</sup> Hawthorne (2004) THRHR 299; Barnard (2005) 185-186.

<sup>152</sup> Hawthorne (2004) THRHR 299.

<sup>153</sup> 2005 3 SA 323 (SCA).

<sup>154</sup> Brand (2009) SALJ 81.

<sup>155</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 339.

<sup>156</sup> 2011 (6) SA 343 (D).

<sup>157</sup> *Silent Pond Investments CC v Woolworths (Pty) Ltd and Another* 2011 (6) SA 343 (D) 350.

<sup>158</sup> *Silent Pond Investments CC v Woolworths (Pty) Ltd and Another* 2011 (6) SA 343 (D) 360, 362-364.



local division it is applauded for enforcing an express term to act in good faith, so giving effect to the intention of the parties and in so doing gave content to an otherwise vague obligation. It is hoped that other local divisions will follow suit if faced with a similar set of facts.

The *Silent Pond Investments*-case is distinguishable from the *South African Forestry Co*-case in two ways: firstly, there was an express agreement to conduct contractual relations in a manner consistent with the principles of good faith. Secondly, there was no long-term relationship, as was the case in the *South African Forestry Co*-case. Despite these differences, it is my submission that both cases are evidence of a progressive willingness of the courts to engage with the principles of good faith to ensure contractual justice between contracting parties.

The role of good faith in post-constitutional contract law was addressed by the Constitutional Court in *Barkhuizen v Napier CC*.<sup>159</sup> The court found itself in broad agreement with the approach followed by the Supreme Court of Appeal thus far, but made some headway toward developing the law of contract so as to bring it in line with the values embodied in the Constitution.<sup>160</sup>

The approach of the court was to use the common law principle of public policy to determine whether a contract should be enforced or not. Where a term is in conflict with a provision of the Constitution, or not compatible with the values underlying the Constitution, it would be found that the term is contrary to public policy and it would not be enforced.<sup>161</sup> Mention was made here for the first time to the African value of *ubuntu* in relation to the law of contract. The Constitutional Court would revisit this idea in 2011 in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd*.<sup>162</sup>

The question on the lips of many academics was whether this approach left enough room for the law of contract to be infused with constitutional values.<sup>163</sup> If constitutional values changed the values of the community and therefore changed public policy, why were cases still being decided as though nothing has changed?

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<sup>159</sup> 2007 (5) SA 323 (CC).

<sup>160</sup> Glover (2007) SALJ 453. Glover goes so far as to suggest that the judgment of *Barkhuizen v Napier CC* 2007 (5) SA 323 (CC) had the effect of raising the *exceptio doli generalis* from the dead despite the fact that the term *exceptio doli generalis* is not used in the judgment. This view has not been supported in subsequent case law or by other academic writers.

<sup>161</sup> *Barkhuizen v Napier CC* 2007 (5) SA 323 (CC) 333.

<sup>162</sup> 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

<sup>163</sup> Bhana (2007) SALJ 274.

Was the reasoning of the courts convincing? Many authors felt that the approach followed was too conservative and would not help to bring about a more equitable society.<sup>164</sup> Even Brand AJ, who is not a proponent of the school of thought wishing to award greater significance to vague and open-ended concepts such as good faith, admitted that greater judicial activism might be called for to ensure development in a constitutional direction.<sup>165</sup>

Despite the fact that the matter was addressed by the highest court in South Africa, the last word had not yet been spoken, and the precise role of good faith was not regarded as settled. The Constitutional Court gave an indication that the matter might be revisited in the future:

Whether, under the Constitution, this limited role for good faith is appropriate ... [and] sufficient to give effect to the value of good faith [is], fortunately, not [a] question that need be answered on the facts of this case and I refrain from doing so.<sup>166</sup>

Even though it is happening much slower than anticipated by academics, South Africa's societal values are changing. Now more than ever the time is ripe to use existing open-ended principles such as good faith to ensure greater fairness for the person on the street in her contractual relationships. Public policy will provide the mechanism to achieve contractual justice between contracting parties. Since there is no general remedy based on good faith, the community's perceptions of fairness have changed and developed to accommodate the non-enforcement of otherwise valid contracts.

The indication given in the majority judgment of Ngcobo J in the *Barkhuizen*-case that the matter was not settled, was mentioned again in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd*.<sup>167</sup> In a case where the development of the law of

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<sup>164</sup> Davis (2008) *SAJHR* 319,324. On the constraining nature of South Africa's common law and legal culture, see Klare K "Legal culture and Transformative Constitutionalism" (1998) *SAJHR* 146. Also see Bennet 15 and Barnard (2005) 18, 149-150, 190.

<sup>165</sup> Brand (2009) *SALJ* 89.

<sup>166</sup> *Barkhuizen v Napier* CC 2007 (5) SA 323 (CC) 347-348.

<sup>167</sup> 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

contract was once again the focus point, both the majority and minority judgments make express mention of the importance of good faith.<sup>168</sup>

No firm decision relating to good faith was made in the *Everfresh*-case, as the matter was not properly pleaded.<sup>169</sup> The significance of the case can be found in the *obiter* statements by the court, relating to future developments in the law of contract.

Worthy of specific mention is the reference the court makes to the concept of *ubuntu* and its role in developing the law of contract to bring it in line with Constitutional norms and values. The court alluded to the fact that had the applicant in the *Everfresh*-case been properly pleaded, the concept of *ubuntu* and the principle of good faith might have tipped the scales in its favour.<sup>170</sup>

The African value of *ubuntu* is defined by the court as follows:

It emphasises the communal nature of society and ‘carries in it the ideas of humanness, social justice and fairness’ and envelopes ‘the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.’<sup>171</sup>

*Ubuntu* can be an appropriate principle to use to inform the new developments in the law of contract; ensuring that it is brought in line with the aims and objectives of the Constitution.<sup>172</sup> The flexibility of *ubuntu* is advantageous and as a basis it has a certain unchanging and unyielding focus on the greater good, the communal interest and dignity.<sup>173</sup> It is seemingly compatible with the concept of good faith and public policy.<sup>174</sup>

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<sup>168</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) 264 and 277.

<sup>169</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) 271-276.

<sup>170</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) 276-277.

<sup>171</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) 276. In this definition the court refers to the definition given in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 484.

<sup>172</sup> Mokgoro 2; Bennet 13.

<sup>173</sup> Mokgoro 2.

<sup>174</sup> Bennet 15.

The court again stated that all laws, including the common law, must reflect the “objective normative value system” embodied by the Constitution.<sup>175</sup> This is not a departure from what has been previously held by both the Supreme Court of Appeal and the Constitutional Court.<sup>176</sup> However, it is my submission that these statements are an indication that a more modernist approach is supported and that the courts should not shy away from their duty to develop the common law in terms of section 39 of the Constitution with reference to underlying values such as good faith and *ubuntu*.

From case law and the writings of academics it is evident that these terms are not necessarily capable of precise definition.<sup>177</sup> The hope is expressed that a properly pleaded case will come before the Constitutional Court in order for it to consider the matter in further detail and hopefully give clear guidelines on how these open-ended values should be used to ensure a greater degree of equity in the South African law of contract.

Many of the questions identified in this section still remained unanswered, giving a clear indication that the precise role of good faith and the role of other open-ended concepts, such as *ubuntu*, have not yet been determined. It remains to be seen whether the courts are capable of providing satisfactory answers to all of these questions and whether the need for intervention by the legislature will arise.

What does seem clear is that a general substantive defence based on good faith is not the direction South Africa is developing towards, and it is unlikely that that will be the direction in which the law of contract will develop in the future. The courts have made it clear that there is no general remedy based on good faith that enables them to refrain from enforcing an otherwise valid agreement, so unless there is direct legislative interference it seems unlikely that this position will be reversed. In light of how the SALC’s suggestions for a general remedy were received, it further seems unlikely that a general remedy will be introduced by statute.

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<sup>175</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) 270.

<sup>176</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* CC 2007 (5) SA 323 (CC).

<sup>177</sup> Kruger (2011) SALJ 713, 715; Cornell (2004) SAPL 669; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) 318; Zimmermann 240.

#### **4 5 The development of the role of good faith in the English law of contract**

It is not only South African law of contract that finds itself in the midst of development and a struggle to find a balance between conflicting ideologies. With regard to the English law, Halson remarks that the jurisprudence on the law of contract reflects the tension between competing ideologies.<sup>178</sup>

At the moment a doctrine of good faith is not accepted as part of the English law.<sup>179</sup> From case law it is evident, however, that there are indications of a movement towards awarding greater significance to the concept of good faith and the role it may play in promoting justice between contracting parties.<sup>180</sup>

It is important to note that the concept of good faith is not completely alien to English law.<sup>181</sup> It plays a significant role in insurance law, where contracts require “utmost good faith” and where the duty to disclose is very closely linked to the principle of utmost good faith.<sup>182</sup> Reference to good faith occurs sporadically in case law with reference to implied terms, and the concept of good faith is also relevant to the law of negotiable instruments.<sup>183</sup>

One of the main problems with assigning a more prominent or important role to good faith in the English law lies in defining the exact content of this principle.<sup>184</sup> The assumption by many authors is that the English law will borrow heavily from European civil law systems and the principles of European contract law in general for guidance.<sup>185</sup>

It is not yet clear whether the English law will follow the example set by international trends and civil law systems, where a general clause or doctrine of good faith is

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<sup>178</sup> Halson 1.

<sup>179</sup> Applebey 238, 240-242; McKendrick 513. For an opposing view see Samuel 87 and the authority referred to.

<sup>180</sup> McKendrick 513 lists the following cases as examples where the courts favourably engaged with the concept of good faith: *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 Build LR 42; *Haines v Carter* [2002] UKPC 49; *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 33.

<sup>181</sup> Applebey 240. Also see Brownsword 112 and McKendrick 496.

<sup>182</sup> Applebey 240.

<sup>183</sup> Applebey 240; *Malik v Bank of Credit and Commerce In SA* [1995] 3 ALL E.R. 545; *Ashmore v Corporation of Lloyds (No. 2)* [1992] 2 Lloyd's Rep. 620, Brownsword 112.

<sup>184</sup> Applebey 239.

<sup>185</sup> Applebey 238, 241; Brownsword 111-114.

accepted or rather continue with the incremental acceptance and development of the principle of good faith.<sup>186</sup>

Several models pertaining to the role of good faith has been suggested and discussed by authors in an attempt to establish what the best direction of development for the English law will be.<sup>187</sup>

The basic three models are the “good faith requirement model”, the “good faith regime” and the “good faith as visceral justice model.”<sup>188</sup> Of these three models the visceral justice model presents the most radical option. It will give courts the power to use an individualistic sense of fairness and reasonableness to either enforce or decline to enforce a term in a contract.<sup>189</sup> This model has much in common with the suggestion put forth by the South African Law Commission discussed in 3.3 above. As was the case in South Africa, this model did not gain wide support and is not considered a serious contender.<sup>190</sup>

The choice then lies between either the “good faith requirement model” or the “good faith regime model.”<sup>191</sup> The good faith requirement model gives effect to the expectations of the parties. One of the advantages of this model is that the parties cannot, after contract conclusion, attempt to escape from their obligations by relying on the sense of fairness of the community. The only consideration that will be considered to determine whether the contract should be enforced is the intention and expectations of the contracting parties. This model is well suited for the needs of the commercial community.<sup>192</sup>

The other option is the good faith regime model which differs from the good faith requirement model in the sense that it does not rely on the clear expectations of the parties, instead it focuses and enforces the expectations of the community.<sup>193</sup> At the

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<sup>186</sup> Applebey 241-242, Brownsword 111, 130.

<sup>187</sup> Applebey 242-243, Brownsword 130-134. McKendrick on 514 supports the views put forth by Brownsword, but emphasises that as part of the global economy the decision is not entirely up to England.

<sup>188</sup> These are the terms used by Professor Roger Brownsword. Some authors have titled the models differently but in essence they share the same characteristics. The term “visceral justice” was first used in this context by Michael Bridge in 1999.

<sup>189</sup> Applebey 243; Brownsword 130.

<sup>190</sup> Brownsword 131.

<sup>191</sup> Brownsword 131.

<sup>192</sup> Applebey 243; Brownsword 131.

<sup>193</sup> This model has much in common with the role that was attributed to good faith in Roman law.

heart of this model lies “standards of fair dealing that are dictated by a critical morality of co-operation.”<sup>194</sup> Although this model may support more lofty ideals than simply protecting the expectations of the parties, the disadvantage is severe enough to give rise to serious doubts regarding the workability of this model.

The main disadvantage of the good faith regime model is that it could lead to the overriding of the expectations of the parties. In such a case this model could provide an “escape clause” to a party no longer wanting to be bound to an obligation he willingly incurred. To give effect to this would undermine party autonomy.<sup>195</sup> This however can be remedied by accepting the “good faith regime” model as a default position. This means that contracting parties, in highly competitive markets for example, may decide to contract out of the requirements set by a good faith regime. As a default position it would protect more vulnerable participants in the economy.<sup>196</sup>

Both models have advantages and disadvantages that can, to a certain extent be justified or remedied. The good faith regime model is more controversial and arguably more difficult to implement, but with it comes the promise of greater gains. As of yet it cannot be said with certainty which model, if any, will be used.

Until the matter is decided authoritatively, discussions regarding the advantages and disadvantages of each course of action is informative and can be of immeasurable value for South Africa who is also still in the process of determining the exact role of good faith.<sup>197</sup>

## **5 The role of good faith in contractual negotiations**

### **5 1 General**

From the discussion above it is evident that a lot of emphasis has been placed on the role of good faith in the context of performance of contracts. Although many of the same considerations mentioned above apply *mutatis mutandis* to the role of good faith in the negotiations of contracts, there are some specific issues that are worthy of closer inspection.

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<sup>194</sup> Brownsword 130.

<sup>195</sup> Brownsword 132-133.

<sup>196</sup> Brownsword 133.

<sup>197</sup> The matter will presumably eventually be settled by Parliament as the constitutional regime in England is that of parliamentary supremacy.

A “requirement” of good faith will usually relate to the way a contract is performed or enforced by one or both of the contracting parties. Under certain circumstances this requirement has a wider scope and can extend to the negotiation of the terms of the contract.<sup>198</sup>

In South Africa, mere negotiations between parties do not create rights and obligations between said parties.<sup>199</sup> The courts are aware that the conduct of parties in the pre-contractual phase can sometimes give rise to losses and/or frustrated expectations, and certain attempts are made to limit the harm that can result from this.<sup>200</sup>

To my mind one issue in particular has been the subject of scrutiny by both the South African courts as well as the subject of academic writing: the enforceability of agreements to negotiate in good faith.<sup>201</sup>

This section examines the situation where the parties agree to contract in future and refer to a duty to engage in *bona fide* negotiations.

## **5 2 The approach of the courts**

In 2005 the Supreme Court of Appeal was given the opportunity to decide on the question whether there is an enforceable duty to negotiate in good faith in South African contract law.<sup>202</sup> An agreement between the parties contained a provision stating that properties will be leased on terms and conditions that will be negotiated in good faith. A second provision had the effect of simplifying the court’s decision. This second term provided a “deadlock-breaking mechanism” that provided recourse to a decision by an arbitrator if the parties were unable to agree on the terms and conditions. If not for this second term, the first term would probably have been unenforceable due to vagueness.<sup>203</sup>

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<sup>198</sup> Brownsword 111.

<sup>199</sup> Van der Merwe *et al* 93.

<sup>200</sup> Van der Merwe *et al* 94. Departure from the information theory where negotiations are *inter absentes* is one such example.

<sup>201</sup> Christie & Bradfield 39-41. Also see Van der Merwe *et al* 94-101 and Hutchison (2011) SALJ 273.

<sup>202</sup> *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA). Also see Hutchison (2011) SALJ 273.

<sup>203</sup> *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) 210-211; Hutchison (2011) SALJ 274.



The case of *Southernport Developments (Pty) Ltd v Transnet Ltd*<sup>204</sup> is authority for the viewpoint that a duty to negotiate in good faith, where the agreement includes a mechanism to resolve the situation if no agreement can be reached, is enforceable.<sup>205</sup>

The question regarding the enforceability of a duty to negotiate in good faith where there is no such mechanism remained unanswered and has been the subject of academic attention ever since.<sup>206</sup>

### **5 3 The academic response**

In terms of pre-constitutional South African law, the bargaining process was regarded as an adversarial relationship.<sup>207</sup> If the law of contract is merely an instrument for parties to further their self-interest at all cost, then a doctrine of good faith will not be feasible.<sup>208</sup> A requirement that forces parties to consider the interests of the other party is then inherently incompatible with the character of the classical theory of contract law.<sup>209</sup>

However, the law of contract fulfils a more complex role than simply being an instrument used by parties to drive a hard bargain.<sup>210</sup> As mentioned, we have seen a shift toward social responsibility and co-operativism. Contract law is relevant in the social, moral and political spheres of life and it reflects the underlying ideologies and values of society.

It is therefore arguably the case that the time is right to acknowledge the role that a doctrine of good faith can play to ensure equity in South African law in the context of contractual negotiations as well as in the performance of contracts. Such an approach will be compatible with the direction indicated by the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd*.<sup>211</sup>

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<sup>204</sup> 2005 (2) SA 202 (SCA).

<sup>205</sup> Christie & Bradfield 40; Hutchison (2011) SALJ 274.

<sup>206</sup> Christie & Bradfield 39-41; Meyer (2010) *Without Prejudice* 42; Hutchison (2011) SALJ 273.

<sup>207</sup> *Hamman v Moolman* 1968 (4) SA 340 (A).

<sup>208</sup> Brownsword 115; Bhana & Pieterse (2005) SALJ 886.

<sup>209</sup> Fried 75.

<sup>210</sup> Fried 76; Also see Brownsword *et al* 22.

<sup>211</sup> 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC). This case concerned the interpretation of a term in a contract that could be construed to place a duty upon the parties to engage in *bona fide* negotiations and the remarks if the court is thus directly relevant and applicable to the issue of the enforceability of a duty to negotiate in good faith.

Van der Merwe *et al* is of the opinion that the recognition of a pre-contractual duty to negotiate in good faith is unlikely, especially in the context of negotiating commercial contracts.<sup>212</sup> Even express terms in otherwise valid contracts requiring parties to negotiate in good faith will be regarded as ineffective as it is regarded as unenforceable due to vagueness.<sup>213</sup>

According to Hutchison the decision in *South African Forestry Co Ltd v York Timbers Ltd*<sup>214</sup> is an illustration of where a party engaged in bad faith conduct.<sup>215</sup> York refused to negotiate in good faith despite a preliminary agreement that implied that the parties agreed to negotiate in the future in accordance with considerations of good faith.<sup>216</sup> Hutchison submits that it is possible to argue that to condone such behaviour is infringing upon the right to dignity.<sup>217</sup> This case made some headway toward enforcing an obligation to negotiate in good faith although the court took care to emphasise it was not accepting such a duty in general. The specific facts of the case, such as the fact that the contract was a long term agreement, proved to be significant.<sup>218</sup>

Hutchison identifies some of the considerations that weigh negatively toward accepting a duty to negotiate in good faith. These include the commercial interest in being able to drive a hard bargain and to threaten with withdrawal from negotiations.<sup>219</sup> He reiterates the view taken by the Constitutional Court in *Barkhuizen v Napier CC*<sup>220</sup> that the key is to distinguish hard bargaining, which must be acceptable for economic reasons, from *mala fide* behaviour, which should not be condoned. A balance should be struck between competing values such as dignity and freedom.<sup>221</sup>

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<sup>212</sup> Van der Merwe *et al* 94.

<sup>213</sup> Van der Merwe *et al* 94.

<sup>214</sup> 2005 3 SA 323 (SCA).

<sup>215</sup> Hutchison (2011) SALJ 282.

<sup>216</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 341; Hutchison (2011) SALJ 282.

<sup>217</sup> Hutchison (2011) SALJ 282. He refers to Lubbe (2004) SALJ 395 in this context as support for this submission.

<sup>218</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) 339-341. In this case the duty involved a negative obligation, meaning that there was a duty upon York Timbers not to act in a certain way, and it acted contrary to this duty.

<sup>219</sup> Hutchison (2011) SALJ 290.

<sup>220</sup> 2007 (5) SA 323 (CC) 343-344.

<sup>221</sup> Hutchison (2011) SALJ 290.

Christie's discussion of this issue reveals that he does not give much thought to future development in this regard as he suspects the matter has largely been settled by the Supreme Court of Appeal in *Southernport Developments (Pty) Ltd v Transnet Ltd*.<sup>222</sup> Where the obligation is supported by a deadlock-breaking mechanism, it can be enforced by a court. Where no such deadlock-breaking mechanism exists, the duty is too vague and uncertain to be enforced by a court.<sup>223</sup>

I am of the opinion that the duty to negotiate in good faith should be considered as part of the overarching concept of good faith. This implies that many of the arguments put forth when arguing for a greater role for good faith will also apply here. Constitutional values should find application in all areas of the law and therefore I find myself in broad agreement with Hutchison. Perhaps a general acceptance of such a duty will be going too far, but sufficient weight should be attached to all relevant considerations when balancing the interests of the parties.

The conclusion that I draw is that it cannot be said with certainty whether the matter has been settled. If the courts should find that the matter is open to further development, different opinions exist on how the issue should be resolved. The opinions remind one of the modernist and traditionalist schools of thought discussed in 3.1 above and the paradigms of either an astute belief in the importance of individualism or dedication to collectivism.<sup>224</sup> A comparative study will prove to be useful to consider how a similar problem is dealt with in another jurisdiction.

#### **5 4 The duty to negotiate in good faith in comparative perspective**

There are many similarities between the South African and the English law of contract, especially in this regard, despite the fact that South African contract law has the Roman-Dutch law as basis. The English law can serve as a useful starting point when considering the way forward.<sup>225</sup>

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<sup>222</sup> 2005 (2) SA 202 (SCA). Also see Christie & Bradfield 40-41.

<sup>223</sup> Christie & Bradfield 41.

<sup>224</sup> Hawthorne (2006) *Fundamina* 71.

<sup>225</sup> Brownsword 112-113. See Hutchison (2011) *SALJ* 285 for the viewpoint that the English law is not suitable for a comparative study. It is my respectful submission that Hutchison attached too much weight to the judgment of *Walford v Miles* [1992] 1 ALL E.R. 453 and that the scope of the decision was not so wide as to decide that no duty to negotiate in good faith will ever be enforced. The justification for this submission will be discussed below.

The issue regarding the acceptance of an enforceable duty to negotiate in good faith in the English law of contract was first addressed in *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*.<sup>226</sup> In this case it was held that the law cannot enforce an agreement to negotiate in good faith, since the content of the obligation was too uncertain to be viewed as binding. In *Walford v Miles*<sup>227</sup> the court upheld the decision of the court in *Courtney & Fairbairn Ltd* and the court decided that “[a] duty to negotiate is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies.”<sup>228</sup>

In his judgment, Lord Ackner supplied two reasons as to why a duty to negotiate in good faith could not be enforced.<sup>229</sup> The first reason closely corresponds with the reasoning we have seen in South African contract law, namely that such a term was too vague and uncertain to be enforced. A court cannot enforce an obligation where the content of that obligation is unknown. The second reason also relates to the quotation included above, namely that a duty to negotiate in good faith is incompatible with the adversarial position that negotiating parties find themselves in.<sup>230</sup> These are compelling reasons not to accept a general enforceable duty to negotiate in good faith and the wide and inclusive language used by the court will make it difficult in the future to successfully argue for the enforcement of a duty to negotiate in good faith.

McKendrick points out that the court did not expressly state that such a duty will never be enforced.<sup>231</sup> This leads to a position very similar to that of South Africa. There is no acceptance of a formal doctrine of good faith or positive obligation to negotiate in good faith, rather considerations of good faith will influence the existing rules and doctrines of the law of contract. This may include, under certain circumstances, acknowledging and enforcing a duty to negotiate in good faith.<sup>232</sup>

Interestingly, the court distinguished between an obligation “to use best endeavours” to reach an agreement and an obligation to negotiate in good faith. The court found

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<sup>226</sup> [1975] 1 WLR 297. The relevance of this case was discussed in *Walford v Miles* [1992] 1 ALL ER 453 on 460-461 as well as in *O’Sullivan & Hilliard* 77.

<sup>227</sup> [1992] 1 ALL ER 453. This case is discussed by Brownsword 112 and McKendrick 502.

<sup>228</sup> *Walford v Miles* [1992] 1 All ER 461-462. Also see *O’Sullivan & Hilliard* 77.

<sup>229</sup> *Walford v Miles* [1992] 1 All ER 461-462; McKendrick 502-503.

<sup>230</sup> McKendrick 503.

<sup>231</sup> McKendrick 503. This view is shared by *O’Sullivan & Hilliard* 78-79.

<sup>232</sup> McKendrick 503; *O’Sullivan & Hilliard* 79.

the former to be enforceable while the latter was found not to be so. The judgment is criticised in this respect as the precise distinction between these two concepts is all but clear. Is the content of an obligation to use best endeavours really more certain than that of a duty to negotiate in good faith? The question is not answered by the court.<sup>233</sup>

The scope of the decision in *Walford v Miles*<sup>234</sup> might not be as wide as is suspected upon first reading the case. The Court of Appeal remarked in passing in 2006 that the judgment should not be understood as to having the effect of nullifying or invalidating an express contractual term requiring parties to negotiate in good faith.<sup>235</sup>

Although an express duty to negotiate in good faith may be subject to the same criticism as raised by Lord Ackner, namely that the term is too vague and uncertain to be enforceable, and that it is at odds with the adversarial positions of the parties, it can be argued that these objections will carry less weight.<sup>236</sup> The reasoning behind this is that where the parties expressly decided to include such a term in their agreement, they wanted effect to be given to this obligation.<sup>237</sup>

Berg offers an interpretation of such an express duty that is very useful to consider in this context. He states that it should be interpreted as an “agreement to renounce purely adversarial negotiation” and that it can contain either a positive duty, meaning to act in a particular way, or a negative duty, meaning to refrain from acting in a certain way, or both. This will have to be determined by looking at how the clause is worded.<sup>238</sup>

On many levels similarities can be drawn between the English position on the enforceability of a duty to negotiate in good faith, and that of South Africa. The courts in England have been presented with more opportunities to consider this matter and the dialogue surrounding this issue has thus been guided by the courts to a greater extent than is the case in South Africa.

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<sup>233</sup> McKendrick 504.

<sup>234</sup> [1992] 2 AC 128.

<sup>235</sup> *Petromac Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891; [2006] 1 Lloyd’s Rep 121. Also see McKendrick 504. The court mentioned that an express agreement between the parties that an obligation to negotiate in good faith cannot be without legal substance.

<sup>236</sup> McKendrick 505.

<sup>237</sup> McKendrick 505.

<sup>238</sup> Berg (2003) *LQR* 357 as referred to by McKendrick 505.

An important point gleaned from the English law is that, as part of a global economy, it is no longer an issue only of national importance. International best practice should be considered before deciding which course South Africa will follow. It is my submission that foreign jurisprudence and academic discourse on this topic can be of great relevance in the future when South African courts are given the opportunity to authoritatively decide the matter.

## **6 Conclusion**

### **6 1 *The debate: For and against a general remedy based on good faith***

It is contended that an imprecise notion of good faith should be given precision by our courts, that the sacrosanct freedom of contract should be tempered by this same good faith to end abuse of contractual terms, which only the hardest of hearts can justify.<sup>239</sup>

The study and analysis of the position of the South African courts brought to light that it is unlikely that a general remedy based on good faith or the equitable jurisdiction of the courts will be accepted.<sup>240</sup> It is my submission that despite compelling arguments put forth by leading jurists, the matter regarding the acceptance of a general, substantive defence based on good faith can be regarded as settled. Time and time again it has been expressly stated by South African courts that such a remedy does not exist. There has been a general reluctance to engage with the principles of good faith and it is only in the past few years that we have seen a willingness to consider the use and role of open-ended concepts like good faith.

This being said, it is my submission that the role awarded to good faith thus far has not been satisfactory. The constitutional mandate to develop the common law to bring it in line with constitutional norms and values has not been adhered to and the courts need to engage with open-ended concepts such as good faith, public policy and *ubuntu* in a more meaningful way.<sup>241</sup>

### **6 2 *The meaning of good faith in a modern context***

It is evident from the discussion of case law that the principle of good faith has been absorbed as one of the considerations of public policy. This is indicative of a change

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<sup>239</sup> Hawthorne (2004) *THRHR* 301.

<sup>240</sup> Barnard (2005) 250.

<sup>241</sup> Brand (2009) *SALJ* 89; Bhana (2007) *SALJ* 269,274, 279-280.

in what is regarded as being in the public interest. It is finally acknowledged that the public has as much, if not more, of an interest in the equitable variation of contracts to ensure fairness and justice than it does in the sanctity of contracts and *pacta servanda sunt*.<sup>242</sup> I am of the opinion that this change in public policy was a reaction to the reality of unfairness and injustice in the contractual context. Since there is no general remedy to ensure that unfair contracts are not enforced, public policy had to adapt to provide a degree of relief.

The true challenge hence forth will not lie in determining *whether* good faith has any role to play but rather *when* the circumstances require the intervention of a court.<sup>243</sup> There is no need for legislative intervention or the acceptance of a general remedy based on good faith if the courts are aware of the changes in public policy brought about by the Constitution.<sup>244</sup>

A willingness to realise constitutional ideals might mean that unjust contracts are more readily declared unenforceable due to being against public policy.<sup>245</sup> In the short term this could negatively impact legal certainty, but as shown, society has a vested interest in promoting just and fair dealings between contracting parties. Over a period of time contracts and contractual negotiations will shape to the norms and values underlying the Constitution.

Furthermore, as argued by Bhana and Pieterse, fears of wreaking havoc on settled law, and creating the unbearable situation where a court needs to be approached in order to determine whether an agreement is in line with public policy, is not a valid concern.<sup>246</sup> The doctrine of legal precedent will work effectively to curb any such problems.<sup>247</sup> A set of guidelines will emerge from case law that can be used by lower courts to ensure a uniform approach that will promote legal certainty.<sup>248</sup> It is my

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<sup>242</sup> Bhana & Pieterse (2005) *SALJ* 887. Also see Hawthorne (1995) *THRHR* 176 and Sutherland (2008) *Stell LR* 407.

<sup>243</sup> Bhana & Pieterse (2005) *SALJ* 887.

<sup>244</sup> Bhana & Pieterse (2005) *SALJ* 888; Davis (2008) *SAJHR* 327-328; Sutherland (2008) *Stell LR* 407.

<sup>245</sup> Davis (2008) *SAJHR* 324-325; Bhana (2007) *SALJ* 271.

<sup>246</sup> Bhana & Pieterse (2005) *SALJ* 895.

<sup>247</sup> Bhana & Pieterse (2005) *SALJ* 895

<sup>248</sup> Bhana & Pieterse (2005) *SALJ* 895.

submission that the Constitutional Court would have done so in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd*,<sup>249</sup> had the case been properly pleaded.

Severability can be used wherever possible, to enforce an agreement without the term(s) that are not compatible with public policy as informed by the values of good faith and/or *ubuntu*. Where severing a term from the rest of the contract is not an option, other innovative remedies can be used by the courts,<sup>250</sup> the most radical being non-enforcement of the entire agreement. Innovative remedies are necessary to support the development towards constitutional contract law, but must not have the effect of creating a completely new agreement that the parties never intended as that would be too drastic an interference by the judiciary.<sup>251</sup>

### **6 3 The influence of consumer protection legislation**

The Consumer Protection Act has paved the way for attributing a bigger role to equitable considerations in the South African law of contract. The Consumer Protection Act will influence the legal values and convictions of the community: greater weight might now be attached to considerations of fairness and justice than in the past, as we are seeing a movement towards greater social consciousness.<sup>252</sup>

The effect of this will be a movement away from emphasis on utmost freedom of contract and capitalist considerations toward promotion of the communal interest. Emphasis will be placed on considerations of fairness, justice, reasonableness and “conscionability.” Because of this shift in emphasis, the values underpinning the Consumer Protection Act will be felt, even where transactions fall outside the scope of the Consumer Protection Act. An argument can be made that the values enshrined by the Consumer Protection Act, and other acts that envisions greater protection for consumers, will influence public policy.

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<sup>249</sup> 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

<sup>250</sup> Bhana & Pieterse (2005) SALJ 888.

<sup>251</sup> Davis (2008) SAJHR 328-329. Also see Kerr 187 and Pretorius (2003) THRHR 642.

<sup>252</sup> Pretorius (2003) THRHR 641.



#### **6 4 The way forward**

The South African common law is by no means a static system of law.<sup>253</sup> It is dynamic and ever changing to adapt to the needs of the developing society which it serves. It is my submission that this will be an area of law that will exhibit this adaptability: the Constitution and consumer protection legislation have paved the way for this development and the courts must display the necessary courage to assist the movement toward greater fairness and justice in the South African contract law. The time is ripe to acknowledge that the law of contract can be infused with considerations of fairness and equity without completely negating legal certainty.

It must be acknowledged that good faith will require of contracting parties to show a certain level of respect for the legitimate interests of the other party.<sup>254</sup> Conduct by a contracting party that has the effect of promoting his own interest to the unreasonable detriment of the other party will be regarded as incompatible with public policy.<sup>255</sup> Public policy should be infused with considerations of good faith and constitutional norms and values such as dignity and *ubuntu* to the extent of empowering courts to promote substantive justice.

A requirement of showing a minimum level of respect for another contracting party's interest echoes the constitutional values of dignity and *ubuntu*, and is a desirable and attainable goal in a legal system that aims to enshrine these values and norms. Hopefully then we will find ourselves able to give content to the bland statement that all contracts in South Africa are *bonae fidei*.<sup>256</sup>

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<sup>253</sup> *Blower v Van Noorden* 1909 TS 890 905 - as referred to by Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (A) 320. Also see Barnard (2005) 145.

<sup>254</sup> Lubbe (1990) *Stell LR* 11. Also see Zimmermann 259-260.

<sup>255</sup> Lubbe (1990) *Stell LR* 11; Zimmermann 259-260.

<sup>256</sup> Bhana & Pieterse (2005) *SALJ* 890; Zimmermann 240; 259-260.

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