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## 1 INTRODUCTION

In South African law, there has been an evident shift from the traditional approach in light of recent case law on agreements to negotiate which have hinted towards a new approach as to how agreements to negotiate should be treated. The recent case of *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd (No 1)*<sup>1</sup> is a direct authority that agreements to negotiate are not void of uncertainty as these agreements to negotiate impose a ‘duty to act reasonably and honestly’ although the Constitutional Court is yet to approve the correctness of this decision.

The Supreme Court of Appeal recently held that the mere fact that parties have appointed an arbitrator had the effect of binding the parties, as evident in the case of *Southernport Developments (Pty) Ltd v Transnet Ltd*.<sup>2</sup> In other instances, the fact that parties have given each other reasonable opportunity to reach consensus was held to be sufficient for parties to be bound by the agreement to negotiate.<sup>3</sup>

This dissertation seeks to analyse agreements to negotiate as well as the duty of good faith at a stage where a contract has not been formed. An argument will be advanced throughout this dissertation that in light of recent South African case law, the traditional approach of agreements to negotiate cannot be said to reflect the correct position. These recent developments in case law suggest that the traditional view regarding agreements to negotiate is no longer an accurate reflection of our common law. This point will be elaborated on further under Chapter 4, under the heading ‘Recent South African Case Law’.

An agreement to make another agreement is void because of its uncertainty, as these agreements lack enforceable content hence agreements to negotiate have been erroneously treated the same way. The view that is advocated in this dissertation is that parties to preliminary agreements should not undermine the binding nature of

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<sup>1</sup> 2012 (6) SA 96 (WCC).

<sup>2</sup> 2005 (2) ALL SA 16 (SCA).

<sup>3</sup> *Schwartz NO v Pike and Others 2008 (3) SA 431 (SCA)*.

agreements to negotiate as the courts have already demonstrated a shift from the traditional approach based on recent South African case law.

### **1.1 Research Question**

The research question to be examined in this dissertation is the enforceability of agreements to negotiate. Recent developments in South African case law provide impetus for the research undertaken. In answering this question, South African as well as foreign case law on agreements to negotiate will be reviewed in order to assess opportunities for South Africa to learn or adopt from other legal systems, what exactly constitutes breach of an agreement to negotiate, and what remedies are available.

### **1.2 Hypothesis**

It is expected that this research will serve as a warning to parties not to underestimate the binding nature of an agreement to negotiate in good faith, as agreements to negotiate are enforceable. This dissertation makes various points namely that an agreement to negotiate is merely an agreement that parties will negotiate on material terms in future, and it does not bind parties to contract with each other, this is a fundamental distinction the courts appear to have missed. Further, the research will show that there is sufficient authority in South African law that reliance damages can be awarded where there has been breach; and lastly, that courts should assess whether or not the conduct of the parties falls short of the standard of good faith.

### **1.3 Overview of Chapters**

Chapter One contains a comparative review of South African and foreign law on agreements to negotiate. Chapter Two will assess the background of agreements to negotiate and review their judicial treatment. Chapter Three will provide an analysis of methodologies used by other jurisdictions to engage with agreements to negotiate. Reference will be made to foreign case law (particularly English, American and Australian jurisdictions) to acquire an advanced understanding of the court's attitude towards agreements to negotiate. In the analysis of these foreign cases, the focus of the comparative study will be to observe foreign law and assess whether agreements

to negotiate are enforceable or not and also whether foreign approaches have lessons which are applicable for South Africa.

Chapter Four focuses on a significant shift in recent South African case law from its traditional approach. It will also review academic writings about this topical issue. The important cases that will be looked at in this chapter will be discussed in great detail as they have shown that the traditional South African approach, as stated by Schutz in the case of *Premier Free State and Others v Firechem Free State (Pty) Ltd*<sup>4</sup>, is no longer an accurate reflection of South African law. The following cases will be analysed, namely that of *Southernport* in which the Court adopted a more lenient approach as there was a deadlock-breaking mechanism; the case of *Schwartz* where the Court held that if parties agreed to give each other a reasonable opportunity to reach consensus they were bound to give that opportunity; the case of *Indwe Aviation* where the court developed the common law regarding agreements to negotiate; and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd*<sup>5</sup> where the Constitutional Court hinted towards a new approach regarding agreements to negotiate but did not take the matter any further.

Chapter Five will look at the feasibility of enforcing agreements to negotiate; whether it is possible to give sufficient meaning to an undertaking to negotiate; what constitutes a breach of agreements to negotiate; and what, if any, have been held to be appropriate remedies in the breach of agreements to negotiate.

Chapter Six will provide an overview on the preceding chapters, questions set out will be answered and a conclusion presented in light of the enforceability of agreements to negotiate.

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<sup>4</sup> 2000 (4) SA 413 (SCA).

<sup>5</sup> 2012 (1) SA (CC).

## **2 THE TRADITIONAL VIEW REGARDING THE ENFORCEABILITY OF AGREEMENTS TO NEGOTIATE**

Traditionally, agreements to negotiate have been held by South African courts to be invalid for uncertainty and, therefore unenforceable. The root cause of this treatment has been in light of agreements to agree which are held to be void for uncertainty as they lack enforceable content, hence agreements to negotiate have been treated in the same way despite these being different concepts. This dissertation thereafter proceeds to analyse and criticise the traditional judicial view and argue it is based on a *non-sequitur*. The mere fact that parties cannot bind themselves to agree does not mean that they cannot bind themselves to negotiate.

### **2.1 Cases adopting the traditional view of agreements to negotiate**

In the 1948 case of *Scheepers v Vermulean*,<sup>6</sup> it was held that an agreement to negotiate was unenforceable on the basis that agreements to negotiate were ‘too vague to enforce as it depends on the absolute discretion vested on the parties, and that no such right to negotiate exists under common law’.<sup>7</sup> In this case, there was an option to buy leased property for a sum payable in cash in exercise of an option, on terms to be agreed upon between parties. The court held that there was no contract as there was no binding agreement. The enforcement of the agreement to negotiate was refused because of the discretion vested on the parties; secondly on the basis that it was not the kind of order where specific performance was available, but a claim for damages might be sustained if the party claiming breach could show that a contract would have been concluded. It is evident that based on the discretion vested in the parties, agreements to negotiate have been held to be unenforceable.

This view was reiterated in the case of *H. Merx & Co (Pty) Ltd v the B-M Group (Pty) Ltd*,<sup>8</sup> where the Court held that where parties had agreed to increase prices, the

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<sup>6</sup> *Scheepers v Vermeulen* 1948 (4) SA 884 (O).

<sup>7</sup> *Supra* at 892.

<sup>8</sup> *H Merx & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 (2) SA 225 (A).

agreement was not binding on the basis that agreements to agree are unenforceable<sup>9</sup> and agreements to negotiate are treated the same way.

Where parties had agreed to negotiate on the amount of rent to be paid in future, the agreement was held to be unenforceable as illustrated in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*.<sup>10</sup> In the case of *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd*,<sup>11</sup> the Court held that agreements to negotiate were invalid as they lacked enforceable content.<sup>12</sup> It is evident from these cases that the primary basis for refusing to enforce agreements to negotiate is the lack of certainty due to the freedom of the parties to agree or disagree.

In the case of *Premier Free State and Others v Firechem Free State (Pty) Ltd*,<sup>13</sup> Schutz JA observed that '[A]n agreement that parties will negotiate to conclude another agreement is not enforceable because of the absolute discretion vested in the parties to agree or disagree'.<sup>14</sup> In light of case law, it is evident that the basis for refusing to enforce agreements to negotiate is because they are not sufficiently certain.

The primary arguments against the enforceability of agreements to negotiate can be summarised as follows: Firstly, parties engaged in good faith negotiations are assumed to lack a serious legal intention to contract, as agreements to negotiate bind parties to promises which they did not intend to be legally binding. Secondly, agreements to negotiate are unenforceable because they are uncertain in nature and they do not promise to produce a contract. Thirdly, the failure to quantify damages has been another reason why agreements to negotiate are held to be unenforceable, as critics of agreements to negotiate question how the frustrated expectations of a negotiating party are to be compensated in cases where negotiations do not produce a contract.

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<sup>9</sup> *Supra* at 233I- 234A.

<sup>10</sup> 1993 (1) SA 768 (A) at 775-776.

<sup>11</sup> *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W).

<sup>12</sup> *Supra* at 338.

<sup>13</sup> 2000 (4) SA 413 (SCA).

<sup>14</sup> *Supra* para 35.

Despite court cases that have held against agreements to negotiate, the major flaw has been the failure by the courts to give precise reasons why agreements to negotiate cannot be enforced. One could ask, rhetorically, why parties enter into agreements to negotiate in the first place if they do not intend the agreement to be binding. The second objection relates to the substantive uncertainty of an agreement to negotiate, particularly in identifying conduct that is not in good faith. Legal practitioners in this regard seem to overstate the problem as it is usually one term that is missing in the agreement, an example being parties ascertaining a price in future. Thirdly, there is the question of how frustrated expectations of a negotiating party would be compensated where negotiations do not produce a contract. Furthermore, what would be the appropriate remedy where one party acts in bad faith given that an ultimately concluded contract is never guaranteed by an agreement to negotiate.

Although the courts traditionally held that agreements to negotiate were unenforceable, a more flexible approach has been developed in recent South African case law. The shift from the traditional approach is evident in both South African and foreign jurisdictions.

## **2.2 Criticism of the Traditional Approach**

When parties enter into a contract, they undertake legally binding obligations. However, in some situations they may agree that they will negotiate certain terms in the future. A deferral of agreement on those terms should not be construed as merely time-wasting, but rather the inability of the parties to formulate the precise terms of the contract at that particular time.

It is of concern that courts often confuse the concepts of ‘agreements to agree’ with ‘agreements to negotiate’. The same sentiments, namely that this analogy is flawed, are shared with Cohen. She correctly states that ‘the two contracts are targeted at different purposes: one is result-orientated, the other is process-orientated’.<sup>15</sup> The courts often miss a fundamental point about agreements to negotiate that the objective

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<sup>15</sup> Cohen, N ‘Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate in Beatson and Friedman (ed) Good Faith and Fault in Contract Law’ (1995) 37.

of such agreements to negotiate is to give effect to the process of negotiating, and not necessarily to reach a final agreement.

One of the objections to enforcing agreements to negotiate is that parties lack a serious intention to be bound in the process. However, surely it can be argued that their seriousness should be assessed on a case by case basis. If parties agree in good faith to take a series of steps to further and complete their negotiation, the courts cannot refuse to bind them to their promise. It is understood that the parties cannot guarantee that they will conclude a contract. Trackman and Sharma argue that it is contrary to public policy to go against the clearly-expressed wishes of parties to enter into legal relations with respect to certain negotiating steps, and that parties should be allowed to give effect to the negotiating process, as contemplated in their agreement, as long as it is not contrary to public policy.<sup>16</sup>

The second objection, namely that agreements to negotiate lack certainty, is also flawed. This is, because the purpose of agreements to negotiate is not to produce a contract, but rather to bind parties to good faith conduct with respect to negotiation. The argument that binding parties to such obligations will encourage a plethora of claims by disappointed negotiators seeking remedies over negotiators that have not satisfied the disappointed parties' expectation, has no grounds.

Trackman and Sharma acknowledge that the problem is that the content of such a duty is uncertain, particularly in relation to defining and identifying conduct that is encapsulated by a duty of good faith.<sup>17</sup> Critics fear that judges may interpret this duty of good faith differently, leading to inconsistent and ideologically-driven decision making.

It is acknowledged that the problem with agreements to negotiate is that as long as a contract has not been concluded, either party is free to withdraw from the negotiations. However, the traditional approach does not take cognisance of a party who engages in sham negotiations; withdraws from negotiations without giving the

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<sup>16</sup> Trackman, L and Sharma, K 'The Binding Force of Agreements To Negotiate In Good Faith' (2014) 73 Cambridge Law Journal at 622.

<sup>17</sup> Supra at 598.

other party reasonable notice or an opportunity to respond; unreasonably withholds consent without which the other party is unable to act; or provides false information in order to deceive the other party into making concessions in refusing to enforce agreements to negotiate. The strict adherence to the party's freedom to withdraw from obligations as long as a contract has not been concluded can lead to a manipulation of the rules of the game.<sup>18</sup>

### **3 FOREIGN JURISDICTIONS**

Having stated the traditional view of agreements to negotiate in South Africa, it is important for the purposes of this study to observe and analyse that agreements to negotiate in foreign jurisdictions, in order to assess whether there have been any developments regarding agreements to negotiate.

#### **3.1 The basis for refusing to enforce these agreements in foreign jurisdictions**

The problem with the enforceability of agreements to negotiate is that they are not sufficiently certain to be enforced. This has been held in numerous foreign cases, including *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*<sup>19</sup>, where Lord Denning MR explained that negotiation clauses are 'too uncertain to have any binding force'.<sup>20</sup> Further, courts have refused to enforce agreements to negotiate on the basis that it would be difficult to determine whether there has been a breach of this agreement to negotiate. Lord Ackner in *Walford v Miles*<sup>21</sup> asked rhetorically as to how the courts were 'to police such an agreement'.<sup>22</sup> In addition, the courts have refused to enforce agreements to negotiate based on the challenge in the enforcement of agreements to negotiate in the difficulty of assessing damages. Lord Denning MR in *Courtney & Fairbairn* held that '[n]o court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through'.<sup>23</sup>

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<sup>18</sup> See footnote 15 at 27.

<sup>19</sup> (1975) 1 W.L.R 297.

<sup>20</sup> *Supra* at 301.

<sup>21</sup> (1992) 2 AC 128.

<sup>22</sup> *Supra* at 138.

<sup>23</sup> See footnote 19 at para 301.

### 3.2 English law and cases

Under English law an agreement to negotiate is not recognised as an enforceable contract on the basis that agreements to negotiate are void for uncertainty. This is despite the fact that the House of Lords had initially accepted, in the case of *Hillas & Co. Ltd v Arcos Ltd*,<sup>24</sup> that an agreement to negotiate was a contract and thus enforceable in principle, but this view was rejected in later cases.

### 3.3 *Hillas & Co. Ltd v Arcos Ltd* (1932) 147 L.T

The material issue in this case was ‘whether a clause in an agreement that contemplated a future bargain with terms which remained to be settled was enforceable’.<sup>25</sup>

An important dictum was made by Lord Wright where he advocated the view that:

‘There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured’.<sup>26</sup>

In relation to the above views expressed in *Hillas*, an interesting point was made by Lord Justice Longmore in the *Petromec Inc v Petroleo Brasileiro SA Petrobras* case where he declared that ‘[i]t is not irrelevant that an express obligation to negotiate is part of a complex agreement, but [t]o decide that it has no legal content... would be for the law deliberately to defeat the reasonable expectations of honest men’.<sup>27</sup> The Lords’ rationale was that ‘[it] would be a strong thing to declare unenforceable a clause into which parties have deliberately and expressly entered’.<sup>28</sup> Lord Wright and

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<sup>24</sup> *Hillas & Co. Ltd v Arcos Ltd* (1932) 147 L.T.

<sup>25</sup> *Supra* at 367.

<sup>26</sup> See footnote 24 at 515.

<sup>27</sup> *Petromec Inc v Petroleo Brasileiro SA Petrobras* (No3) [2005] EWCA Civ 891, [2006] 1 Lloyd’s Rep. 121, 152.

<sup>28</sup> *Supra* para 152.

Lord Justice Longmore moved away from the strict interpretation of agreements to negotiate and indicated the binding nature of agreements to negotiate.

### **3.4 Later decisions in *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* (1975) 1 W.L.R 297 and *Mallozzi v Carapelli* (1976) 1 Lloyds Rep 407.**

In *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*, the parties had proposed that the plaintiff would introduce a financier to the defendants who were to develop a site but that they would employ the plaintiff to do the construction work. The defendants agreed to instruct a quantity surveyor to ‘negotiate fair and reasonable contract sums’ if the plaintiff introduced an acceptable financier. The financier was introduced, but the defendants used a third party to perform construction work. Lord Denning MR found there was no contract to employ the plaintiff because there was no machinery for ascertaining the price except by negotiation. The court took no cognisance of the views expressed by Lord Wright in *Hillas*, Lord Denning held that agreements to negotiate could not be enforced. In reaching this decision, he equated agreements to negotiate with a contract to enter into a contract.

If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful what the results would be.<sup>29</sup>

The uncertainty in *Courtney* was not merely that there was an agreement to negotiate but that the term to be negotiated was a material one. The flaw in this view was that Lord Denning MR did not explain nor set out clearly why an agreement to negotiate was unenforceable.<sup>30</sup>

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<sup>29</sup> See footnote 19 at 301.

<sup>30</sup> J Cumberbatch, ‘In freedoms cause: The contract to negotiate’ (1992) 12 *Ox JLS* 586.

The *obiter dictum* in *Hillas* has not been appreciated under English Law as Lord Diplock in *Courtney* regarded the views expressed in *Hillas* as ‘bad law’<sup>31</sup> and Lord Denning MR in the same case held that the *dictum* in *Hillas* was ‘not well founded’.<sup>32</sup>

Of interest is the case of *Mallozzi v Carapelli*<sup>33</sup> where the learned Kew J made reference to the *dictum* of Lord Wright in *Hillas* and held that there was an obligation on the parties to at least negotiate *bona fide* with a view of reaching agreements.<sup>34</sup> In both *Courtney* and *Mallozzi*, the courts disregarded the views in the *Hillas* case and held that the agreements to negotiate were not enforceable.

### **3.5 Walford v Miles (1992) 2 A C 128.**

The leading case under English law is *Walford v Miles* where the Court held that the earlier view in *Hillas* was wrong and approved the approach taken in *Courtney & Fairbain Ltd.*

The parties had entered into negotiations which were ‘subject to contract’ for the sale of the respondent’s photographic processing business. The appellants were given an oral undertaking by the respondent that it would not negotiate with any third parties or consider an alternative offer. The appellants in turn had to provide a comfort letter and continue negotiations with the bankers confirming that they had sufficient funds to purchase the business. The appellant was, however, informed 10 days later that the business had been sold to the third party.<sup>35</sup> Proceedings were then instituted by the appellants stating that the respondent had breached a collateral agreement by continuing to negotiate with the third party. At the court of first instance, the judge found that the respondents had breached an agreement not to deal with third parties or give further consideration to any alternative. The judge held that the promises of the respondent amounted to misrepresentation and ordered that the damages for loss of opportunity be assessed. The appellants were awarded damages for wasted expenditure. At the Court of Appeal, Bingham LJ, dissenting, agreed that a ‘lock-in’

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<sup>31</sup> See footnote 21 at 302.

<sup>32</sup> See footnote 21 at 301-302.

<sup>33</sup> *Mallozzi v Carapelli* (1976) 1 Lloyds Rep 407.

<sup>34</sup> *Hillas v Arcos* (1975) 1 Lloyds 229 at 249.

<sup>35</sup> See footnote 21 at para 456-457.

agreement was unenforceable and that a simple ‘lock-out’ agreement which provided the appellants with an ‘exclusive opportunity’ to try and reach an agreement with the respondent was enforceable, hence the respondent was in breach. The majority in the Court of Appeal held that the provision of the contract was unenforceable, and there was no legal obligation to negotiate. Lord Ackner at the House of Lords held that the agreement was unworkable as there was no way of determining how long the respondent was locked out from negotiating with third parties, although it was noted that the promise to provide a comfort letter was a valid consideration. Lord Ackner went as far as stating that ‘an undertaking to negotiate intrudes on the freedom of parties to make negotiation concessions, to withdraw from negotiations, or to negotiate with third parties during the course of negotiations’.<sup>36</sup>

The House of Lords based their reasoning on two grounds: firstly, that ‘an idea that agreements to negotiate duty to carry on negotiations in good faith is inherently inconsistent with adversarial of party, each party can pursue own interest and party can withdraw when it is in his interest’;<sup>37</sup> and secondly, on the basis of certainty that ‘these agreements cannot be policed, that they are unworkable in practice because during negotiations either party is entitled to withdraw at any time and for any reason’.<sup>38</sup> Although an agreement to use best endeavours<sup>39</sup> is enforceable under English law, a bare agreement to negotiate has no legal content under English law even where parties have agreed to be bound by these agreements to negotiate. The decision in *Walford v Miles* confirmed that a ‘lock-out’ agreement was unenforceable because it lacked the necessary certainty and that a ‘lock-out’ agreement was enforceable only in limited circumstances.

### **3.6 Emirates Trading Agency LLC v Prime Mineral Experts Private Limited (2014) EWHC 2104.**

The High Court of England and Wales in *Emirates Trading Agency LLC v Prime Mineral Experts Private Limited*<sup>40</sup> found that an agreement which had a dispute

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<sup>36</sup> See footnote 21 at para 128.

<sup>37</sup> See footnote 21 at para 138.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Chanel Home Centers Division of Grace Retail Corpn v Grossman* 795 F2d 291 (3<sup>rd</sup> Cir 1986).

<sup>40</sup> *Emirates Trading Agency LLC v Prime Mineral Experts Private Limited* (2014) EWHC 2104.

resolution clause which required “parties to undertake ‘friendly discussions’ prior to arbitration was an enforceable condition precedent to invoking the arbitration clause”.<sup>41</sup> There was a particular clause in this case which stated that the parties ‘shall first seek to resolve the dispute or claim by friendly discussions’<sup>42</sup> which Teare J held was intended to be binding. His Honour found that the clause was sufficiently certain in nature, distinguishing it from the *dicta* in *Walford v Miles*. The court correctly noted that ‘where commercial parties have entered into obligations they reasonably expect the court to uphold these obligations’.<sup>43</sup>

The English courts in the case of *Emirates Trading Agency LLC* seemed to introduce a new approach to agreements to negotiate. The obligation to seek to resolve disputes by ‘friendly discussions’ in this case was enforceable on the basis that ‘[t]he agreement is not incomplete, no term is missing. Nor is it uncertain, an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute’.<sup>44</sup> This decision is a remarkable departure from the English courts’ approach to the enforceability of agreements to negotiate. The court upheld this agreement because it found that no essential term was lacking; that the term was not too uncertain; that parties had freely agreed to a restriction on their right to commence arbitration; and, more importantly, that enforcement of such an agreement was in the public interest because there was an overriding obligation on the Court to seek to enforce obligations that had been negotiated freely in order to avoid the expense of arbitration.<sup>45</sup> The Court in this case looked at the facts and circumstances and found that Prime Mineral Experts Private Limited had complied with the obligation to ‘seek to resolve the dispute or claim by friendly discussions,’ and therefore the application brought by Emirates Trading Agency LLC was dismissed.<sup>46</sup>

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<sup>41</sup> Supra at para 26.

<sup>42</sup> See footnote 40 at para 25.

<sup>43</sup> See footnote 40 at para 40.

<sup>44</sup> See footnote 40 at para 64.

<sup>45</sup> See footnote 40 at para 47.

<sup>46</sup> See footnote 40 at para 52.

### 3.7 Criticism and comment on English case law

The position in *Courtney & Fairbain* sums up how agreements to negotiate are treated in English law as well as the basis of this refusal. This is evident in the case of *Mallozzi v Carappeli*. Cohen in her article correctly states that the fate of agreements to negotiate was ‘doomed in English law’<sup>47</sup> in the case of *Courtney & Fairbain* where Lord Denning MR held that agreements to negotiate were uncertain and damages difficult to assess.

*Walford v Miles* seem to have put an end to the debate as to whether an agreement to negotiate in good faith with a view of reaching agreement is capable of enforcement, holding that agreements to negotiate are unenforceable. This case has been subjected to substantive criticism where academic writers have argued both ways, some holding that the case was wrongly decided, whilst others agreed with the approach taken by the House of Lords.

The same view is shared by Brown, who is critical of the approach taken in *Walford v Miles* stating that this case:

ensures that under English law an unqualified certainty is engendered by unequivocally denying any efficacy to contracts to negotiate in good faith, but on the facts of the case. This conclusion undoubtedly indirectly condones acts of bad faith from parties in commercial negotiations rather than a mere apprehension regarding the applicability of good faith.<sup>48</sup>

As noted by Peel, the learned Bingham, L. J recognised that this approach was open to the objection that, indirectly, it subjected the defendant to the very duty to negotiate in good faith which was rejected as the basis of a ‘lock-in’ agreement. For this reason, Lord Ackner found that a ‘lock-out’ agreement which failed to specify a particular period during which it was to operate, was not enforceable.<sup>49</sup>

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<sup>47</sup> N Cohen, ‘Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate’ in Beatson and Friedman (ed) *Good Faith and Fault in Contract Law* (1995) 25, 36.

<sup>48</sup> I Brown, ‘The Contract to Negotiate: A Thing Writ in Water?’ (1992) *JBL* 353, 368.

<sup>49</sup> E Peel, ‘Locking-out and locking-in: the enforceability of agreements to negotiate’ (1992) *Cambridge Law Journal* 211, 212.

Although it has been argued that agreements to negotiate intrude on the parties' freedom, Cohen correctly states that when parties enter into agreements to negotiate 'parties did intend to limit this freedom'.<sup>50</sup> Cohen, in assessing the facts of *Walford v Miles* correctly stated that 'the objection that the respondents feared that the appellants would not get along with the photographic processing business staff was a valid consideration, as this would put in jeopardy the net profit guaranteed by the defendants, but this reason existed from the outset'.<sup>51</sup> A similar view was held by Brown who stated that the defendant's concern that the plaintiff would conflict with existing staff should not have justified the discontinuation of negotiations.<sup>52</sup> A more interesting observation is made by Brown which should be taken into cognisance, namely the possibility in practice of one party using the other as 'a trap to improve the bargain which they really wished to conclude with a third party'.<sup>53</sup> On the issue of certainty, the writer criticised the House of Lords stating that in applying the formal rule of certainty, its application destroyed the intentions of the parties.<sup>54</sup> Hence, the approach of the House of Lords permitted parties to break promises where they had initially agreed to negotiate.<sup>55</sup>

Cumberbatch<sup>56</sup> is also critical of the approach of the court in *Walford v Miles* holding that 'the House of Lords did not set out, in clearer and more cogent terms, exactly why an agreement to negotiate is unenforceable'.<sup>57</sup> The writer advocates the view that the Court could have made reference to cases where there was recognition of an obligation to act in good faith,<sup>58</sup> American academic authority, as well as statutes which describe the concept of good faith negotiation.<sup>59</sup> Cumberbatch essentially sums up his argument by stating that the concept of negotiation in good faith, as has been noted traditionally, is not so vague as to be incapable of formulation. The writer correctly goes on to argue that parties should be held to what they initially agreed upon instead of using 'a dubious absolving power to 'unmake a contract' for one

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<sup>50</sup> See footnote 47 page 37.

<sup>51</sup> See footnote 47 page 42.

<sup>52</sup> See footnote 48 page 360.

<sup>53</sup> *Ibid.*

<sup>54</sup> See footnote 48 at page 368.

<sup>55</sup> *Ibid.*

<sup>56</sup> J Cumberbatch, "In Freedom's Cause: The Contract to Negotiate" (1992) 12 *OX JLS* 586,586.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ee v Kakar* (1979) 40 P & CR 223, *Batten v White* (1960) 12 P & CR 223.

<sup>59</sup> S8(a)(5) and S8(b)(3), National Labour Relations Act 1947.

party’,<sup>60</sup> hence the House of Lords erred in holding that the agreement had no legal content.

The *Emirates Trading Agency LLC* case is evidence of the approach which South African courts should take especially where there is a time-limited obligation, and the intention of the parties should be given preference. Parties should be allowed to engage in the process of negotiation. However, drafters are cautioned that agreements to negotiate must not be too vague, they should be sufficiently certain to be enforced, and a failure by one party to negotiate in good faith can result in them being in breach of contract. This case is significant in that it shows the shift from the Courts’ approach that agreements to negotiate are unenforceable by giving effect to the intention of the parties.

Despite the development in the above-mentioned cases, English courts remain reluctant to enforce contractual duties to negotiate in good faith on the basis that in freedom of contract and, especially, freedom from contract, it is evident that English contract law requires that the parties evince a clear intention to create legal relations, and the contract and terms of the agreement must be certain in nature.

It is of concern that Lord Ackner held the view that a party is entitled not to continue with, or withdraw from negotiations at any time and for any reason.<sup>61</sup> In this regard, he assumes that there is neither relevant constraint on the negotiation nor the manner of its conduct by the bargain that has been freely entered into. Hence, the requirement is that parties should be allowed to engage in genuine and good faith negotiations. Despite the contrary view from Lord Ackner, the same views are shared by Lord Justice Longmore that ‘[I]t would be a strong thing to declare unenforceable a clause into which parties have deliberately and expressly entered’<sup>62</sup> because the follow-up question would be as to the motivation that informed the reasons as to why parties entered into an agreement to negotiate in the first place.

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<sup>60</sup> See footnote 56 at 589.

<sup>61</sup> See footnote 21 at 181.

<sup>62</sup> *Petromec Inc v Petroleo Brasileiro S.A Petrobras* (No3) [2005] EWCA Civ 891, [2006] 1 Lloyd’s Rep. 121, at 153.

Brown makes an interesting reference to Corbin's warning in the 1960s that 'certainty in the law is largely an illusion at best, and altogether too high a price may be paid in the effort to attain it'.<sup>63</sup> This is true in that it is evident that this high price has been seen in agreements to negotiate that are held to be unenforceable on the basis of uncertainty, even though parties entered into these negotiations with an intention of negotiating.

It is evident that English courts would rather allow a party to act in a manner contrary to that expected of negotiating parties than to uphold an agreement to negotiate, based on the fact that agreements to negotiate are uncertain. Certainty is of paramount importance under English law. The same view is shared with Stewart that a blanket refusal of enforceability of agreements to negotiate misses the point of these agreements, and the approach in *Coal Cliff Collieries (Pty) Ltd v Sihehama (Pty) Ltd* by Kirby P is to be preferred.<sup>64</sup>

### **3.8 American case law**

In the United States of America, the treatment of agreements to negotiate differs from state to state. Some states find agreements to negotiate sufficiently certain to be enforceable and they have been willing to give effect to the expressed intention of the parties. Other states hold that agreements to negotiate are void for uncertainty.<sup>65</sup>

The United States recognises an obligation to act in good faith as S205 of the American Restatement (2nd) of the Law of Contracts provides that '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'. The obligation to act in good faith in the performance of commercial contractual terms is also required by S1- 203 of the Uniform Commercial Code which requires honesty but not fairness.<sup>66</sup> The American academic writer Farnsworth states

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<sup>63</sup> See footnote 48 at 368.

<sup>64</sup> I B Stewart, 'Good faith in contractual performance and in negotiation' (1998) 72 *Australian Law Journal* 370, 385.

<sup>65</sup> *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) ALL SA 16 (SCA) para 14.

<sup>66</sup> See footnote 64 at 375.

that the existing contract law is adequate to protect parties in preliminary agreements.<sup>67</sup>

The leading case in this regard is that of *Itek Corp v Chicago Aerial Industries*<sup>68</sup> where parties had entered into negotiations for the purchase of Itek's assets by California Aerial Industries (CAI). The parties executed a letter of intent which confirmed the terms of the sale and stated that they 'shall make every reasonable effort to agree upon and have prepared... a contract providing for the foregoing purchase... embodying the above terms and such other terms and conditions as the parties shall agree upon'.<sup>69</sup> Itek consented to a modification of the agreed terms but CAI had received a more favourable offer, and telegraphed that it would not go ahead with the transaction. Itek sued CAI. The Supreme Court of Delaware held the letter in which 'the parties obligated themselves to 'make every reasonable effort' to agree upon a formal contract... obligated each side to attempt in good faith to reach final and formal agreement'.<sup>70</sup> The Court found that the summary judgment was granted in error. It is evident that CAI had failed to negotiate in good faith and to make 'every reasonable effort' to agree upon a formal contract, as it was required to do.<sup>71</sup> This view has gained substantial following.

In the case of *Hoffman v Red Owl Stores*,<sup>72</sup> the defendant induced the plaintiff, a prospective franchisee of a supermarket, to act to his detriment in the expectation that negotiations would lead to a complete franchise. Hoffman, to his detriment, sold his bakery, bought and sold a grocery store in order to gain relevant experience, secured an option to buy land for the proposed supermarket, and rented a home close to the prospective site.<sup>73</sup> Negotiations ended when the defendant demanded a larger contribution, which the plaintiff refused to pay. The defendant consequently refused to execute the contract. The plaintiff was awarded reliance damages, despite the lack of a completed contract or even an identifiable clear offer.<sup>74</sup>

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<sup>67</sup> E.A Farnsworth 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' (1987) 87 *Columbia Law Review* 285.

<sup>68</sup> *Itek Corp. v Chicago Aerial Industries* 248 A.2d 625 (Del. 1968).

<sup>69</sup> *Supra* at 627.

<sup>70</sup> See footnote 68 at 629.

<sup>71</sup> *Ibid.*

<sup>72</sup> 26 WIS. 2d 683, 133 N.W. 2d 267 (1965).

<sup>73</sup> *Supra* at page 274.

<sup>74</sup> See footnote 72 at page 275.

### **3.9 Criticism and comment on American case law**

In the United States, although many of the leading cases involve mergers and acquisitions, it is evident that the courts have been of two minds. Some of the states refuse to enforce these agreements voluntarily entered into by the parties on the basis that they are indefinite. Some states in the United States should be commended for their willingness to hold parties to negotiate in good faith as well as the standard the parties agreed to in their agreement, as well as holding the defaulting party liable for breach.

### **3.10 Australian case law**

Australian courts have found agreements to negotiate sufficiently certain to be enforced. The grounds on which Australian courts have found agreements to negotiate to be enforceable should be observed in order to assist South African courts in dealing with agreements to negotiate. The leading cases are *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd*<sup>75</sup> and *United Group Rail Services Limited v Rail Corporation New South Wales*.<sup>76</sup>

### **3.11 Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd (1991) 24 NSWLR 1.**

In the *Coal Cliff Collieries* case, the Court distinguished between the concepts of agreements to agree (which they refer to as a ‘contract to contract’) and agreements to negotiate, acknowledging that a contract to contract is not binding, and found that an agreement to negotiate in good faith may be enforceable in certain circumstances.<sup>77</sup>

This was an important starting point by the Court as these two different concepts should always be distinguished from each other. The Court, in reaching this decision, took into account the doctrine of freedom of contract as well as the fact that the parties had intended their agreement to be binding. What is interesting is the way in

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<sup>75</sup> *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1.

<sup>76</sup> *United Group Rail Services Limited v Rail Corporation New South Wales* (2009) NSWCA 177.

<sup>77</sup> See footnote 75 at para 26.

which the judge reached this conclusion. Firstly, he sets out the case against enforceability: the term ‘negotiation’ contemplates the possibility of frustrating failure and does not assure success, the subject matter of the proposed lease had not been determined. In other words, an essential part of the agreement had not been stipulated.<sup>78</sup>

The factors in favour of the enforceability included reference to the term ‘agreement’ and the apparent intention of the parties as evident in the agreement that it should have ‘full and binding effect’.<sup>79</sup>

The judge, in this case, found that where parties have agreed to negotiate or consult in good faith they then need to be held liable to that promise.<sup>80</sup> He disagreed with the views which had been expressed in earlier English cases, and went further to state that the outcome must depend on the construction of each particular contract.<sup>81</sup>

Kirby P held that ‘a promise to negotiate ought to be enforceable only if the parties clearly so intend and only if good consideration is given for their promise to negotiate’.<sup>82</sup> The promise in this case was found to be too vague to be enforced. There was no external arbitrator to resolve outstanding differences.<sup>83</sup> An important observation from this case is that despite the Court holding the view that agreements to negotiate are enforceable, the court, however, stated that the court is not equipped to fill in ‘blank spaces’.<sup>84</sup> Agreements to negotiate need to be sufficiently certain.

Kirby P correctly held that the intention of the parties needs to be upheld. It is worth noting that judges of late have been adopting the view that where third parties have been appointed to settle uncertainties, such agreements are enforceable. Kirby P stated that ‘if the parties have bound themselves, expressly, as in this case, to negotiate or consult in good faith, they should be held to that promise’.<sup>85</sup> The ordinary person

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<sup>78</sup> See footnote 75 at para 18.

<sup>79</sup> See footnote 75 at para 21.

<sup>80</sup> See footnote 75 at para 26.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> See footnote 75 at para 27.

<sup>84</sup> *Ibid.*

<sup>85</sup> See footnote 75 at para 26.

considering entering into such an agreement should be aware of the fact that the court will not fill in the blank spaces left by the parties in agreements to negotiate as stated earlier in the case of *Hillas & Co. Ltd v Arcos Ltd*. It is also worth noting that the learned Handley JA held that all agreements to negotiate were unenforceable, stating that ‘a promise to negotiate in good faith is illusory and therefore cannot be binding’.<sup>86</sup>

Of more importance, in this case, was the discussion by the learned Kirby P where he analysed three situations involving agreements to negotiate. Firstly, he states that where a third party has been identified and given the power to settle any ambiguities and uncertainties, that agreement would be enforceable. Secondly, that while courts do not draft contracts for parties, a court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory. Thirdly, the promise to negotiate in good faith may be made in the context of an arrangement which by its nature, purpose, context, other provisions or otherwise makes it clear that the promise is too illusory or too vague and uncertain to be enforceable.<sup>87</sup>

Kirby P explicitly stated that he did not share the opinion of the English Court of Appeal in either *Courtney & Fairbain Ltd* or *Walford v Miles* that no promise to negotiate in good faith would ever be enforced by a court. He stated that he agreed with Lord Wright’s speech in *Hillas & Co. Ltd* that in some circumstances a promise to negotiate in good faith would be enforceable, but he did state that ‘the proper approach to be taken in each case depends upon the construction of the particular contract’.<sup>88</sup>

### **3.12 United Group Rail Services Limited v Rail Corporation New South Wales (2009) NSWCA 177.**

*United Group Rail Services* is important for rejecting the approach of the House of Lords in *Walford v Miles*. The Court here dealt with the certainty of terms in light of agreements to negotiate, holding that agreements to negotiate may be sufficiently

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<sup>86</sup> See footnote 75 para 42.

<sup>87</sup> See footnote 75 para 26-27.

<sup>88</sup> See footnote 75 para 26.

certain to be valid and enforceable.<sup>89</sup> Of particular interest in this case was Clause 35, the Notice of Dispute clause, where there was a dispute resolution in place which essentially stated that if there was any dispute or difference between the parties, the dispute would be determined in accordance with the procedure set out in Clause 35.<sup>90</sup> Following this, there was a further sub-clause 35.2, titled the Submission to Expert Determination, which held that an expert had to be appointed to resolve any dispute if the parties failed to resolve the dispute as required under clause 35.1.<sup>91</sup> The parties had set out for themselves steps that they had to take if any dispute or difference arose between the parties, and failure to adhere to the prescribed steps would amount to a breach.

The learned judge in this case found Kirby P's reasoning in the *Coal Cliff Collieries* more persuasive than competing authority.<sup>92</sup> The learned judge in *United Group Rail* noted that Lord Denning MR in his reasoning in *Courtney* equated agreements to negotiate with agreements to agree, a mistake which courts often make.<sup>93</sup> The court here made an interesting and important observation 'that to enforce an undertaking entered into by the parties is not to interfere with the parties' freedom to contract but rather to uphold it'.<sup>94</sup>

An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not necessarily uncertain where there is an applicable standard of behaviour having legal content.<sup>95</sup> Further, the idea that each party must have an unfettered right to protect his or her own interests and withdraw from negotiations at any time ignores the fact that a party who has agreed to negotiate has voluntarily imposed constraints on his right not to bargain.<sup>96</sup>

The court acknowledged that the obligation to undertake genuine and good faith negotiations did not impose on parties the obligation to advance the interests of the

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<sup>89</sup> *United Group Rail Services Limited v rail Corporation New South Wales* (2009) NSWCA 177 at para 25.

<sup>90</sup> *Supra* at para 2.

<sup>91</sup> See footnote 89 at para 4.

<sup>92</sup> See footnote 89 at 26 C-D.

<sup>93</sup> See footnote 89 at para 64.

<sup>94</sup> See footnote 89 at para 63.

<sup>95</sup> *Supra* at para 65.

<sup>96</sup> See footnote 89 at para 76.

other party: the process of negotiation has the effect of each party looking out for their own interest.<sup>97</sup> Secondly, there was a voluntarily assumed requirement to take self-interested steps in negotiation in light of the genuine and honest conception of pre-existing bargain, including the rights and obligations; as well as the facts said to comprise the controversy; and that, in light of this, the required behaviour is genuine and in good faith with a view to settlement or compromise.<sup>98</sup> Thirdly, there is no yardstick by which good faith can be measured other than honest and genuine negotiation. A question of whether this is done or how a party does this will be a question of fact.<sup>99</sup>

The relevant clause, Clause 35.11 (c)<sup>100</sup>, was not uncertain and had identifiable content.<sup>101</sup> Although it may be difficult in any given case to determine whether a party has made a genuine attempt to negotiate, the court took the position that the difficulty of proof does not mean that the obligation cannot be enforced: the mere fact that there is an obstacle does not mean that there is no obligation with real content. The court further acknowledged that it may be difficult in some cases to assess whether there has been such an attempt to negotiate: in other cases the answer to this may be obvious, in others, less so.<sup>102</sup>

### **3.13 Criticism and comment on Australian case law**

As evident from Australian law there has been a shift, thus parties should proceed cautiously when entering into such agreements to negotiate.

As noted by Stewart, the judgment in *Coal Cliff Collieries* illustrates the importance of parties being precise in their agreements and giving attention or stating precisely what the phrase ‘negotiate in good faith’ means in their agreement.<sup>103</sup>

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<sup>97</sup> See footnote 89 at para 71.

<sup>98</sup> *United Group Rail Services Limited v Rail Corporation New South Wales* at para 76.

<sup>99</sup> *Supra* at para 77.

<sup>100</sup> Clause 35.11 (C).

<sup>101</sup> See footnote 98 at para 81.

<sup>102</sup> See footnote 98 at para 74.

<sup>103</sup> I B Stewart, ‘Good faith in contractual performance and in negotiation’ (1998) 72 *Australian LJ* 370, 379.

## 4 RECENT SOUTH AFRICAN CASE LAW

Having analysed the traditional treatment of agreements to negotiate in South Africa and foreign jurisdictions, it is important to examine the recent developments in South African law. This research will look firstly at cases where there are material terms outstanding; secondly, where there is a deadlock-breaking mechanism in place; and thirdly, where there is an agreement to allow each other a reasonable opportunity of reaching consensus as well as a plain agreement to negotiate.

### 4.1 Material terms outstanding

In *CGEE Alstom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd*<sup>104</sup> the court held that where parties make a partial agreement and agree to negotiate the remainder, the parties may intend the partial agreement to be binding even though important matters remain to be agreed.<sup>105</sup> The dispute in this case concerned the validity of a telex message<sup>106</sup> sent to the respondent confirming an earlier oral award of a contract to it. The appellant was constructing a nuclear power station and the respondent was to supply steel guttering to support electric cables at the plant. The appellant orally confirmed that the contract had been awarded to the respondent and requested that the respondent order steel in the interim. A telex message was sent by the appellant to the respondent as per the respondent's request to have the acceptance placed in writing. However, negotiations broke down after the respondent had ordered the steel but before performance had been taken. The question before the court was whether a binding contract had been formed and whether the respondent was entitled to its reliance expenditure. Corbett JA, held that the telex message did constitute a binding acceptance of the respondent's offer.<sup>107</sup> The

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<sup>104</sup> 1987 (1) SA 81 (A).

<sup>105</sup> *Supra* para 42.

<sup>106</sup> SUBJECT: KOEBERG NUCLEAR POWER STATION/ CABLE TRAYS

FOLLOWING OUR VARIOUS MEETING(S) WE HAVE PLEASURE IN INFORMING YOU THAT THE ORDER FOR THE ABOVE HAS BEEN AWARDED TO YOURSELVES. THE OFFICIALISATION OF THIS ORDER WILL BE TRANSMITTED AT THE LATEST BY FRIDAY 29TH JUNE 1979. THEREFORE WE WOULD BE VERY GRATEFUL IF YOU WOULD ORDER ALL THE NECESSARY STEEL YOU MAY NEED TO START MANUFACTURE AND SO THAT THE FIRST DELIVERY DATE MAY BE MET.

<sup>107</sup> See footnote 104 para 90-91.

appellant contended that material and important matters relating to the work to be done under the contract were still being contracted by the parties, therefore the telex was not binding.<sup>108</sup> Corbett JA held that ‘the existence of ‘outstanding matters’ did not necessarily deprive an agreement of binding force’.<sup>109</sup> The Judge of Appeal held that the wording of the telex was unambiguous, the circumstances under which the telex message had been sent and subsequent conduct of both parties indicated that it was a binding acceptance.<sup>110</sup> The respondent was awarded full expectation interest measure of damages.<sup>111</sup>

## 4.2 Deadlock breaking mechanism

In the case of *Southernport Developments (Pty) Ltd v Transnet Ltd*,<sup>112</sup> the parties had provided for a deadlock breaking mechanism, a provision which allowed for arbitration if any dispute arose between the parties. The court held that such a provision was not void for vagueness.<sup>113</sup> Two agreements had been entered into by the parties in the former case, the first agreement however is irrelevant for present purposes.

The parties described the second agreement as a bridging agreement. It provided for the conclusion of a definitive agreement in the event of Tsogo Sun’s application for the casino licence succeeding and an alternative agreement if it failed.

The second agreement had an interesting clause, Clause 3, but more specifically sub-clause 3.4, which stated that if parties were unable to reach agreement within thirty days on any of the terms and conditions of either the definitive or alternative agreement, the dispute would be referred to an arbitrator agreed upon by the parties. The clause went further to stipulate that if parties failed to appoint such arbitrator within five days of being called to do so, an arbitrator would be selected for that purpose by the Arbitration Foundation of South Africa (The Foundation) which would have the effect of the arbitration being finalised in accordance with the Foundation’s

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<sup>108</sup> See footnote 104 para 91-92.

<sup>109</sup> See footnote 104 para 92.

<sup>110</sup> See footnote 104 para 93-94.

<sup>111</sup> See footnote 104 para 95.

<sup>112</sup> *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) ALL SA 16 (SCA).

<sup>113</sup> *Supra* para 17.

expedited arbitration rules.<sup>114</sup> Southernport Developments instituted action against Transnet as Tsogo's Sun licence application was unsuccessful and Transnet having failed to enter into good faith negotiations with its predecessor.

Transnet advanced the argument that they had not agreed on the essential terms of the lease and that the second agreement was an unenforceable preliminary agreement. The Supreme Court of Appeal found that although the parties had not agreed to the use and enjoyment of the property this did not invalidate the agreement.<sup>115</sup> The Court advancing an argument in favour of enforcing the agreement, held that Blieden J erred in relying on the *Premier Free State and Others v Firechem Free State (Pty) Ltd*<sup>116</sup> as that case contained no deadlock breaking mechanism, and found that the second agreement prescribed steps to be followed by the parties in the event of a deadlock between the parties.<sup>117</sup>

The mere existence of the dispute resolution clause, which required arbitrators appointed by the parties, was sufficient to have the agreement upheld so that if there were any disputes, these could be resolved. The Supreme Court of Appeal held that 'the presence of the deadlock-breaking mechanism was sufficient to take the contract in question beyond the realm of being an unworkable agreement to agree'.<sup>118</sup> The Court held that:

[t]he second agreement had settled all of the essential terms between the parties and was immediately binding, although fuller negotiations to settle subsidiary terms were still within the contemplation of the parties, in accordance with the continuing relationship between them. Simply put the arbitrator was entrusted with putting the flesh onto the bones of a contract already concluded by the parties.<sup>119</sup>

In the case of *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*, the parties had entered into an agreement in which there was an option to renew a lease on the basis that the rental would be determined by arbitrators. This was held by the Court not to

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<sup>114</sup> See footnote 112 para 3.

<sup>115</sup> Supra para 5-6.

<sup>116</sup> *Premier Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA)*.

<sup>117</sup> See footnote 112 para 11.

<sup>118</sup> See footnote 112 para 17.

<sup>119</sup> *Ibid.*

be too vague because of the existence of an arbitration provision. Botha JA held that it was not necessary for the parties to ‘formulate a precise, mathematical criterion for the determination of the rental’.<sup>120</sup> This case is evidence of a more flexible approach by the courts where parties have chosen to delegate to a third party if there are any uncertainties in the agreement entered into; in this case, the agreement entered into by the parties prescribed further steps which had to be followed if a deadlock between the parties arose. It was held that the provision did not lack certainty and that such an agreement had to be distinguished from an unenforceable agreement to agree.

The reason why these agreements were upheld in the above cases was that the uncertainty or dispute could be resolved because of the standard or method agreed upon by the parties, namely a deadlock breaking mechanism. The final and binding nature of the arbitrator’s decision renders certain agreements enforceable which would have otherwise been unenforceable. As noted by Hutchison, this case was thus ‘simplified by the presence of a deadlock breaking mechanism in the parties [sic] own contract’.<sup>121</sup>

### **4.3 Reasonable opportunity of reaching consensus**

In the case of *Schwartz NO v Pike and Others*,<sup>122</sup> it was established that where parties had given each other a reasonable opportunity of reaching consensus, they would be bound by such an agreement.<sup>123</sup> There was a Written Association Agreement in this case which was concluded by a number of partners, one of whom subsequently died. Clause 16 of the agreement regulated the disposal of a deceased member’s interest in the event of death. The clause further provided that within thirty days, the remaining members and the executor had to ‘enter into negotiations with the view of reaching an agreement as to the reasonable and fair value of the Deceased’s Interest as at the date of the Deceased’s death’.<sup>124</sup> The clause further provided that if no agreement was reached the parties had to ‘jointly appoint a chartered accountant to determine the reasonable and fair value of the Deceased’s Interest’. If there was no agreement as ‘to

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<sup>120</sup> 1993 1 SA 768 (A), referred to by Ponnar AJA in *Southernport* para 8.

<sup>121</sup> A Hutchison, ‘Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith’ (2011) 128 *SALJ* 273, 273.

<sup>122</sup> *Schwartz NO v Pike and Others* 2008 (3) SA 431 (SCA).

<sup>123</sup> *Supra* para 17.

<sup>124</sup> *Supra* para 4.

the appointment of a chartered accountant either the remaining members or executor could request the acting President of the South African Institute of Chartered Accountants to make such an appointment and such appointment would be final and binding'.<sup>125</sup>

The parties had agreed upon a four stage process to give effect to the disposal of the member's interest. The same view is shared with the learned judge in this case, that it is evident that the 'appellant did not afford respondents such an opportunity'<sup>126</sup> because the executor bypassed the procedure agreed upon, approached the President of the South African Institute of Chartered Accountants and had an accountant appointed. Although it was evident that the parties were poles apart and were not going to agree, the procedure agreed upon had to be given effect.<sup>127</sup>

In this case, it is evident that agreements to give reasonable opportunity to reach consensus are enforceable and that this can be implied from the agreement itself; it does not have to be spelt out in the agreement. The courts have hinted that the agreement would be analysed to observe what the parties required of each other as well as the time period in which they gave each other to negotiate. An agreement to give a reasonable opportunity to reach consensus differs from a plain agreement to negotiate in that there is a set procedure which needs to be adhered to, and parties need to afford each other an opportunity to adhere to the prescribed procedure. If the parties fail to afford each other a reasonable opportunity of reaching consensus, they act prematurely.<sup>128</sup> This procedure which parties need to adhere to, makes agreements to give reasonable opportunity to reach consensus different from plain agreements to negotiate, as the former relates to the machinery or process of negotiations, and how these are to be reached.

An important lesson that can be taken from this case, moving forward, is that the intention of the parties needs to be given effect. The appellant in this case was under an obligation to afford a reasonable opportunity to the other members to reach

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<sup>125</sup> *Ibid.*

<sup>126</sup> See footnote 122 at para 15.

<sup>127</sup> See footnote 122 para 16.

<sup>128</sup> See footnote 122 para 17.

consensus on a joint appointment before approaching the Institute<sup>129</sup> and the procedure by the executor was rendered premature.<sup>130</sup> Based on the judgment in this case, a ‘reasonable attempt’ or ‘best endeavours’ would also be binding.

#### 4.4 Agreements to negotiate

In the case of *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd*,<sup>131</sup> the respondent operated 2 off-shore oil and gas platforms in which the appellant had a contract to provide the respondent with aircraft and auxiliary services. The parties embarked on a series of negotiations with the view that they would conclude a new 4-year contract which would take effect immediately after the expiry date of the previous contract, being 30 June 2010. The applicants were informed in May 2010 that its Board had resolved that it would negotiate only a 1-year contract with the applicant. The applicant sent the respondent a letter offering it a 1-year contract, but the respondent did not accept. The applicant was advised that the respondent had found an alternative supplier and the applicants contract would not be extended. The applicant applied for an interim interdict preventing the respondent from implementing any contract for the provision of aircraft or auxiliary services until it had entered into and concluded good faith negotiations with the applicant.

The interdict was granted on the basis that in the view of Blignaut J, the applicant had established *prima facie* that the parties had entered into a preliminary agreement which was not too vague to be enforceable;<sup>132</sup> that the parties had entered into a preliminary agreement to negotiate a 1-year contract for aircraft and auxiliary services;<sup>133</sup> and the respondent had failed to negotiate with the applicant in a reasonable manner.<sup>134</sup> As to the enforceability of the preliminary agreement the learned judge acknowledged that South African law had formerly regarded an agreement to negotiate as being void for uncertainty. However, the judgment of Ponnau AJA in *Southernport* was indicative of a more flexible approach.

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<sup>129</sup> See footnote 122 at para 16.

<sup>130</sup> See footnote 122 at para 18.

<sup>131</sup> (No 1) now reported in 2012 (6) SA 96 (WCC).

<sup>132</sup> *Supra* at para 31.

<sup>133</sup> See footnote 131 at para 35.

<sup>134</sup> See footnote 131 at para 36-38.

The *Indwe Aviation* case, as noted by Professor Sharrock, is significant because it constitutes direct authority for the proposition that an agreement to negotiate a further agreement is in principle not void for uncertainty. The reasons for this being because it imposes an implied duty on each party to act honestly and reasonably in conducting the negotiations and a court is able to determine whether this duty has been observed.

In the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd*,<sup>135</sup> the Court correctly indicated that the common law relating to agreements to negotiate needs to be developed to bring it into line with constitutional values.<sup>136</sup> As noted by Bhana and Broeders, although this view was made *obiter*, it is worth noting. The Constitutional Court reached this decision unaware that an important development in common law had occurred some eighteen months earlier in the *Indwe Aviation case*. In this matter, Blignaut J accepted that an agreement to negotiate placed an implied duty on each party to negotiate with his or her counterpart and to act honestly and reasonably in doing so.<sup>137</sup>

The facts of the Everfresh case are worth noting to illustrate the potential unfairness of the court's decision in refusing to enforce an agreement to negotiate. In this case, there was a clause in place, namely clause 3, which gave Everfresh the right to renew the lease on the same terms as before, namely for a period of 4 years and 11 months and that the rent would be agreed upon by the parties at least three months before the lease was terminated. The renewal was, however, subject to two exceptions: that there would be no further right of renewal, and the rental for this new period would be agreed upon between lessor and lessee. The lessor was required to give written notice no less than six months prior to the termination of the lease, of its intention to renew.<sup>138</sup> However, when this option was exercised, Shoprite contended that they were not legally obliged to negotiate a renewal of the lease and that clause 3 did not constitute a legally binding and enforceable right of renewal, and Everfresh was to vacate the premises by the termination date.<sup>139</sup> The basis of Everfresh's argument was that Shoprite was obliged to make a *bona fide* attempt to agree on the rent for the

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<sup>135</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd 2012 (1) SA (CC)*.

<sup>136</sup> *Supra* para 22 (Yacoob, J), para 72 (Moseneke, J).

<sup>137</sup> See footnote 131 at para 28.

<sup>138</sup> See footnote 135 at para 3.

<sup>139</sup> See footnote 135 at para 5.

renewal period as per the agreement; and that until this had been done, Shoprite could not evict them. Essentially, Everfresh was contending that, at the very least, a *bona fide* attempt for the rent of the renewal period as clause 3 required both parties to negotiate in good faith.<sup>140</sup>

At the High Court, Everfresh limited its argument to the obligation of Shoprite to make a *bona fide* attempt to agree and that its right of renewal would only fall away if the negotiations in good faith did not result in an agreement.<sup>141</sup> The High Court held against the lessee on three grounds. Firstly, on the basis that an option to renew a lease on terms to be agreed is unenforceable; secondly, on the fact that there was no obligation on the lessor to negotiate;<sup>142</sup> and thirdly, that an obligation to negotiate in good faith, was too vague to be enforced in the absence of a 'readily ascertained objective standard' of good faith.<sup>143</sup>

The High Court adhered to the traditional approach in granting the eviction order, reasoning that agreements to negotiate in good faith were not enforceable as they were too uncertain to be enforced in the absence of a readily ascertainable, external standard of good faith. The eviction order was granted as there was no obligation created by clause 3. Leave for appeal was refused in both the High Court and the Supreme Court of Appeal and Everfresh approached the Constitutional Court. In the Constitutional Court, Everfresh raised for the first time the argument that the common law needed to be developed in light of the spirit, purport and objectives of the Constitution as required by S39(2), so that parties may not refuse to negotiate in good faith where they have agreed to do so. This was motivated by the consideration that courts are under a general obligation to develop the common law by applying Constitutional values as mandated by the relevant provisions in the Constitution.<sup>144</sup>

At the Constitutional Court, the minority and majority judgments differed on whether Everfresh had raised a constitutional issue before it for the first time, and, moreover, on whether to deal with the matter at the same time. The Constitutional Court, as a

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<sup>140</sup> See footnote 135 at para 9.

<sup>141</sup> *Shoprite Checkers Ltd v Everfresh Market Virginia (Pty) Ltd* Case No 6675109, KZN HC, PMB 25 May 2010 as yet unreported at para 9.

<sup>142</sup> *Supra* at para 19.

<sup>143</sup> See footnote 141 at para 22.

<sup>144</sup> See footnote 135 para 13.

whole, appeared receptive to the idea of constitutionally developing the common law on agreements to agree so they may be valid and enforceable.<sup>145</sup>

The minority judgement of Yacoob J held the view that the common law of contract should take cognisance of the value of *ubuntu*, and the idea that people can refuse to negotiate clearly compromises *ubuntu*.<sup>146</sup> Yacoob J held that the High Court failed to consider S39(2) when it ought to have done so, as Everfresh had a reasonable prospect of success in its quest to develop the common law in terms of S39(2).<sup>147</sup>

In the majority judgment, Moseneke J noted that the contention that parties who have agreed to negotiate should be required to do so in good faith is in line with the underlying notion of good faith in contract law, the maxim that agreements seriously entered into should be enforced (*pacta sunt servanda*), as well as the value of *ubuntu*. Moseneke J further noted that it would hardly be imaginable that the constitutional value would not require parties who have agreed to negotiate to do so reasonably and in good faith.

It is evident from both the minority and majority judgments that had this argument on the development of the common law been brought earlier, it would have been upheld. The Court shared the same sentiments that where parties had agreed to negotiate, they should not be permitted to disregard their agreement. In light of the above discussed cases, it is evident that the traditional approach in this situation is no longer a good reflection of South African law.

#### **4.5 Critique on Recent South African case law**

Hutchison correctly notes that in South Africa ‘there is clear authority that a provision in a contract imposing on the parties a duty to negotiate further terms in good faith is enforceable, provided an arbitration clause is provided’.<sup>148</sup> Although this is the

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<sup>145</sup> D Bhana, and N Broeders ‘Agreements to agree- Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd’ (2014) 77 THRHR 167-168.

<sup>146</sup> See footnote 135 at para 22-23.

<sup>147</sup> See footnote 135 at para 37.

<sup>148</sup> A Hutchison, ‘Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith’ (2011) 128 SALJ 274.

position, Hutchison notes that the ‘present state in light of these agreements to negotiate is more in favour of a party attempting to resile from these negotiations’.<sup>149</sup>

In analysing the case of Everfresh, Bhana and Broeders (who are critical of the majority judgment) argue that two issues need closer examination: firstly, ‘the nature of the constitutional duty on the courts to assess and, if necessary, constitutionally to develop the common law of contract’ and secondly, ‘the precise import of the Constitutional Court’s appreciation of the foundational legal principles of freedom of contract and *pacta sunt servanda* is examined’.<sup>150</sup> In light of the development of the common law, the same sentiments are shared with Bhana and Broeders that ‘even where parties do not invoke the provisions for the development of the common law the courts have the power to do so *ex meru motu*’.<sup>151</sup> One would then go on to question why this constitutional duty was not carried out in this case. Bhana and Broeders correctly state that it is because our ‘legal practitioners and judges are schooled mostly in a liberal legalistic tradition which approaches litigation and adjudication in a conservative manner’.<sup>152</sup> The authors correctly blame procedural law which side lines the Constitution and rather preserves the (classical liberal) *status quo*.<sup>153</sup>

The authors state that the conservative legal culture of practitioners and judges, which is embedded in the procedural rules of pleading and the common law of contract alike, enabled both the High Court and the Supreme Court of Appeal to sidestep the Constitution without even considering whether they were under a duty in terms of S39 (2) read with S173.<sup>154</sup> In light of the second examination, the authors state that Yacoob’s judgment, which they describe as appropriate, reveals an understanding of the relationship between the common law of contract and the Constitution as an integrated one where the constitutional dimension must be implicit in contract law.<sup>155</sup> The referral to the High Court for reconsideration of the judgment provided the High

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<sup>149</sup> Supra at page 275.

<sup>150</sup> D Bhana and N Broeders ‘Agreements to agree- Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd’ (2014) 77 *THRHR* 164,168.

<sup>151</sup> Supra at page 169.

<sup>152</sup> See footnote 150 at page 170.

<sup>153</sup> *Ibid.*

<sup>154</sup> See footnote 150 page 171.

<sup>155</sup> Supra page 173. *Everfresh v Shoprite* at para 41.

Court (and possibly the Supreme Court of Appeal) with a further opportunity to utilise its common law expertise in the process of constitutionalising contract law in terms of S39 (2) and S 173.<sup>156</sup> The authors stated that in the majority court judgment, the potential prejudice to Shoprite was paramount and the prejudice to Everfresh was not taken into account. The Constitution was perceived as external to the common law of contract and was ignored, despite the majority having stated that Everfresh was raising a Constitutional issue of some importance, before the Court,<sup>157</sup> and went as far as to suggest how the law on agreements to agree ought to be developed. The authors argue that the focus should have been whether the High Court and the Supreme Court of Appeal were under a duty to *ex meru motu* to assess constitutionally; and if necessary, to develop relevant common law rules governing agreements to agree.<sup>158</sup>

Professor Sharrock, commenting on *Everfresh* and *Indwe Aviation*, observed that the Constitutional Court in *Everfresh* gave a clear indication (without reaching a final decision) that the common law needs to be developed to bring it in line with constitutional development, evidently the Constitutional Court was unaware that an important development had taken place in the case of *Indwe Aviation*.<sup>159</sup> The academic writer goes on to state that both the majority and the minority were of the view that had Everfresh raised its argument regarding the development of the common law earlier then the court would have upheld it. Sharrock states further and that the members of the court appear to have been of the view that where parties have agreed to negotiate, they should not be permitted simply to disregard their agreement.<sup>160</sup> He further states that the *Indwe Aviation* case is significant ‘in that it is direct authority for the view that an agreement to negotiate is not void for uncertainty because it imposes an implied duty on parties to act reasonably and honestly’.<sup>161</sup>

Harms, who is critical of the approach of Yacoob J, analyses the Constitutional Courts minority judgments in *Everfresh* and criticises the fact that the Court would have referred the matter back to the High Court to develop the common law.<sup>162</sup> In holding

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<sup>156</sup> See footnote 150 page 173. *Everfresh v Shoprite* at para 41-42.

<sup>157</sup> *Ibid. Everfresh v Shoprite* at para 48.

<sup>158</sup> See footnote 150 at page 171.

<sup>159</sup> R Sharrock, Extracted from 2012 ASSAL: Certainty page page 417.

<sup>160</sup> *Supra* at page 419.

<sup>161</sup> See footnote 159 page 420.

<sup>162</sup> LTC Harms, “The puisne judge, the chaos theory and the common law” (2014) 131 *SALJ* 3, 3.

so, the writer stated that '[i]t did not consider the fact that the puisne judge would thereby have been placed in an invidious positio'.<sup>163</sup> Harms seems to be more concerned about the position in which the judges in the lower courts would be placed if the matters were referred back for development of the common law. In arguing against the minority judgment, the author submits that the argument that the Constitutional Court can be approached as court of first and last instance pays no regard to rule 16A (1) of the Uniform Rules of Court that a constitutional matter must be brought timeously to the registrar, and the notice 'must be clear and succinct description of the constitutional issue concerned'.<sup>164</sup> As both the majority and minority judgments invoked *ubuntu*, Harms criticises this by stating that this 'was nothing more nor less than the holy cow with the Latin name *pacta sunt servanda*'; he states that the concept of *ubuntu* cannot be used as a '*muti*' which can transform a concept or a thing which was otherwise uncertain and make it certain; and further that to use this concept of *ubuntu* as a 'general cure for all ills debases its meaning and value'. The author went on to state 'that common law does not have rules similar to definitions one finds in statutes where for instance, a peacock can be defined to include a fowl or a pheasant'.<sup>165</sup>

Lewis noted that she was concerned with the recent developments in South African courts of law because foundational 'values like certainty in business dealings may be in jeopardy'.<sup>166</sup> The academic writer does not agree with the majority judgment in *Everfresh* where it was suggested that there was a possibility that a court could require parties to negotiate terms of their contract,<sup>167</sup> stating that this undermined the notion of legality as it begged the question of what '*pactum*' is. The judgments in *Everfresh*, the author argues, 'offend the principle of legality and infuse the law of contract with confusion'.<sup>168</sup> The argument comes across as confused as the author is a strong advocate of the principle of legality but does not say that these agreements are not enforceable. Lewis makes reference to the *CGEE Alsthon* case, stating that where parties have agreed to negotiate further terms in their contract, their agreement has

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<sup>163</sup> Supra at page 4.

<sup>164</sup> See footnote 162 at page 10.

<sup>165</sup> Supra at pages 6-7.

<sup>166</sup> C Lewis, "The uneven journey to certainty in contract" (2013) 76 *THRHR* 80, 82.

<sup>167</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA (CC) at para 69.

<sup>168</sup> See footnote 166 at page 94.

contractual force.<sup>169</sup> Lewis seems to be sceptical in the enforcement of these agreements to negotiate.

## **5 FEASIBILITY OF SOUTH AFRICAN COURTS ENFORCING AGREEMENTS TO NEGOTIATE**

The problem posed by an agreement to negotiate, accepting that it gives rise to a duty to negotiate honestly and reasonably, is determining the content of this duty. What exactly does the duty encapsulate, how is it to be enforced, what conduct amounts to dishonest or unreasonable conduct in the negotiation process. In other words, what conduct constitutes breach of a duty to negotiate, what remedies can be granted to the aggrieved party for breach of the duty to negotiate, does an agreement to reach consensus on something imply an agreement to negotiate honestly and reasonably? The view held here is that courts should be encouraged to enforce agreements that are intended to be binding, which are consistent with business practice, and the breach of which may cause a negotiating party material loss or harm.

### **5.1 Breach of duty to negotiate**

The conduct that constitutes unreasonable bargaining will ultimately have to be identified in court decisions. Valuable guidance may be obtained from the law governing collective bargaining in labour matters, and, by drawing from the principles of the view of commentators such as Farnsworth, it is possible to advance certain propositions about what constitutes unreasonable or dishonest bargaining.

Farnsworth identifies seven examples of instances of bad faith. Thus, if one of the parties engages in such conduct, they will be in breach of an agreement to negotiate that they had entered into in good faith. The first instance of bad faith is 'Refusal to Negotiate'. This is the clearest example; namely where parties have agreed to negotiate and one of them refuses to do so, that party is obviously in breach of what they had initially agreed upon. The writer states further that dilatory tactics can amount to failure to negotiate fairly. In addition, the willingness to negotiate on

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<sup>169</sup> C Lewis, "The uneven journey to certainty in contract" (2013) 76 THRHR 80, 89.

concessions regarding matters that are not closely related, can amount to bad faith. The writer also identifies another problematic aspect, namely deciding what conduct amounts to improper conduct as.<sup>170</sup>

Secondly, the writer identifies ‘Improper Tactics’ as another form of breach and states that fraud and duress are plainly unfair. The writer does however correctly note that these forms of breach ordinarily induce rather than obstruct the agreement. Stubborn and unyielding bargaining alone does not suffice to constitute bad faith, but is often taken as evidence of bad faith.<sup>171</sup>

Thirdly, ‘Unreasonable Proposals’ is identified as another form of unreasonable conduct. The same sentiments are shared with the writer that it is surely not good faith to make a proposal that plainly falls below a standard that is ‘no less favourable’ than those specified in the agreement. It is a clear example of bad faith to engage in negotiations on terms less favourable.<sup>172</sup>

Fourthly, ‘Non-disclosure’ of important information is regarded as misrepresentation and another form of breach. A party will be in breach if s/he fails to disclose a material term. For instance, failing to disclose that a previous statement is no longer true is an obvious example of a breach. A failure to disclose would expose a party to liability for reliance damages, should negotiations not result in a contract.<sup>173</sup>

Fifthly, he identifies ‘Negotiations with third parties’ as another form of breach. This is a situation in which parties have bound themselves to ‘exclusive negotiations’ which obligate one of the parties to refrain from negotiating with other persons for a stipulated period. The writer notes that parallel negotiations are not unusual in preliminary agreements and are important for competition. The writer, however, does warn parties to preliminary agreements not to overlook the importance of specifying a time limit for exclusivity. These are the equivalent of ‘lock-out’ agreements in South

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<sup>170</sup> E.A Farnsworth ‘Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations’ (1987) 87 *Columbia Law Review* 218, 273-275.

<sup>171</sup> *Supra* at page 275-276.

<sup>172</sup> See footnote 170 at page 276-277.

<sup>173</sup> See footnote 170 at page 277-279.

Africa. Therefore, if one party fails to adhere to this ‘lock-out’ agreement there is a clear evidence of breach.<sup>174</sup>

‘Reneging’ is identified as the sixth form of breach. The motivation for this is because the common reason for making agreements to negotiate is to prevent the re-opening of matters on which parties had initially agreed upon. Although agreements to negotiate are not binding and to renege on such commitment amounts to bad faith, a party can show due justification if there was good reason to renege.<sup>175</sup>

Lastly, Farnsworth identifies ‘Breaking off negotiations’ as another form of bad faith, but the author here does acknowledge that there may be a justification in some instances for breaking off negotiations. Examples given include where there is a change in circumstances or there was a mistake which is justifiable, but the disappointed party is not entitled to any relief. In some instances, the author notes that a party may be exhausted from the negotiation process and concludes that the negotiation process has no chance of success; the circumstances must be observed in such instances. It is further noted that where parties are deadlocked, whether the parties have reached this stage is a matter of judgment.<sup>176</sup> Although this is not a closed list, courts should look at the agreements between the parties as well as the conduct of the party to observe if there has been any breach.

Farnsworth makes an interesting point where he states that there needs to be some form of restitution where there has been a breach, as one party ‘may have disclosed to the other an idea in confidence in order to enable the potential buyer to appraise the value of the business and when negotiations fail the other party uses that disclosed idea’.<sup>177</sup> Courts thus need to afford some form of remedy as one party can use this form of agreement to get a better deal with another third party. The party in negotiations needs to be ‘reimbursed where the other party intentionally misrepresented, as well as in instances where parties enter into negotiations without serious intent to reach agreement’.<sup>178</sup> It also applies if a party, ‘having lost that intent,

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<sup>174</sup> See footnote 170 at 279-280.

<sup>175</sup> See footnote 170 at 280-281.

<sup>176</sup> See footnote 170 at 282-284.

<sup>177</sup> See footnote 170 at 229.

<sup>178</sup> *Ibid.*

continues in negotiations or fails to give prompt notice of its change of mind',<sup>179</sup> the court should look to the conduct of the party to see if they acted honestly and reasonably.

It is important to note that if a party has undertaken to negotiate fairly, it should not be free to change its mind arbitrarily without reasonably exhausting the negotiation process. An important point is made by Farnsworth, which is important in moving forward with agreements to negotiate in South African law, that it is reasonably expected that a party who has agreed to negotiate with another party is expected to keep that party informed of relevant proposals from third parties so as to take them into account in negotiations.<sup>180</sup>

Even in situations where parties have not stipulated whether they can engage with other third parties, it is required that a party may not be free in dealing with third parties if there is no agreement to negotiate in good faith. It is acknowledged, however, that parallel negotiations are important in practice for competition purposes. Farnsworth notes that if a party abruptly terminates negotiations, especially if they advanced by accepting third party offers without giving the other party an opportunity to respond, this would ordinarily amount to a breach of a duty of good faith.<sup>181</sup>

## 5.2 Possible remedies

The court in *Courtney & Fairbain Ltd v Tolaini Brothers (Hotels) Ltd* stated that an agreement in good faith 'promises no definitive result, they entertain no material harm, and they lead to no determinate loss that is quantifiable as damages'.<sup>182</sup>

Although this was the argument advanced in *Courtney & Fairbain Ltd*, Trackman and Sharma correctly acknowledge that although this is a valid consideration, the 'mere difficulty in determining the quantum of damages for breach of an agreement to negotiate in good faith is not a definitive reason to deny damages'.<sup>183</sup>

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<sup>179</sup> See footnote 170 at page 234.

<sup>180</sup> See footnote 170 at page 284.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Courtney and Fairbain Ltd v Tolaini Brothers (Hotels) Ltd* (1975) 1 W.L.R at 297.

<sup>183</sup> *Ibid.*

Allsop P in *United Group Rail Services v Rail Corporation* correctly made reference to *Chaplin v Hicks* where it was held that ‘the objection that no court could estimate the damages, because no one could tell whether the negotiations ‘would be’ successful, ignores the availability of damages for the loss of a bargained- for value commercial opportunity’.<sup>184</sup> His Honour, in this case, went on to observe that ‘uncertainty of proof ... does not mean that (agreements to negotiate) are not a real obligation with real content’.<sup>185</sup> The learned Teare J in the case of *Emirates Trading Agency LLC v Prime Mineral Experts Private Limited*, shared the same sentiments stating that, ‘difficulty of proof of breach in some cases does not mean that the clause lacks real content’.<sup>186</sup> It is evident from the above-mentioned cases that an aggrieved party in agreements to negotiate can be awarded a remedy as a result of a breach from the defaulting party.

Where breach of an agreement to negotiate has caused material loss or harm, the disappointed party should be compensated. The expenses incurred in the conduct of negotiations and consequences, such as loss of chance to conclude contract with a third party, should not be ignored. A party can be awarded damages for ‘loss of chance’ to negotiate with third party.<sup>187</sup>

Trackman and Sharma, in passing, noted that the remedy of specific performance is ‘unrealistic in the face of failed negotiations that can no longer be performed, or would require constant supervision’.<sup>188</sup> This view is not without fault, as this remedy can be afforded in limited circumstances, as ‘specific enforcement of an agreement to negotiate arises too late to be effective or fair, after negotiations have failed’.<sup>189</sup> Hutchison also argues that the remedy of specific performance is feasible and the court should be able to compel the recalcitrant party to negotiate in good faith perhaps

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<sup>184</sup> *United Group Rail Services Limited v Rail Corporation New South Wales* (2009) NSWCA 177 at 64, *Chaplin v Hicks* (1911) 2 KB 786, 792.

<sup>185</sup> *United Group Rail Services Limited v Rail Corporation New South Wales* (2009) NSWCA 177 at para 74.

<sup>186</sup> *Emirates Trading Agency LLC v Prime Mineral Experts Private Limited* (2014) EWHC 2104 at para 47.

<sup>187</sup> *Ibid.*

<sup>188</sup> L Trakman and K Sharma ‘The binding force of agreements to negotiate in good faith’ (2014) 73 *Cambridge Law Journal* 598, 624.

<sup>189</sup> *Supra* at page 625.

even under threat of possibly appointing an arbitrator to supply outstanding term.<sup>190</sup> It is evident that the remedy of specific performance can be indirectly granted by the Court in the form of an interdict, where the court can compel the defaulting party to stop contracting with a third party even in the absence of an express ‘lock-out’ provision. The Court, in *Indwe Aviation*, granted an interdict prohibiting the first respondent from utilising the services of the second respondent (SANDF) or any third party from performing air transportation and auxiliary services. The first respondent was ordered to allow the applicant to continue providing the services as per the terms and conditions.<sup>191</sup> An interdict was also granted in the Schwartz case.

The purpose of reliance damages is to award the injured party to claim to the extent that he has altered his position to his detriment in relying on the agreement to negotiate. It is acknowledged that expectation damages are problematic as the existence of open terms may make it difficult to prove what the ultimate gains would have been.<sup>192</sup>

In *Walford v Miles* the plaintiff at the trial court claimed damages for misrepresentation in continuing to deal with the third party. At the trial court, the damages for loss of opportunity were ordered to be assessed. At the Court of Appeal, Bingham L J, dissenting, noted that the vendor broke the agreement not to deal with the third party. However, no award for damages was made by the House of Lords.

In the United States, the appropriate remedy as noted by Farnsworth is not damages for lost expectations but rather the damages caused by the injured party’s reliance on the agreement to negotiate. Once the other party has relied on the agreement and the agreement to negotiate is advanced, the onus is on this party to prove the loss caused by its reliance.<sup>193</sup> Brown states that the appropriate damages that need to be awarded where there has been a breach is ‘reliance damages or full expectation loss.’<sup>194</sup> Cohen also strongly advocates that reliance damages, as awarded in *Walford v Miles*, are the

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<sup>190</sup> A Hutchison, ‘Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith’ (2011) 128 *SALJ* 274 at page 296.

<sup>191</sup> *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd* (No 1) now reported in 2012 (6) SA 96 (WCC) at para 16.

<sup>192</sup> See footnote 190 at page 293-294.

<sup>193</sup> *Supra* at 267.

<sup>194</sup> I Brown, ‘The contract to negotiate: A thing writ in water?’ (1992) *JBL* 353, 363.

appropriate damages.<sup>195</sup> A party should be afforded remedy in the form of reliance damages if the other party to the agreement withdrew without any just cause. In the case of *Hoffman v Red Owl Stores*, it was impossible to put a value on Hoffman's lost expectation, and Hoffman's recovery was measured by his reliance.

Trakman and Sharma note that courts should be encouraged to 'enforce agreements that are intended to be binding, grounded in party practice, which are consistent with business practice, and where breach of an agreement to negotiate may cause a negotiating party material loss or harm'.<sup>196</sup> The writers go on to make reference to the case of *Lam v Austintel Investments Australia Pty Ltd* where it was stated that the 'law of contract should be more than just a blunt instrument which ignores expenses incurred in the conduct of negotiations and consequences such as the loss of chance to conclude an agreement with a third party 'locked out' as a precondition for negotiations'.<sup>197</sup> The plaintiff was awarded the difference of profit had it continued with the work in the case of *CGEE Alsthor*.

Where a party has transferred benefits to the other party in the negotiation process, in the belief that a contract will eventually be concluded, the restitutionary remedy can be used so as 'to put the injured party in the position he would have been had the contract been performed'.<sup>198</sup>

### 5.3 A way forward

Farnsworth suggests that in enforcing agreements to negotiate, the issues that need to be taken into account are the language as well as the surrounding circumstances in determining the content of the duty of good faith under a particular agreement which involves an inquiry into the expectations of the parties.<sup>199</sup> Farnsworth goes on to note that in looking at the 'surrounding circumstances, the behaviour of the parties up to

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<sup>195</sup> N Cohen, 'Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate' in Beatson and Friedman (ed) *Good Faith and Fault in Contract Law* (1995) 36, 49.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Lam v Austintel Investments Australia Pty Ltd* (1989) 97 F.L.R 458, 575 (Gleeson C.J.).

<sup>198</sup> See footnote 195 at page 29.

<sup>199</sup> E.A Farnsworth, 'Precontractual liability and preliminary arrangements: fair dealing and failed negotiations' *Columbia Law Review* (1987) 87 at 272.

the time of the agreement and the state of the negotiations at the time<sup>200</sup> when the agreement was entered into must be considered. This is evident in the telex message that was sent in the case of *CGEE Alsthon* where it was held that the wording of the telex message amounted to an acceptance. The author correctly states that ‘expectations generally build over time, so that the more advanced the negotiations, the more difficult it will be to justify withdrawal’,<sup>201</sup> and further the ‘previous relationship between parties may also be important to take into account as well as evidence of trade practices’<sup>202</sup> as was stated in the case of *Hillas*.

The point made above is that a court should be able to consider a variety of *indicia* when applying a legal duty of good faith, including the industry practices, and any history between the parties. The overall purpose would be to ensure that the parties remain reasonably and honestly committed to the purpose which they had initially set out in their agreement.

Stewart provides advice to reduce findings of agreements to negotiate being uncertain and states that the fundamental terms of contract to negotiate in good faith should be specified, including its duration, the consideration, whether parallel negotiations with third parties are prohibited, provision for referral to third party arbitration in the event of disagreement, and any other terms limiting free regard to self-interest.<sup>203</sup>

Critics of agreements to negotiate base their argument on the fact that these agreements offend public policy as they bind parties to promises that parties never intended to be legally binding. The important point missed by these critics is that neither party guarantees that a further agreement will be produced. The intention of the parties is to enter into an arrangement requiring that certain steps be taken. It seems to be rather against public policy to ignore the expressed wishes of parties to enforce agreements to negotiate as long as they are not contrary to the law or public policy. In *Coal Cliff Collieries*, the Head of Agreement in this case contained too many ‘blank spaces’ for a court to enforce, and for this reason the duty was not

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<sup>200</sup> See footnote 199 at 273.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> I B Stewart, “Good faith in contractual performance and in negotiation” (1998) 72 *Australian LJ* 370, at page 381.

enforced.<sup>204</sup> Parties to agreements to negotiate should therefore include as much detail as possible in order for their agreements to be enforceable.

## 6 CONCLUSION

Having analysed the traditional view regarding agreements to negotiate in contrast to recent cases, it is evident that the traditional approach as enunciated in both *Scheepers v Vermuelen* and *Premier Free State and Others v Firechem Free State (Pty) Ltd* is no longer an accurate reflection of South African law. It is evident through case law that agreements to negotiate; agreements that are accompanied by a deadlock breaking mechanism provision such as an arbitration clause; agreements where parties have given each other a reasonable opportunity to reach consensus; or use best efforts or best endeavours may be enforceable agreements.

Traditionally, agreements to negotiate were held to be void for uncertainty; and South African courts often confuse agreements to agree and agreements to negotiate. The courts, going forward, need to draw a distinction between these two distinct concepts, as there are commercial reasons why parties enter into these agreements, and these should not be struck down arbitrarily. It is evident that even in English law, agreements to negotiate are not completely disregarded as agreements to use best endeavours were held to be enforceable as well as those to undertake ‘friendly discussions’ as established in *Emirates Trading Agency LLC v Prime Mineral Experts Private Limited*. Foreign case law has shown that in other states in Australia and America agreements to negotiate are enforceable and there are remedies readily available where there has been a breach. The parties, when entering into agreements to negotiate, need to state as much as possible about the agreement as suggested by Stewart.<sup>205</sup>

Although the duty of good faith is open to wide interpretation, it has been suggested that the parties themselves can attribute meaning to what they want this duty to mean in their agreement. The courts would then look to the agreement to negotiate that parties have entered into, in order to ascertain what this duty entails rather than

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<sup>204</sup> *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd* (1991) 24 NSWLR 1 at para 27.

<sup>205</sup> See footnote 203 at page 379.

striking it down as uncertain. Parties who have entered into agreements to negotiate should be held bound to promises which they have made and not be allowed to withdraw unreasonably from negotiations, without any justifiable reason. The reasons for withdrawal should be valid ones.

The more advanced negotiations are, the harder it should be for a party to withdraw from negotiations as expectations generally build over time; and, as noted by Farnsworth, previous relationship between the parties, and evidence of trade practices are important considerations to be taken into account.<sup>206</sup> The development of the South African common law in *Indwe Aviation* should likewise be taken into account. It is evident that, despite the contrary, there are a variety of remedies that can be afforded, including an indirect award of specific performance by means of an interdict and reliance damages, which are evidently the most appropriate damages.

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<sup>206</sup> See footnote 199 at 273.

## BIBLIOGRAPHY

ARTICLES	MODE OF CITATION
Bhana D and Broeders N (2014) “Agreements to agree- Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd” Tydskrif vir Hedendaagse Romeins-Hollandse Reg vol 77 pp 164-176	D Bhana and N Broeders (2014) “Agreements to agree- Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd” THRHR vol 77
Brown I (1992) “The contract to negotiate: a thing writ in water?” JBL pp353-368	I Brown (1992) “The contract to negotiate: a thing writ in water?” JBL
Cohen N (1995) “Pre-contractual duties: two freedoms and the contract to negotiate in Beatson and Friedman (ed) Good Faith and Fault in Contract Law” pp 25-56	N Cohen (1995) “Pre-contractual duties: two freedoms and the contract to negotiate in Beatson and Friedman (ed) Good Faith and Fault in Contract Law”
Cumberbatch J (1992) “In freedom’s cause: the contract to negotiate” Oxford J. Legal Studiespp 586-589	J Cumberbatch (1992) “In freedom’s cause: the contract to negotiate” Oxford J. Legal Studies
Farnsworth EA (1987) “Precontractual liability and preliminary arrangement: fair dealing and failed negotiations” Columbia Law Review vol 87 pp 598-628	EA Farnsworth (1987) “Precontractual liability and preliminary arrangement: fair dealing and failed negotiations” Columbia Law Review vol 87
Harms LTC (2014) “The puisne judge, the chaos theory and the common law” South African Law Journal vol 131 pp 3-10	LTC Harms (2014) “The puisne judge, the chaos theory and the common law” South African Law Journal vol 131
Hutchison A (2011) “Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?” South African Law Journal vol 128 pp 273-296	A Hutchison (2011) “Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?” SALJ vol 128
Leon E and Kunal Sharma (2014) “The binding force of agreements to negotiate in good faith” Cambridge Law Journal vol 73 pp 598-628	Leon E and Kunal Sharma (2014) “The binding force of agreements to negotiate in good faith” Cambridge Law Journal vol 73
Lewis C (2013) “The uneven journey to certainty in contract” Tydskrif vir Hedendaagse Romeins-Hollandse Reg vol 77 pp 80-94	C Lewis, (2013) “The uneven journey to certainty in contract” THRHR vol 77
Mupangavanhu B (2013) “Yet another	B Mupangavanhu, (2013) “Yet another

missed opportunity to develop the common law of contract? An analysis of Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd [2011] ZACC 30” Speculum Juris Vol 1 pp 148-173	missed opportunity to develop the common law of contract? An analysis of Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd [2011] ZACC 30” Speculum Juris Vol 1 pp 148-173
O’Connor J (2010) “The enforceability of agreements to negotiate in good faith” University of Tasmania Law Review vol 177	J O’Connor, (2010) “The enforceability of agreements to negotiate in good faith” University of Tasmania Law Review vol 177
Peel E (1992) “Locking-out and locking- in: the enforceability of agreements to negotiate” Cambridge Law Journal pp 211-213	E Peel, (1992) “Locking-out and locking- in: the enforceability of agreements to negotiate” Cambridge Law Journal
Schwartz A and Scott RE (2007) “Pre-contractual liability and preliminary agreements” Harvard Law Review vol 120 pp 661-707	A Schwartz and RE Scott, (2007) “Pre-contractual liability and preliminary agreements” Harvard Law Review vol 120
Sharrock R (2012) “General Principles of the law of contract: Certainty” Annual Survey pp 417-418	R Sharrock, (2012) “General Principles of the law of contract: Certainty” Annual Survey
Stewart I (1998) “Good faith in contractual performance and in negotiation” Australian Law Review vol 72 pp 370-391	I Stewart, (1998) “Good faith in contractual performance and in negotiation” Australian Law Review vol 72
<b>CASE LAW</b>	<b>MODE OF CITATION</b>
CGEE Alsthor Equipments et Entreprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A)	CGEE Alsthor Equipments et Entreprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A)
Chanel Home Centers Division of Grace Retail Corpn v Grossman 795 F2d (3rd Cir 1986)	Chanel Home Centers Division of Grace Retail Corpn v Grossman 795 F2d (3rd Cir 1986)
Chaplin v Hicks (1911) 2 KB 786.	Chaplin v Hicks (1911) 2 KB 786.
Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1	Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1
Courtney and Fairbain Ltd v Tolaini Brothers (Hotels) Ltd (1975) 1 W.L.R 297, 301.	Courtney and Fairbain Ltd v Tolaini Brothers (Hotels) Ltd (1975) 1 W.L.R 297, 301.
Ee v Kakar (1979) 40 P & CR 228	Ee v Kakar (1979) 40 P & CR 228
Emirates Trading Agency LLC v Prime Mineral Experts Private Limited (2014)	Emirates Trading Agency LLC v Prime Mineral Experts Private Limited (2014)

EWHC 2104	EWHC 2104
Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd 2012 (1) SA (CC)	Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd 2012 (1) SA (CC)
Hillas & Co. Ltd v Arcos Ltd (1932) 147 L.T.	Hillas & Co. Ltd v Arcos Ltd (1932) 147 L.T.
H Merx & Co (Pty) Ltd v The B-M Group (Pty) Ltd 1996 (2) SA 225 (A).	H Merx & Co (Pty) Ltd v The B-M Group (Pty) Ltd 1996 (2) SA 225 (A).
Hoffman v Red Owl Stores 26 WIS. 2d 683, 133 N.W. 2d 267 (1965).	Hoffman v Red Owl Stores 26 WIS. 2d 683, 133 N.W. 2d 267 (1965).
Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd (No 1) now reported in 2012 (6) SA 96 (WCC).	Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd (No 1) now reported in 2012 (6) SA 96 (WCC).
Itek Corp. v Chicago Aerial Industries 248 A.2d 625 (Del. 1968).	Itek Corp. v Chicago Aerial Industries 248 A.2d 625 (Del. 1968).
Lam v Austintel Investments Australia Pty Ltd (1989) 97 F.L.R 458, 575 (Gleeson C.J).	Lam v Austintel Investments Australia Pty Ltd (1989) 97 F.L.R 458, 575 (Gleeson C.J).
Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk 1993 (1) SA 768 (A)	Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk 1993 (1) SA 768 (A)
Mallozzi v Carapelli (1976) 1 Lloyds Rep 407.	Mallozzi v Carapelli (1976) 1 Lloyds Rep 407.
Petromec Inc v Petroleo Brasileiro SA Petrobras (No3) [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121, 152	Petromec Inc v Petroleo Brasileiro SA Petrobras (No3) [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121, 152
Premier Free State and Others v Firechem Free State (Pty) Ltd 2000(4) SA 413 (SCA).	Premier Free State and Others v Firechem Free State (Pty) Ltd 2000(4) SA 413 (SCA).
Scheepers v Vermeulen 1948 (4) SA 884 (O)	Scheepers v Vermeulen 1948 (4) SA 884 (O)
Schwartz NO v Pike and Others 2008 (3) SA 431 (SCA)	Schwartz NO v Pike and Others 2008 (3) SA 431 (SCA)
Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) ALL SA 16 (SCA).	Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) ALL SA 16 (SCA).
Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd 1996 (3) SA 320 (W).	Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd 1996 (3) SA 320 (W).
United Group Rail Services Limited v Rail Corporation New South Wales (2009) NSWCA 177.	United Group Rail Services Limited v Rail Corporation New South Wales (2009) NSWCA 177.

Walford v Miles (1992) 2 WLR 174	Walford v Miles (1992) 2 WLR 174
<b>STATUTE</b>	<b>MODE OF CITATION</b>
Constitution of the Republic of South Africa, 1996	Constitution of the Republic of South Africa
Restatement of Contracts Second	Restatement of Contracts Second
National Labour Relations Act 1947.	National Labour Relations Act
Uniform Commercial Code S1-203	Uniform Commercial Code