The Role of Good Faith in South African Contract Law

By Tashri Govender

(217008805)

Submitted in partial fulfilment of the requirements for the degree Master of Laws (Business Law) in the College of Law and Management Studies and the School of Law at the University of KwaZulu-Natal.

Supervisor: Dr D C Subramanien

DECLARATION OF ORIGINALITY

I hereby certify that I am the sole author of this dissertation and that no part of this dissertation has been published or submitted for publication.

I declare that this is a true copy of my dissertation including any final revisions and that this dissertation has not been submitted for a higher degree to any other University or Institution. I declare that this dissertation is my own unaided work. To the best of my knowledge and belief, the dissertation contains no material previously published or written by another person except where due reference is made in the dissertation itself.

This project is an original piece of work which is made available for photocopying and for interlibrary loan.

[redacted]

Tashri Govender

217008805

Date of Submission: 10 January 2022

ACKNOWLEDGMENTS

First and foremost, thank you God for guiding me through 2021. This has been a trying year, but your guiding hand saw me through all my challenges.

To my parents, thank you for your unwavering support, encouragement and love. I am who I am because of you both. I hope I make you proud.

Thank you to my supervisor, Dr D C Subramanien, for all your advice and patience. It is much appreciated.

ABSTRACT

This research paper seeks to address the role that good faith plays in South African contract law by first discussing its origin and then chronologically tracing its position from pre-1994 to today. The judgements of both the Supreme Court of Appeal and the Constitutional Court will be unpacked, as a means to understand the development of good faith over the years. The position that good faith plays in foreign jurisdictions will also be discussed, for the sake of achieving a universal understanding of how good faith is perceived around the world. The research concludes by placing good faith in its current role and context in South Africa, and also proposing a way forward.

TABLE OF CONTENTS

Chapter 1: Introduction

1.1. BACKGROUND

Good faith or *bona fides* is a concept of much controversy in South African contract law. This can be attributed to the fact that although it is an underlying value in our law, it is not a stand-alone requirement. As such, our courts have been hesitant to recognize good faith as a requirement for a valid contract or basis for setting aside a contract. In coming to their decisions, our courts have treated good faith as a mere guiding principle. [1] Mgweba believes that this is because our courts are of the view that *pacta sunt servanda* and legal certainty are far more sacred concepts in the law of contract and therefore allows it to take preference.[2]

Many legal scholars, such as Manolios, also emphasize that courts do this as they do not wish to impose their own thoughts and notions on contracts that were voluntarily entered into.[3] However, Du Plessis argues that this cannot be the case, especially in South African contract law. He bases his argument on the fact that our courts are obliged by the Constitution to develop the common law taking into account African values such as Ubuntu, fairness and justice. In addition, such thinking cannot possibly be rational where non-interference would inevitably lead to injustice.[4] Law itself was created to combat and curb injustices of the same nature.

Previously, and before its abolishment, a party to a contract could avoid contractual liability based on the other party's bad faith based using the doctrine *exceptio doli genaralis*. However, with the demise that this doctrine sadly faced in *Bank of Lisbon and South Africa v De Ornelas*[5], today we are left with the reluctance of the courts to recognize good faith as a legal requirement and a general unwillingness to interfere into contracts that were validly entered into. As such, we have to rest on the concept of good faith.

---

[1] Andrew Hutchison 'Good Faith In Contract: A Uniquely South African Perspective' (2019) *Journal of Commonwealth Law.*

[2] Asiphe Mgweba, A revised role of good faith in the law of contract and employment contracts (unpublished LLM thesis, University of Western Cape (2019).

[3] Keshia Jaye Manolios 'Pacta servanda sunt v Ubuntu' Go Legal 29 May 2018 available at https://www.golegal.co.za/pacta-servanda-sunt-v-ubuntu/, accessed 25 May 2021.

[4] Du Plessis H 'Harmonising Legal Values and Ubuntu: The Quest for Social Justice in the South African Common Law of Contract' (2019) PER/PELJ 22

[5] 1988 (3) 580 (A)

However, it is not all doom and gloom. There have been developments which seem to indicate that our courts may be taking small steps in the right direction. As we will see further on in this study, the Constitutional Court has been trying to incorporate good faith into their judgments – the first and prime example being highlighted in *Barkhuizen v Napier*[6] Alas, the Supreme Court of Appeal (SCA), being the conservative court that it is, does not seem to echo the same sentiments. They stand strong with their opinion that good faith cannot and will not be regarded as a standalone requirement[7]. It is, however, refreshing to see the highest court of our land adopting a different approach. [8]

In light of the above comments, this study will embark on an analysis of the role of good faith in South African contract law. This will be unpacked by discussing, *inter alia*, the origins of good faith, the chronological approaches adopted by the SCA and Constitutional Court respectively and how other jurisdictions interpret good faith in contract law.

1.2. RATIONALE FOR THIS STUDY

The implied concept of good faith is what makes business work. It obliges parties to a contract to deal with one another in a manner that is fair, transparent and honest. By demanding that good faith be practised in contract law, it allows parties to trust one another and as such, gives parties confidence that they will receive the benefit of their bargain.[9] In failing to recognize good faith as a stand-alone requirement in contract law, it often leads to unsuccessful business transactions and a loss of faith in our law to ensure fair dealings.

In South Africa specifically, our Constitution imposes a duty on our courts to develop the common law and bring it in line with Ubuntu and African values which places an emphasis on the concept of good faith.[10] As such, I believe that embarking on a study that looks at the history of good faith, the role that good faith plays in our law currently and ways in which we can incorporate good faith into our law is a topical issue.

---

[6] 2007 5 SA 323 (CC)

[7] Brisley v Drotsky 2002 (4) SA 1 (SCA)

[8] Supra note 6.

[9] Thomas Howard 'Good Faith is Business' available at https://www.collateralbase.com/what-to-know-about-good-faith-or-bad-faith-an-illustrated-easy-guide/, accessed on 06 August 2021.

[10] Section 39(2) of the Constitution

In my readings and research, I have come across far too many cases, such as *Afrox Healthcare Bpk v Strydom*,[11]that could have been easily rectified by imposing good faith as a requirement. Too many innocent parties have not received the benefit of their bargain as a result of bad faith on part of the other party to the contract. Our courts are cautious with such cases as they fear that their interference will prejudice *pacta sunt servanda* or rather freedom of contract, however a line needs to be drawn where non-interference actually leads to more injustice. It is important that the courts weigh the two concepts on a case by case basis in order to achieve fairness, as with any concept in law. Good faith is as important as any other legal concept and should be given the necessary recognition in today's democratic society.

My discussion focuses on looking at points that favour good faith as a stand-alone requirement. It is my intention to spark the interest of my readers with a fresh and dynamic approach to good faith, with the possibility of other researchers taking it even further and the topic becoming more and more of a topical issue.

1.3. FRAMEWORK

The principle on which this thesis is based on is that including good faith as a stand-alone requirement in the South African law of contract will have important consequences. This includes developing our contract law to bring it in accordance with the principles of our Constitution and African values. This means that principles such as fairness, justice, reasonableness and Ubuntu will be given importance, as it should. Furthermore, by including good faith as a stand-alone requirement, it will bring about a transformation in the way parties deal with one another and it will also lead to a relaxation of *pacta sunt servanda* and legal certainty– principles that very often results in injustice.

Although a comparative analyse between foreign jurisdictions and South African contract law will be conducted, it is not an in-depth discussion/comparison. The same applies to discussions on legislations such as the Consumer Protection Act 68 of 2008. Rather, it is just to deliver a holistic study, in keeping with the theme of and understanding the role of good faith in South African contract law.

[11] 2002 (6) SA 21 (SCA)

1.4. CHAPTER OUTLINE

Chapter 1 sets out the background information required in order to understand the main aim and significance of this study. In addition, this chapter sets out the rationale and purpose for the study, together with the research questions guiding the research. In summary, chapter 1 aims at setting the scene the research and gives readers an idea of what to expect as the study unpacks itself.

Chapter 2 analyses the origin or roots of good faith as a concept. This chapter looks at understanding how good faith came into being, why it came into being and the changes it brought about as a result. In order to fully understand the role of good faith in South African contract law, it is only fitting to first establish the purpose for which it was created. This chapter also discusses good faith in a constitutional era, taking into consideration the historical concepts of good faith.

Chapter 3 dives deeper and takes a look into the history of good faith – both pre and post 1994. This is done by analysing the diverging approaches adopted by the SCA and Constitutional Court in chronological order.

Chapter 4 draws a comparative analysis between good faith in South African contract law and other jurisdictions, being England and Australia.

Chapter 5 concludes the study and proposes a way forward.

Chapter 2: The Origins of Good Faith

2.1. GOOD FAITH IN ROMAN LAW

As with any narrative of the common law of South Africa, one almost always has to begin with a discussion of the underlying source - Roman law and Roman-Dutch law. [12]

Good faith or *bona fides* is said to have been born from Roman law.[13] Prior to the introduction of good faith, the Romans realized that the current state of laws were of such a nature that it could not properly serve the community's needs. [14] They saw a dire need for more flexible legal procedures and realised that their current rigid laws were not able to provide for the ever changing needs of their people.[15] This was evident from the fact that the slightest deviation from a rule of law was taken as total and complete non-compliance. Contracts were, for example, based on *negotia stricti iuris*, meaning based on strict adherence to prescribed formulae procedure.[16] An analogy by Gaius explains this as follows:

> "The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes … or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word 'vines', had lost his claim, because he ought to have said 'trees', seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general."[17]

The above analogy evidences that even the most mere deviation resulted in non-compliance with the law. This over-literal interpretation of the law was all but realistic. As such, they decided to adapt the procedures accordingly. As a result of this adaptation and it working

[12] Andrew Hutchison 'Good Faith in Contract: A Uniquely South African Perspective' (2019) *Journal of Commonwealth Law*.

[13] Du Plessis H. M. 'Legal Pluralism, uBuntu and the Use of Open Norms in the South African Common Law of Contract' (2019) 22 *PELJ*.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Du Plessis H. M. 'Legal Pluralism, uBuntu and the Use of Open Norms in the South African Common Law of Contract' (2019) 22 *PELJ*, where the author refers to Gaius Inst 4 11 (quoted from De Zulueta Institutes of Gaius Part I).

so well, the new, more flexible procedures were adopted and became a part of the existing formalistic law. The concept of good faith was then born and incorporated into their *ius civile*. It subsequently became deeply entrenched in Roman contract law, and aimed to infuse it with equitable values. [18]

Thereafter, it followed that the *exceptio doli generalis* was introduced, which afforded a judge power to decide against an act that had the effect of being *contra boni mores.* It allowed judges the opportunity to fully consider the facts of a case and make a decision based on reasonableness and fairness.[19]

2.2. GOOD FAITH IN GREEK LAW

There has been a general understanding that good faith has some Greek influences[20], of which can be noted if we deconstruct comments made by Cicero. As such, it is of relevance that this paper touches on the influence which Greek law is said to have had on the concept of good faith. In his book, *De Officiis[21]*, he speaks about a man who, after agreeing to a truce, destroys the enemy's fields at night. The man then argues that this does not break the truce as the agreement referred specifically to days and not nights.[22] This is a prime example of how the over-literal interpretation of the law leads to injustice.

Another example by Cicero which supports the idea that good faith has Greek influences is a case of where a judge ordered a seller of a house to compensate the buyer, where the seller did not inform the buyer of defects to the property before purchase. The basis on which the judge relied on for the decision was the concept of good faith. In this case, the seller of the house had

[18] Dale Hutchison 'from bona fides to Ubuntu: the quest for fairness in the South African law of contract' (2019) *Acta Juridica*. Also see R Zimmermann 'Good faith and equity: Southern Cross, Civil Law and Common Law in South Africa" (1996)

[19] Ibid.

[20] Hanri Magdalena Du Plessis, The harmonisation of good faith and Ubuntu in the South African common law of contract (unpublished PhD thesis, University of South Africa, 2017), where the author refers to Kelly Kunkel's Introduction to Roman history (1985)

[21] Du Plessis H 'Harmonising Legal Values and Ubuntu: The Quest for Social Justice in the South African Common Law of Contract' (2019) *PER/PELJ* 22, where the author discusses Cicero's *De Officiis* (1560) III 70.

[22] Ibid.

complied with an order to demolish the property and thereafter put it on the market. [23] Had it not been for the application of good faith, the buyer would have been left with no remedy as the *ius civile* at the time did not afford him a remedy in such a case.[24]

As such, Du Plessis opines that in Roman law, when good faith was used to transform the existing formalistic laws - it was with done by borrowing these Greek philosophical ideas. While it may appear that the Roman's used their current indigenous laws to develop a body of contract law that was fairer, there is evidence that suggests that this was actually adopted from the Greeks. Just as the Greeks used good faith to create a more lucrative body of law, so too did the Romans. [25] Although the extent to which Greek laws influenced Roman laws is not ascertainable, evidence shows that it is evident nonetheless.

2.3. GOOD FAITH IN ROMAN - DUTCH LAW

Du Plessis then traces the development of good faith to Roman-Dutch law. [26] A body of law introduced by Dutch colonisers in the Cape of Good Hope, there was a general acceptance that all contracts were based on good faith. The Dutch settlers were said to be unhappy about the current state of laws at the Cape[27] and therefore made a decision to apply the law of Holland (the main province in the United Provinces of the Netherlands) in the Cape.[28]

[23] Ibid.

[24] Ibid.

[25] Ibid. In this regard see also R.A Bauman (1996) 'The Interface of Greek and Roman Law' in which the author opines that "Roman law borrowed extensively from the Greeks."

[26] Du Plessis P 'Good faith and equality in the law of contract in the civilian tradition' (2002) 65 *Tydskrif vir Hedendaagse Romeins Hollandse Reg*

[27] Philip Thomas 'The development of the Cape common law during the early nineteenth century: William porter, James Kent and Joseph Story' (2014) *Fundamina.*

[28] Hanri Magdalena Du Plessis, The harmonisation of good faith and Ubuntu in the South African common law of contract (unpublished PhD thesis, University of South Africa, 2017), where the author refers to 'Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) Constitutional law (2014) para 2.2(d).

With the newly imported Roman-Dutch law[29], much more emphasis was placed on the consensus between parties[30]. This meant that as long there was meeting of the minds when the parties had entered into the contract, the contract was binding. As such, judges could not impose their own thoughts when it came to acting in good faith. This was not the approach adopted in Roman law, as discussed above. Nevertheless, any old distinctions between *stricti iuris* and *bonae fidei* contracts no longer existed and all contracts were said to be validly entered into by consent from both parties and were governed by good faith.[31] In essence, in Roman-Dutch law, all contracts were considered *bonae fidei*.[32]

It is generally understood that Roman-Dutch law is an equitable body of law and it is therefore important to note that the concept of good faith (*bona fides*) in the Roman-Dutch law of contract originated from the concept of equity and arrived at the Cape as being already established and a part of the Roman-Dutch law. [33] In effect, all parties were required to conduct themselves in a way that is in line with the principles of good faith. Alas, the concept of a free-standing principle of good faith never really came to fruition. As a result, the already established doctrine *exceptio doli generalis* was used to "ward off claims tainted by unconscionability."[34] In other words, it was used as a remedy where a party acted in bad faith. In as much as good faith was not a recognised requirement, the *exceptio doli generalis* successfully combated injustices and acts of bad faith.[35]

[29] Ibid. The author credits this term to Simon van Leeuwen,"who used it as a sub-title of his Paratitula juris novissimi (1652)"

[30] Du Plessis P 'Good faith and equality in the law of contract in the civilian tradition' (2002) 65 *Tydskrif vir Hedendaagse Romeins Hollandse Reg*

[31] Ibid.

[32] Hanri Magdalena Du Plessis, The harmonisation of good faith and Ubuntu in the South African common law of contract (unpublished PhD thesis, University of South Africa, 2017), where the author refers to Zimmerman "Good faith and equity" in Zimmerman & Visser (eds) Southern Cross (1996)

[33] Ibid.

[34] L Hawthorne 'Public policy: the origin of a general clause in the South African law of contract' (2013) *Fundamina*

[35] Hanri Magdalena Du Plessis, The harmonisation of good faith and Ubuntu in the South African common law of contract (unpublished PhD thesis, University of South Africa, 2017), where the author refers to Zimmerman "Good faith and equity" in Zimmerman & Visser (eds) Southern Cross (1996) 220

What will be seen in coming chapters is that this doctrine was somewhat carried over into South African contract law, albeit used for short period of time. What followed thereafter was a series of confusion and unsettled law.

2.4. GOOD FAITH IN A CONSTITUTIONAL ERA

South Africa's legal pluralism is quite similar, although relatively new, to that of the Roman's.[36] With the abolishment of the apartheid era in 1994, came with the abolishment of apartheid laws and acceptance of the indigenous laws (customary laws) of our people.[37] However, when I say accept, this by no way means that these indigenous laws have been given the same status of the common law. This is still a work in progress as will be seen throughout this study. In fact, Davis refers to an "overwhelming underdevelopment" in the law of contract in this new constitutional era. [38]

The 1994 Constitution introduced a customary principle, *Ubuntu*, as a restorative tool that could be used to correct injustices of the past.[39] Section 21(1) recognises the indigenous laws and systems of traditional leaders and courts are obliged to apply this law, taking into consideration the constitution, where it is applicable.[40] In simpler terms, *Ubuntu* was to be used as an underlying constitutional value to promote justice. The word *Ubuntu* has however been said to be undefinable and Justice Mokgoro is of the view that *Ubuntu* is one of those things that you recognise when you see it.[41] Nevertheless, she describes the very essence of *Ubuntu* by making reference to what it feels like to others. She states that it has been regarded as a way of life and represents things like humanity morality and togetherness. It is a belief that "motho ke

[36] Du Plessis H. M. 'Legal Pluralism, uBuntu and the Use of Open Norms in the South African Common Law of Contract' (2019) 22 *PELJ*

[37] Ibid.

[38] Davis D "Private law after 1994: Progressive development or schizoid confusion?" (2008) 24 *South African Journal for Human Rights*

[39] Himonga, Taylor and Pope 'Reflections on Judicial Views of Ubuntu' (2013) 16 *PER / PELJ*

[40] JY Mokgoro 'Ubuntu and the law in South Africa' (1998) *PER/PELJ*

[41] JY Mokgoro 'Ubuntu and the law in South Africa'(1998) *PER/PELJ*

motho ba batho ba bangwe/umuntu ngumuntu ngabantu" which literally translates to mean that people can only be people through others. [42]

Justice Mokgoro thus regards *Ubuntu* as an important legal value or tool that could be used to transform our current legal culture to one that is more suited to our community needs.[43] The burning feeling and idea one gets from this explanation (to me anyway) is the concept of good faith. *Ubuntu* seems to embody the very meaning of good faith and good faith seems to embody the very meaning of *Ubuntu*. It follows that if our law incorporates *Ubuntu*, so too can we incorporate good faith.

Du Plessis similarly opines that South African law can, similarly to the Romans (as discussed above), adopt the concept of *Ubuntu* (an underlying South African constitutional concept) into our law as a means to adopt the open norm of good faith in the common law of contract. In order for South Africa to adopt the same approach, she opines that we can follow certain methods, such as harmonisation of values from different legal systems and the concretisation of open norms intended to realise contractual justice.[44] With regard to harmonisation, she argues that just as we harmonised the Westernized values and South African values in South African jurisprudence, so too can we harmonise the Westernized concept of good faith and *Ubuntu*. In the same regard, she argues that just as the Romans may have adopted the concept of good faith from the Greek, so too can we adopt the concept of good faith from them (the Romans). [45]

Du Plessis further opines that both good faith and *Ubuntu* can be used as an open norm to almost correct and change the existing rules and regulations where it was in the best interests of justice to do so.[46] This was shown by the fact that *bona fides* creates rights and duties for both parties to a contract but it also protects weaker parties from acts of bad faith, unfairness and unreasonableness. She does however, highlight an important distinction between the two - while good faith was promotes justice and fairness between the two contracting parties only, *Ubuntu*

[42] Mbigi L and Maree J Ubuntu: The Spirit of African Transformation Management' (1995) '*Sigma Press Johannesburg*

[43] Du Plessis H. M. 'Legal Pluralism, uBuntu and the Use of Open Norms in the South African Common Law of Contract' (2019) 22 *PELJ*

[44] Ibid.

[45] Ibid.

[46] Ibid.

goes further in that it also promotes the achievement of an egalitarian society.[47] This means that if we had to properly incorporate *Ubuntu* into our law, not only will good faith be a requirement amongst contracting parties, so too will it promote good faith within our community. She then comes to the conclusion that by following these themes or rather guidelines, incorporating good faith and *Ubuntu* into our law should not be a monstrous task. If the Romans could do it, so can we – a modernised society.

On the same train of thought is Mupangavanhu. He opines that in terms of section 39(2) of the Constitution, our courts are legally obliged and expected to develop the common law and bring it in line with the spirit, purport and objects of the Bill of Rights. He further avers that this means that the common law concept of *Ubuntu* and thus good faith ought to developed and deemed enforceable in contractual dealings. [48] Furthermore, Hawthorne avers that section 173 of the Constitution grants our courts an inherent power to develop the common law in terms of the interests of justice. She argues that these provisions are interpreted to incorporate open norms like good faith. As such, she argues that good faith should be used as a "tool to promote substantive equality between contractual parties in line with the values and aims of the Constitution."[49] In addition, Bennett has argued that *Ubuntu* can be used as an effective tool to modify the law in a way that changes the strict application of rules and regulations. As such, values such as good faith can be easily incorporated. [50]

Furthermore, Keep and Mingley aver that *Ubuntu* can be used to create a legal culture that is distinctively African – one that is characterised by humanity, sharing, compassion and good faith. As the law currently stands, there is very little in the Bill of Rights that is a true reflection of what is African. This is mind-boggling given the fact that our Constitution is said to be based on African values, and principles that are far from those that once existed during the apartheid era. [51]

---

[47] Ibid.

[48] Brighton Mupangavanhu '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' (2013) *Speculum Juris.*

[49] L Hawthorne 'Public policy: the origin of a general clause in the South African law of contract' (2013) *Fundamina*

[50] TW Bennet 'Ubuntu: An African Equity' (2011) 14 *PER / PELJ*

[51] TW Bennet 'Ubuntu: An African Equity' (2011) 14 *PER / PELJ,* where the author refers to Keep and Midgley's 'Emerging Role of Ubuntu-botho.'

Coleman avers that *Ubuntu* has already "crept" into the world of law, in that the Constitutional Court has seem to have given good recognition to the concept. This was seen in the case of *S v Makwanyane*[52], where the court held that the concept of *Ubuntu* carries pivotal nuances of fairness, humaneness and justice. Furthermore, in the case of *Port Elizabeth Municipality v Various Occupiers*[53], the Constitutional Court neatly described the very essence of *Ubuntu*, by stating that the spirit of *Ubuntu* is a deeply rooted cultural heritage which is a part of the lives of majority of South Africans, encompasses the whole Constitutional order. It encapsulates one's individual rights and the rights of the community as a whole. In addition "it is a unifying motif to the Bill of Rights, which is nothing, if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern." [54]

What is clear from the above narrative, is that *Ubuntu* mirrors the essence of our Constitutional values and human rights. *Ubuntu* underlines fairness, humanness and justice, and so too does our Constitution.

Coleman submits that *Ubuntu* informs public policy in South Africa. As such, it is generally understood that a contract for example has to be in accordance public policy and by extension, *Ubuntu*. Given the fact that *Ubuntu* has been given a status in our Constitution, together the judicial acceptance, it is clear that it can rather easily alter, improve and incorporate its principles into South African law.

The development of the common law is crucial, in that it ought to be done in a way that caters for the ever-changing social, economic and moral make of society. [55] It is evident that this is possible by making certain changes and adjustments as the Romans did. Taking into account the special circumstances of South African law (I refer here to the apartheid era laws), vital values like good faith which is enshrined in the constitution should be given a certain degree of importance. Mupangavanhu speaks about the missed opportunities, as our courts (more so the SCA) have failed time and time again to do this. [56] This statement is further supported if one

[52] 1995 3 SA 391 (CC)

[53] 2005 1 SA 217 (CC)

[54] TE Coleman, "Reflecting on the Role and Impact of the Constitutional Value of uBuntu on the Concept of Contractual Freedom and Autonomy in South Africa" (2021) *PER / PELJ*

[55] Ibid. See also S v Theus 2003 6 SA 505

[56] Ibid. See also Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 1 SA 256 (CC).

refers to the fact that the *exceptio doli generalis*, an almost alternative to the concept of good faith, was abolished by our courts. [57]

To end with a valuable and meaningful statement by Justice Mokgoro on good faith and *Ubuntu*:

> "The values of Ubuntu, I would like to believe, if consciously harnessed can become central to a process of harmonising all existing legal values and practices with the Constitution. Ubuntu can therefore become central to a new South African jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance."

2.5 CONCLUSION

As can be seen from the above discussion, good faith is a value that was developed and moulded several years ago from Roman, Greek and Roman-Dutch law. A need first arose for the concept during the Roman era and the Romans acted on this. Over time, unfortunately, it never really developed into a stand-alone requirement - although it did play quite an important role in restoring justice. South Africa, as a result, did not welcome in into our own law and we have been on the fence with it ever since. Although a similar Roman doctrine, the *exceptio doli generalis* was adopted and used for a short period of time, it was later abolished. As indicated above, there have been calls from academics and legal scholars to incorporate good faith by learning and adopting mechanisms from the Romans. Others have called for good faith to be incorporated into our law by using *Ubuntu* as the trump card, as *Ubuntu* embodies the very essence of good faith. Furthermore, others have opined that our courts are obliged in terms of the constitution[58] to develop the common law in a way that brings it in line with the spirit and objects of the Bill of Rights.

[57] Bank of Lisbon and South Africa v De Ornelas (1988) (3) SA 580 (A) 586)

[58] Section 39(2) and 173.

Chapter 3 – Chronological Approach of Good Faith in South African Contract Law: The Constitutional Court and Supreme Court of Appeal.

3.1. PRE-CONSTITUTIONAL ERA

(a) Introduction

The concept of good faith is not an unknown phenomenon in South African contract law, even pre-1994.[59] However, the definitive position that it played was never established (much like the position today) – as will be seen by the judgments handed down in the several cases discussed below. A very useful doctrine was used to curb inequalities and injustices, however this doctrine was unfortunately done away with, for reasons of legal uncertainty and *pacta sunct servanda*

(b) The approach adopted by courts

Magna Alloys & Research (S.A.) (Pty) Ltd. v Ellis [60] is one of the earliest cases that dealt with contracts which are contrary to public policy. The then Appellate Division here, held that restraints of trade are enforceable unless it imposes an unreasonable restriction on a person's ability or freedom to work, and if that is the case, then the agreement will be unenforceable for reasons of being contrary to public policy.[61] Subsequent to this case, and as will be seen below, several other cases began looking at public policy, good faith and related principles.

The doctrine *exceptio doli generalis* was said to be adopted into South African contract law from Roman-Dutch law and is defined as giving our courts the discretion to decide a case according to considerations of what is fair and reasonable. As such, sharing a similar function to that of good faith. [62] The doctrine however, was short lived in South African contract law. The decision in the *Bank of Lisbon and South African Ltd v De Ornelas* [63] left us with the reason for its demise as being the fact that it was not properly adopted into Roman-Dutch law. As such, if

[59] Barkhuizen v Napier 2007 5 SA 323 (CC) para 80.

[60] 1984 (4) SA 874 (A).

[61] Supra note 3 at para 12 and 95.

[62] Lenee Veldsman, Birgit Kuschke 'The *Exceptio Doli Generalis* – back again?' *Without Prejudice* 2012 available at https://repository.up.ac.za/bitstream/handle/2263/20245/Kuschke_Excptio%282012%29.pdf?sequence=1&isAllowed=y, accessed 29 May 2021.

[63] 1988 (3) SA 580 (A).

it was not adopted into Roman-Dutch law then it cannot be said to be adopted by South African law. In addition, the majority decision held that:-

> "It is said that the recognition of the *exceptio doli* in this sense would be an infraction of the freedom of contract and of the principle that *pacta servanda sunt* - that it would lead to legal uncertainty."[64]

The above extract, in essence, portrays how our courts have an almost palpable sense of rejection to any principle that takes away from or invalidates the long standing freedom of contract and legal certainty.

The minority judgment, delivered by Jansen JA, completely disagreed with that of the majority. He held that the *exceptio doli generalis* could in fact be used as a substantive defence where a party acts in *mala fides.* He held that this doctrine is closely related to *bona fides* and justice within a community and as such, is a suitable doctrine.[65] Although this judgment sheds positive light on this very valuable doctrine, it did however cause much confusion. Many cases to follow did attempt to clear the position that the doctrine played, to the relief of several confused legal scholars. Alas, many other cases thereafter continued to blur the position it played, as will be seen throughout this study.

Awhile after the decision in *Bank of Lisbon v Ornelas*, Smalberger JA, in the case of *Sasfin (Pty) Ltd v Beukes* [66] delivered his judgement on the concept of public policy and good faith. In his majority judgment, it was held that the contract ought to be set aside as it was "unconscionable and incompatible with the public interest and therefore contrary to public policy." [67] In as much as it was made clear that contracts will be set aside where it offends public policy, a clear line was drawn between contracts that affect the community and contracts that affect individual notions of fairness. The court held that individual notions would not restrict *pacta sunt servanda.* Smalberger JA also added an extra requirement to set aside a contract that affects public notions of fairness, that is, the contract or conduct has to be "unconscionable and

[64] Bank of Lisbon & South Africa v Ornelas and Another (53/85) [1988] ZASCA 35; [1988] 2 All SA 393 (A) (30 March 1988) para 8.

[65] Supra note 5 at 617F – 617G.

[66] 1989 1 All SA 347 (A).

[67] At para 29. Also see (Eastwood v Shepstone 1902 TS 294; Biyela v Harris 1921 NPD 83).

incompatible," not merely unfair. The court concluded that we must err of the side caution when setting aside a contract merely because it offended one's individual understanding of fairness. [68]

3.2. CONSTITUTIONAL ERA

(a) Introduction

Post-1994, our new Constitution effected much change in the way our courts should act in the interests of justice. In specific, the new Constitution imposed an obligation on our courts to develop the common law in such a way that it is brought in line with the spirit, purport and objects enshrined in the Bill of Rights. In addition, it afforded our courts the ability to decide on matters using their own discretion as a means to bring about a just and equitable system. [69]

Hutchison discusses the importance of incorporating or re-establishing good faith into our contract law and the benefits of doing so, taking into account our specific circumstances such as the Constitution and African values. He concurs with the principles of the Constitution and states that without creating laws which are parallel African values, our law is incomplete and incompatible with our country. [70]

South African contract lawyers have tried exploring other avenues to protect contracting parties against the enforcement of unfair contracts or terms. According to Hawthorne the search paved the way for several possibilities, one being recognition of the open norms of good faith or public policy as the general clause to ameliorate unfair terms. This is the current position in South Africa – mere debate, possibilities and ideas of good faith being developed to form part of our law. [71] What is to follow is the development of good faith in South African contract law, in chronological order.

---

[68] At para 12.

[69] Section 39(2) of the Constitution.

[70] Andrew Hutchison 'Good Faith in Contract: A Uniquely South African Perspective' (2019) *Journal of Commonwealth Law.*

[71] L Hawthorne 'Frontiers of Change and Governance in Contractual Agreements: The Possible Role of Exploitation - Uniting Reformed Church *De Doorns V President of the Republic of South Africa 2013 5 SA 205 (WCC)'* (2014) *PER / PELJ*

(b) The approach adopted by courts

In *Brisley v Drotsky*[72] an issue arose regarding the validity of a non-variation clause, which provided that any variation or changes to a contract would be declared invalid should it not be in writing and signed by all parties to the contract. After failing to pay rent on time for several months, a lessor attempted to cancel the lease agreement and remove the lessee from the property. The lessee, in turn, sought to rely on an alleged oral agreement (variation) between her and the lessor where there was agreement to accept late payments. The lessor then relied on the Shifren principle (which was first established in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere*[73] and where the minority of the court opined that good faith ought to play a more prominent role in contract law*).* According to the principle, any oral variation would be invalid in terms of a non-variation clause. As such, he attempted to hold the lessee in breach of the contract. The lessee tried to argue that this principle cannot be used as the results would be unreasonable and unfair. She further held that the outcome would be *contra boni mores* and as such, contrary to the principles enshrined in our Constitution. She based her argument on the fact that the Shifren principle places her in a weaker bargaining position to that of the lessor. [74]

The court came to the unfortunate conclusion, that good faith is a mere underlying principle – nothing more. It was held further that the principle is not merely a clause in a contract, but an important principle in the law of contract. In making reference to contractual certainty and freedom of contract, the court stated that good faith cannot be used to set aside a valid contract based on valid principles as it was not a "free floating" basis to invalidate an agreement reached voluntarily. The court in essence rejected any idea which suggested that they have a wide discretion to decide on matters taking into consideration principles of public policy and good faith. They based their decision on the fact that this will inevitably lead to "intolerable uncertainty and arbitrariness." [75]

Although Cameron JA, throughout his concurring judgment, made reference to the inherent mandate given to courts to develop the common law[76] – *pacta sunt servanda* and

[72] 2002 (4) SA 1 (SCA)

[73] 1964 (4) SA 760 (A)

[74] Irma Kroeze 'Contract, constitution and confusion : the case of *Brisley v Drotsky*' (2006) 47 *Codicillus*.

[75] Bhana D and Pieterse M (2005) "Towards reconciliation of contract law and constitutional values" Brisley and Afrox revisited" 122 *South African Law Journal*

[76] Supra note 14 para 94.

contractual certainty still seemed to be at the fore. At most, these comments were mere utterances and no actual cognisance was taken of this Constitutional mandate.

A few weeks later, the courts were given another opportunity to make a definitive decision in regard to good faith in contract law. The case in question was *Afrox Healthcare Bpk v Strydom* [77] where the court had to decide, *inter alia,* whether an exemption clause that excused all medical staff from negligence was *contra boni mores*. It was disappointingly held that:

> "Abstract ideas such as good faith, equity, reasonableness and the like were not in themselves legal rules, but rather constituted the basis for legal rules. The court had no discretion in this regard, and could only operate on established legal rules, not on such abstract concepts."[78]

Again, we see the courts favour the likes of *pacta sunt servanda* and legal certainty. It is interesting to note how the courts, throughout their decisions, refer to the Constitution and the principles and duties that it imposes. And yet, our courts still fail to act in accordance with same.

In keeping with the chronological theme of cases, we now turn to briefly look at the case of *South African Forestry Co Ltd v York Timbers.*[79] Although the court a quo had found otherwise, the conservative SCA held that concepts like good faith and fairness are not self-standing legal principles in our law. As such, these "abstract values" are not a basis for courts to intervene in valid contractual relationships. The court made further statements to the effect that, if we allow individual judges to decide on matters according their own personal sense of fairness and justice, this will lead to legal uncertainty. They opined that it would not be viable to allow refusal of a contract that was validly entered into just because it offends one's personal sense of justice.[80] Despite reliance on Section 39(2) of the Constitution (which calls for the infusion of contract law with constitutional values such as Ubuntu[81]), the SCA in this case held that it would in fact be against public policy to force a party uphold an agreement that he or she does not wish to a part of. To rely on values such as Ubuntu, good faith and fairness to import terms not

[77] 2002 (6) SA 21 (SCA)

[78] 40 G-J, 41 A-B. Also see R-M Jansen, B.S. Smith 'Hospital disclaimers : Afrox Health Care v Strydom: Chronicle (2003) 28 *Journal for Juridical Science*

[79] 2005 (3) SA 323 (SCA)

[80] Para 27.

[81] Andrew Hutchison 'Good Faith in Contract: A Uniquely South African Perspective' (2019) *Journal of Commonwealth Law.*

intended by either party would be unreasonable and contrary to the principle of sanctity of contract.[82]

The overall impression that we get from the above-mentioned cases is that the courts will not accept abstract values interfering with self-standing legal principles. This rigid approach adopted by our courts is at the least, disappointing. No regard has been given to important Constitutional values. In fact, there is total disregard for African values – the cornerstones of our Constitution. Our courts have repeatedly averred that the reason that they are reluctant to apply abstract values is because they are not self-standing. So this begs the question, why not make it self-standing? Why not develop our common law as a means to infuse and incorporate these vital African values, as enshrined in our Constitution?

In *Barkhuizen v Napier*[83], legal scholars were able to sigh in relief as the position regarding good faith was seen to make some change for the good. The case concerned a time-limitation provision which was held to be contrary to public policy as it enforced an unreasonably short time to seek legal action. As such, it was contrary to one's right to seek the help of the court. Furthermore, the applicant relied on section 34 of the Constitution which states that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".[84]

The court ultimately held that should a term of a contract be in conflict with a provision of the Constitution or contrary to the values of the Constitution, then it would be declared *contra boni mores* and unenforceable.[85] Although the court found itself in agreement with the SCA decisions to date that good faith is not a stand-alone requirement and as such cannot be used by itself to invalidate a contract, some sort of headway was made for the further development of the common law in that contracts could now be unenforceable for reason of being against public policy. I say headway as good faith and public policy go hand in hand. Furthermore, and rather importantly, this was the first case over several years that made mention of the African value of Ubuntu in relation to the law of contract. This paved the way for further breakthroughs. As such,

[82] Supra note 21 at para 28.

[83] 2007 5 SA 323 (CC)

[84] Ibid para 5

[85] Ibid para 52

what can be concluded in this case is that the Constitutional Court (being the highest court of the land) has "identified public policy as the general clause relating to the validity of contracts."[86]

In addition, the introduction of the two-staged reasonableness test in *Barkhuizen v Napier* marks a step in the direction of introducing fairness in contract. The test provided that terms in a contract need to be both objectively and subjectively reasonable in terms of the Constitution. This means that the clause ought to be objectively reasonable when looked at in itself and the enforcement of the clause ought to be subjectively reasonable in terms of the particular circumstances of the case.[87] This no doubt introduced a new dimension in deciding cases based on fairness, good faith and African values. Alas, the Constitutional Court was unclear as to the exact applicability and scope of this new-founded test. This is to be cleared below. [88]

In *Bredenkamp v Standard Bank of South Africa Ltd*[89], the SCA, in applying the test set out in *Barkhuizen v Napier,* came to the conclusion that the unilateral termination of a bank-customer relationship was not unreasonable or unfair. As such, it was not *contra boni mores.* The basis for this decision was the fact that the bank had a contract which allowed such termination. In addition, the bank's reason for termination had merit. Furthermore, the manner in which it exercised the right was done in a manner that is in line with good faith and public policy. [90] What can be ascertained from this decision is that the court re-iterated that a term in a contract will only be regarded unconstitutional, should it harm notions of public policy. This case clarified much of the confusion with regard to the role of public policy and good faith associated with previous judgments.

However, clarity was later snatched away in the well-known constitutional judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*. [91] Here the court re-introduced the idea that good faith is a "free floating" notion that underlies all contractual agreements. [92] This case is a revisit of the comments touched on by the court in *Bredenkamp* v

[86] L Hawthorne, 'Public policy: the origin of a general clause in the South African law of contract' (2013) 19 *Fundamina : A Journal of Legal History*

[87] Supra note 25 at para 9 – 10 and para 95.

[88] Deeksha Bhana, 'Contract law and the Constitution : *Bredenkamp v Standard Bank of South Africa Ltd* (SCA) : case note' (2014) 29 *Southern African Public Law*

[89] 2010 (4) SA 468 (SCA)

[90] Ibid at para 64.

[91] 2012 (1) SA 256 (CC).

[92] Carole Lewis 'The uneven journey to uncertainty in contract' (2013) 80 *THRHR*

Standard Bank of South Africa Ltd as discussed above - good faith being a stand-alone requirement. What will be seen, in this rather ground breaking judgment, is Justice Moseneke's bold statements about good faith. It successfully countered the arguments of the Supreme Court of Appeal, which after the Constitutional Court's decision *Barkhuizen v Napier,* concluded that freedom of contract reigns supreme over good faith.[93] The facts of the case are as follows:

The Applicant relied on the duty to negotiate a new lease in good faith with the Respondent, Everfresh Market.[94] However, the matter was pleaded incorrectly in the court a quo and the first time that vital constitutional issues were raised, was in the Constitutional Court.[95] As is known, the Constitutional Court will not act as a court of instance in such a circumstance. This resulted in the appeal being denied. In coming back Moseneke J's obiter remarks on good faith, he stated as follows:

> "Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith." [96]

What can be ascertained from this, is that if the court a quo had properly applied their minds and acted in accordance with the duty to develop the common the law keeping in mind the objects and purport of the Constitution[97], then Moseneke J would have relied on African values such as Ubuntu and good faith to decide in favour of the Applicant. In essence, and on the bright side, the minority judgment did not reject the idea of good faith per se. Rather, they rejected the manner in which the case was pleaded before them.

In the minority judgment, Yacoob J referred to the *Southernport Developments (Pty) Ltd v Transnet Ltd* [98] case and stated that it is correct in concluding that the promise to negotiate in

---

[93] Jaco Barnard-Naudé 'Justice Moseneke and the emergence of a new master-signifier in the South African law of contract' (2017) *Acta Juridica*

[94] Ibid 33 para 6

[95] Ibid 33 para 27 - 28

[96] At para 72.

[97] Section 39(2) of the Constitution.

[98] 2005 (2) SA202 (SCA)

good faith was valid because of the parties' agreement. However, in his opinion, the matter should have been referred back to the High Court to decide whether there was in fact a duty to negotiate in good. In doing so, develop the common law as required by the Constitution.[99] He went on further and stated that development of the common law needs to be done taking into consideration the majority of our people. This would mean that African values, in specific Ubuntu and good faith, ought to be taken cognisance of. [100]

No doubt, Justice Moseneke's judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* paved the way for the reliance by the Constitutional Court in *Both v Rich NO*[101] – as will be seen below.

In *Botha v Rich NO*[102], Botha purchased a building, of which the purchase price was agreed to be paid in instalments over many years. During this time, she was still entitled to make use of and occupy the property. She paid the instalments religiously, until she defaulted once and made one payment over a six month period. However, she sought to have the property transferred to her name on the basis that she paid more than half of the purchase price already.[103] Rich however, rejected this contention and requested her to fulfil her obligations in terms of their agreement. Botha failed to take heed of this for months. She was then informed that the contract was to be terminated and she needs to vacate the property. Only then did she pay the arrears. Be that as it may, Rich refused to uphold their contract and sought an application to evict her from the property. The High Court decided in favour of the Rich, on the basis that the cancellation and eviction clause that was used to bring the application was not unconstitutional.[104]

On appeal, the SCA concurred with the decision of the High Court.[105] When the matter reached the Constitutional Court, they found in favour of the Botha. They did agree with the fact that Rich was entitled to cancel the contract, however they took into consideration the payment tendered eventually and the fact that Botha had already paid over half the purchase price. In doing so, they found that the cancellation and eviction would be unfair, disproportionate and

[99] At para 22.

[100] At para 23.

[101] 2014 (4) SA 124 (CC).

[102] Ibid.

[103] This was in terms of the Alienation of Land Act 68 of 1981, which allowed transferable once half the purchase price been paid.

[104] At para 5 – 13.

[105] At para 14.

contrary to public policy. As such, it would offend notions of good faith and Constitutional rights.[106] In effect, Botha could not be evicted by virtue of the circumstances stated above – provided that she paid whatever remaining balance stood on her account. [107]

The judgment of Nkabinde J the Constitutional Court was fair as it took into consideration the interests of both parties. However, it was subject to a lot of criticism. She averred that unfairness is a valid ground for refusing a contract, however she failed to explain the principles or test to be applied to determine when unfairness can justify such refusal. This gap in her reasoning has left it wide open for judges to decide enforcement in terms of their own understanding of what is fair and what is not.[108] This is what Brand JA was concerned about (as discussed above) in *South African Forestry Co Ltd v York Timbers Ltd*[109], as he stated:

> "Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder."[110]

In the latest case dealing with good faith in contract, we now turn to the trilogy of *Beadica v Oregon Trust for the time being of the Oregon Trust and Others*[111]. Through this case, the Constitutional Court traced the journey of "good faith, reasonableness, fairness and Ubuntu through the South African law of contract."[112] Throughout the judgment, we see reference being made to the various cases decided before and how the decisions have led to confusion and uncertainty. As Davis J expressed in the High Court that "this case goes to the heart of the debate as to what now constitutes the law of contract in constitutional South Africa,'[113] the discussion of this case will be lengthy in so far as the judgments of the High Court, Supreme Court of Appeal and Constitutional Court go.

---

[106] Leo Boonzaier 'Rereading *Botha v Rich*' (2020) 137 *South African Law Journal*

[107] At para 49.

[108] Robert Sharrock 'Unfair enforcement of a contract: a step in the right direction? Botha v Rich and Combined Developers v Arun Holdings' (2015) 174 *SA Merc* LJ

[109] 2005 (3) SA 323 (SCA) at para 27

[110] At para 27.

[111] [2020] ZACC 13 (Neutral citation)

[112] Simon Thompson '*Beadica 231 CC* : an end to the trilogy?' (2020) 137 *South African Law Journal*

[113] Beadica v Oregon Trust for the time being of the Oregon Trust and Others (13689/2016) [2017] ZAWCHC 134; 2018 (1) SA 549 (WCC) at para 1.

This case concerned franchisees who entered into franchise agreement for ten years. Each of the franchisees also entered an agreement with the franchisor for the lease of its premises, of which the lease would be for a period of five years. In addition, this agreement included a right to renew the lease for another five years, as long as the option to renew was done so within six months before the first agreement came to an end. We can then establish that the lease agreement and the franchise agreement ran concurrently. When the termination of the first agreement was near, then franchisees did not exercise the option to renew within the required time. They did try to get in touch with the franchisor via email, of which they believed validly exercised the right to renew. They reasoned that as they were not people of the law, they were not privy to implications of the law of contract and believed that the correspondence sufficed to show their intention to renew. As they stood to lose their business should the lease agreements not be renewed, they sought an order confirming that the correspondence via email was a valid option to renew. [114]

In the High Court, the Applicant's relied on the fact that our Constitutional is built on notions of fairness and good faith and used authority for this statement as being, *inter alia*, the *Everfresh Market v Virginia* (Pty) Ltd case, where Moseneke DCJ said the following:

> "Had the case been properly pleaded, a number of interlinking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of Ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this court has had regard to the meaning and content of the concept of Ubuntu. It emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness' and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity."[115]

As such, they averred that the cancellation would inevitably eject the leases and terminate their businesses. This, they held, were not consistent with provisions of the Constitution as it was contrary to public policy. Further points that were relied on was that the only thing that was not complied with was the notice period. In addition, the eviction would be detrimental to the BEE objectives of the franchise agreements.[116] Davis J was convinced with this reasoning. He opined

[114] Supra note 54

[115] Ibid

[116] Ibid.

that sufficient reasoning was given on behalf of the Applicants, in that they were unsophisticated black businessmen who were not privy to technical laws and compliance. In support of his argument, he referred to *Botha v Rich NO,* and found that the cancellation would be disproportionate to the circumstances of the case. As such, it was found that the Applicants validly invoked the option to renew the lease. Respondents took it on appeal. [117]

In the Supreme Court of Appeal, the approach and decision taken by Davis J was rejected. The found that the court a quo had firstly misidentified the legal issue at hand, in that the issue was in regard to the expiration of a lease period and not about enforcing a cancellation clause. The SCA also rejected the use of the proportionally principle as in *Botha v Rich NO* and stated that this concept is "entirely alien"[118] in South African contract law. As a means to draw the issue back to being of public policy, the SCA made reference to *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd.* [119] Here it was held that although strict compliance with an agreement may yield an unfavourable outcome, this in itself does not render the agreement against the Constitution and public policy. In showing when a court may actually invalidate an agreement on the basis of being against the Constitution and public policy, reference was made to *AB v Pridwin Preparatory School, [120]*where the court had set our various principles aimed at guiding public policy in contracts. In applying the decision in these two cases, the SCA concluded that the renewal provisions was not offensive. In fact, the six month notice period was rather reasonable and the Applicant's should have complied. The businessmen contended that they were unsophisticated, but be that as it may, they were not incapable of following a simple agreement. [121]

The SCA concluded that the Applicant's got themselves in this predicament, nobody else. Had they provided proper reasons for non-compliance, then the decision could have maybe swung in their favour. The appeal was upheld that the court ordered that the Applicant's be removed. The Applicant's then took the matter to the Constitutional Court. [122]

[117] Ibid.

[118] Para 38

[119] 2018 (2) SA 314 (SCA).

[120] 2019 (1) SA 327 (SCA).

[121] Supra note 54.

[122] Ibid.

In the Constitutional Court, it a very lengthy judgment, concurred with the decision taken in the SCA, albeit not in agreement with the reasoning of the decision. They also set down various rules governing the concept of public policy in contract law. The court expanded on the principles stated in to *AB v Pridwin Preparatory School*[123], with specific reference being made to the fact that a court cannot refuse to uphold a contract on the basis that it is subjectively unfair or harsh. The only situation in which such refusal would be permitted is where the agreement is so unfair, unreasonable or unjust that it is contrary to public policy. In addition, the court stressed that as much as concept of *pacta sunt servanda* is important in contract law, it cannot be given privilege over other constitutional rights. Furthermore, the court stated that extreme caution needs to be adopted when deciding whether or not a contract should be set aside on the basis of being against public policy. It should be very clear that this approach needs to be adopted. Lastly, the court opined that although BEE promotion was at stake, this was not a sufficient reason and cannot be used to justify bad decisions. There was nothing preventing the Applicants from complying with the terms; and the failure to discharge the onus that the enforcement was contrary to public policy was their own fault. [124]

Theron J delivered a well-rounded judgment as he made a neutral decision, taking into consideration both the development of the common law and legal certainty. It can be said that the decision delivered much needed clarity, that of which previous cases failed to do. As this judgment cannot be said to be the end of the ongoing 'here nor there' position that public policy, good faith and fairness plays in the law of contract in South Africa, the decision does offer better guidance for future cases.

3.3. CONCLUSION

As seen from the chronological discussion of cases, since the very first good faith issue arose in South African contract law, there has been nothing but confusion. Soon after a case, such as in *Bredenkamp v Standard Bank of South Africa Ltd,* established the role that good faith played, other cases that followed, such as in *Everfresh v Virginia Market (Pty) Ltd*, negated the previous judgments. What we can conclude is that good faith has not been recognised as a stand-alone requirement in South African contract law. Although, we can see from some decisions such as

[123] AB and Another v Pridwin Preparatory School and Others (CCT294/18) [2020] ZACC 12

[124] Supra note 54

in *Everfresh v Virginia Market (Pty) Ltd,* that the Constitutional Court is moving in the direction of good faith becoming free-standing. The SCA however, as seen in *Bredenkamp v Standard Bank of South Africa Ltd,* does not wish to entertain any idea in the same regard – they stand by their opinion that these abstract principles are mere guiding principles and that is the end of it. But this is the root of the problem and confusion. The principle of stare decisis seems to be forgotten, as the SCA is at total odds with the Constitutional Court. The discord between these two courts are thus quite bewildering.

For reasons beyond me, the SCA refuses to take heed of the developments that the Constitutional Court seems to develop. In *Barkhuizen v Napier* for example, the Constitutional Court averred that good faith and fairness can be stand-alone requirements but in *Bredenkamp v Standard Bank of South Africa Ltd* the SCA held that this is not so. While the Constitutional Court aims to promote important values like Ubuntu, the SCA will not hear of it. The SCA, in my opinion, fails to understand and apply the principles enshrined in the Constitution. In specific, section 39(2) which obliges the courts to develop the common law and bring it in line with the spirit, purport and objects of the Bill of Rights. This major divergence in approaches and also some inconsistencies by the Constitutional Court is no doubt going to slow down (or even halt) the common law development of good faith. One of the most difficult hurdles to climb is getting the SCA away from the rigid and conservative thinking that it insists on adopting. Only then, when both courts are on the same wave length, will good faith be en route to becoming stand-alone.

However, for the time being, we can see that development of good faith as a stand-alone requirement is not really something of importance in South Africa. As it stands, the likelihood of this happening is a mere debate. If legislation is introduced to the effect that it offered a legal remedy based on good faith where a party acted in bad faith, this would definitely be a step in the right direction. Alas, this is just suggestive and the possibility of this happening anytime soon or at all is farfetched.

Chapter 4 – A Comparative Analysis between Good Faith in South African Contract Law and Other Jurisdictions

4.1. ENGLISH LAW

(a) Introduction

As history would tell, good faith is not a principle recognised by the English courts.[125] In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd,*[126]it was held that English contract law has not "committed itself to no overriding principle of good faith but has developed piecemeal solutions in response to demonstrated problems of unfairness." [127] As such, other methods, rules and regulations are used to cater for situations of unfairness. [128]However, similar to South African contract law, recent notable judgments have been handed down by English courts which reintroduced the idea of good faith in contract. This will be seen below.

(b) Notable Judgments

In *Yam Seng Pte Ltd v International Trade Corp Ltd,*[129] the concept of a duty to act in good faith in contract law was recognised. In this landmark case, an agreement was concluded for the sale of products. The buyer would then go on to resell the same products once the contract had been fulfilled. An issue arose whether the seller had a duty to perform in good faith, as he failed to disclose pertinent information about the products to be sold.[130] In his obiter statement, Leggatt J spoke in favour of a duty to act in good faith in all commercial and relational contracts. He stated that these contracts actually require a high degree of communication, trust and confidence. These principles are not necessarily catered for in the contractual terms, and thus it is important that same is implied.[131]

[125] Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433

[126] [1989] QB 433

[127] Ibid at 439

[128] Ibid.

[129] [2013] EWHC 111(QB).

[130] Ibid at 1 – 4

[131] Ibid at 142

He stated that is should be common cause that all contracts are to be construed as having regard to honesty, and that parties should behave honestly in their dealings without saying.[132] He opined that honesty, in effect, is what gives rise to efficiency in commercial dealings.[133] In addition, Leggatt J placed emphasis on interpretation of contracts. He stated that it is virtually impossible for a contract to provide for every single situation that may occur. As such, courts are obliged to interpret the contract by taking into consideration other clauses of the contract (and thus the main intention of the parties), fair dealings and fidelity to the parties' bargain. [134] He further stated that the test for good faith is objective, in that it should be tested against what a fair and reasonable person believes to be unacceptable.[135]

Leggatt J averred the fact that there is no overriding principle of good faith and that contracting parties are given free rein to deal without judicial oversight in English law, the courts are "swimming against the tide."[136] The general concept of good faith is recognised in several other jurisdictions such as Germany, Italy and France and is developing in other jurisdictions such as Canada, Australia and Scotland. However, English law remains stagnant in its approach, with good faith being implied in very limited instances such as contacts of employment and insurance.[137] Given this, he believes that "the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that is still persists, is misplaced".[138]

In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)*[139]the scope and extent of the application of good faith was discussed. In the High Court, it was held that there had been a material breach of an obligation to cooperate in good faith. As such, the aggrieved party was entitled to cancel the agreement.[140] On appeal, the court took a difference stance and held that cannot be so. They disagreed with the decision of the High Court and held that the obligation to act in good faith as per a term in the contract was not general and did not reinforce all of the obligations between the parties. The Court of Appeal thus limited

[132] Ibid at 135

[133] Ibid at 137

[134] Ibid at 138 – 139.

[135] Ibid at 144

[136] Ibid at 124

[137] Ibid

[138] Ibid at 153

[139][2013] EWCA Civ 200

[140] Ibid at 69

the scope of good faith in the good faith obligation.[141] The court also referred to the judgment handed down in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [142] and reiterated the matter of construct:

> "The scope of the obligation to co-operate in good faith must be assessed in the light of the provisions of that clause, the other provisions of the contract, and its overall context."

This case did not concur with *Yam Seng Pte Ltd v International Trade Corporation Ltd*, nor did it overrule it. However, it indicated that the good faith can only be used in very limited circumstances and with caution.

In *Bristol Groundschool Ltd v Intelligent Data Capture Ltd,*[143]a different approach was adopted to that of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest).* The court held that there was an implied duty to act in good faith. The contract was said to be a "relational contract" as described in *Yam Seng* and this required an extensive degree of trust, confidence and cooperation.[144] As such, and as per *Yam Seng*, the court held that there was a duty to act in good faith and that "good faith extends beyond, but at the very least includes, the requirement of honesty."[145] Furthermore, the court quoted *Yam Seng* and held that the test is whether a party's conduct "would be regarded as "commercially unacceptable" by reasonable and honest people in the particular context involved"[146]

(c) Conclusion

As seen from above, English law and its relationship with the principle of good faith seems to be unstable. Whilst there is no duty to act in good faith under English contract law, the obligation seems to be etching its way into relational contracts, by implication and by express terms. However, party autonomy and individualism is something of great importance as the English courts are more inclined to give preference to party's intentions. This unstable position is the same in South African contract law, as our courts favour *pacta sunct servanda* and sanctity of contract over good faith. In South African contract law, we also see good faith etching its way

[141] Ibid at 122 – 128

[142] [2013] EWHC 111 (QB)

[143] [2014] EWCH 2145 (Ch)

[144] Ibid at 196

[145] Ibid at 196

[146] Ibid

forward in SCA judgments, where the court seems to be warming up to the principle. Alas, the same cannot be said for the Constitutional Court.

Nevertheless, the role that good faith plays in both these jurisdictions is far from definitive. In as much as this is vital to preserve the essence of contract law, the duty to act in good faith promotes and gives effect to fair dealings, openness and honesty which is something that should be desired in contractual dealings.

What should be noted is the restrictive application of good faith in English contract law. Whilst South African contract law makes reference to good faith being a requirement *generally*, English contract law only makes reference to good faith being a requirement for certain contracts.

4.2. AUSTRALIAN LAW

(a) Introduction

In a similar position to England and South Africa, traditionally there has been and is no overarching requirement of good faith in Australian contract law. [147] The traditional view is that the duty of good faith is an unjustified intrusion into freedom of contract. Parties to a contract should be able to get the best bargain that they possibly can. Where no fiduciary relationship exists (and thus no duty of good faith), it is held "no matter how wicked, cruel, or mean the motive may be which determines the enforcement of the right." [148] This view is further reflected by Kirby P, in the case of *Biotechnology Australia Pty Limited v Pace,* [149]where he averred that he doubts that statute does or should "enforce a regime of fairness upon the multitude of economic transactions governed by the law of contract" [150]

Cater and Peden opine that to say that good faith is unsettled and in a state of flux in Australian contract law would be an understatement. They would rather it be said that it is in state is utter confusion. [151] However, it would seem apparent that *some* Australian courts are opening up to the idea of good faith in contract law, if we assess notable judgments that have

[147] Stephen Corones and Philip H Clarke *Australian Consumer Law – Commentary and Materials* 5ed (2015)

[148] David Ferguson and Julia Bracun, "The Implied Condition Of Good Faith In Contractual Performance" (1999) *Australian Construction Law Newsletter*

[149] (1988) 15 NSWLR 130

[150] Ibid.

[151] J W Carter and Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 *Journal of Contract Law*

been handed down. It seems that the duty of good faith has been somewhat imposed in three main ways: [152]

- First, a requirement of good faith must be implied.
- Second, the implied requirement of good faith is an implied term of the contract.
- Third, the implied requirement of good faith is satisfied by a party who has acted with honesty and reasonableness.

Support for these methods can be found in the case of *Renard Construction (ME) v Minister for Works*[153]. It was with the obiter statements made by Priestley J that put good faith on the judicial agenda and paved the way for the introduction and development of the concept of good faith in Australian contract law.[154]

(b) Notable Judgments

As already mentioned, the case of *Renard Construction (ME) v Minister for Works*[155]*('Renard')* is generally understood as the starting point when one looks at the principle of good faith in Australian contract law. [156] In this case, it was found that the "ability of the principal under a building contract to rely on a show cause procedure was subject to requirements of reasonableness."[157] The court then confirmed that the duty to act in good faith and the requirement of reasonableness overlapped with one another.[158] Priestley J stated that the kind of reasonableness he has been making reference to throughout his judgment has a lot in common with the notions and principles of good faith. [159] As such, he holds these two principles to be indistinguishable from one another.

Nevertheless, even though this case has been used as authority for including good faith as a requirement in Australian contract law, the statements made by Priestley J were obiter. As

[152] Ibid.

[153] (1992) 26 NSWLR 234

[154] Supra note 23

[155] Supra note 25

[156] J W Carter and Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 *Journal of Contract Law.* See also Elisabeth Peden "Contractual Good Faith: Can Australia benefit from the American Experience?" (2003) 15(2) *Bond Law Review 186.*

[157] Ibid

[158] Supra note 25 at 265

[159] Supra note 25 at 263

such, the extent to which this case has been used as support in subsequent cases has been criticized.[160] Peden, in criticizing the approach taken in *Renard*, held that equating good faith with reasonableness is "more confusing than instructive." She opined that the courts aver that these two principles are indistinguishable from one another, but no actual explanation has been given as to how they both fit together. She further stated that there has been no good enough reason as to why reasonableness is said to include good faith or why it is considered identical.[161] But, criticism did not stop the possibility for the development of the doctrine of good faith in Australian contract law – as will be seen below.

In *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*[162]*('Hughes Bros')* Kirby P confirmed the position taken in *Renard* and held that he was bound by the decision. As such, he felt obligated to apply it in the appeal before him as part of his judicial duty.

Furthermore, strong support for *Renard* was also found in *Alcatel Australia Ltd v Scarcella*[163] where Shellar JA held that the decision taken in *Renard* (and *Hughes Bros*) effectively means that the duty of good faith both by performance obligations and exercising rights may, by implication, be imposed in contracts in New South Wales. [164]

Despite the above judgments, a different approach was adopted in *GSA Group Pty Ltd v Siebe PLC*[165]at the New South Wales Court of Appeal, where an issue arose with whether or not there was a duty to act in good faith as per a term in the contract. Rogers CJ Comm D in this case, refused to render good faith an obligation of a contract because of its nature. He held that the parties were commercial entities, with equal bargaining power and able to "look after their own interests." [166]

Furthermore, in *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum*[167]the Court of Appeal of Victoria rejected the proposition that an obligation of good faith should be

[160] Marcel Gordon "Discreet Digression: The Recent Evolution of The Implied Duty of Good Faith" (2007) 19.2 *Bond Law Review* 26 at 27

[161] Elisabeth Peden *Good Faith in the Performance of Contract Law* (LexisNexis Butterworths, 2003) 176

[162] (1993) 31 NSWLR 91

[163] (1998) 44 NSWLR 349, 368

[164] Ibid at 369.

[165] (1993) 30 NSWLR 573

[166] Ibid at 570

[167] NL [2005] VSCA 228

implied indiscriminately into all commercial contracts. Warren CJ, in explaining the basis of her approach, said that the modern contract law aims at achieving certainty in commerce. If good faith is adopted as a requirement, without first having a solid definition and application, undermines that certainty. She opined therefore, that the duty to act in good faith is merely a duty to act reasonably – which is already a long established duty. [168]

(d) Conclusion

Australia, much like South Africa and England, has not yet committed itself to the concept of good faith and it being incorporated into their contract law. There have been diverging decisions by different judges and different jurisdictions. Whilst New South Wales seems to be warming up the idea (albeit not consistently), the Victorian Court of Appeal has not. In the same regard, the High Court is yet to voice their opinion on the topic. Until same has been done, the uncertainty of the position of good faith will persist.

What should be noted is the similarity of the wording of decisions in Australia and South Africa. Whilst Australian courts make reference to reasonableness being indistinguishable from and one with good faith, a similar position has been adopted in South Africa. Reasonableness and good faith are said to go hand in hand as an extension of the concept of *Ubuntu*.

[168] Sergio Freire, " Implied Obligation Of Good Faith In Contracts: Only "Vulnerable" Parties Need Apply" (2006) 25 *Australian Resources and Energy Law Journal*

5.1 FINAL REMARKS AND THE WAY FORWARD

It is no doubt that South African contract law has come a long way from the "cast in stone" ideas that freedom of contract and legal certainty are far more important than the concept of good faith. However, this does not mean that the current position is sufficient. If our law is to fully embrace good faith as a standalone requirement, much more work needs to be done. It is submitted that Constitutional concepts such as *Ubuntu*, fairness and reasonableness can be used to introduce good faith into our law, as all these principles are connected to one another. Furthermore, and from a legislative point of view, if laws were enacted to the effect that good faith be recognised as a standalone requirement, this will also be a step in the right direction.

Courts play a substantive role in the developing the common law, and the Constitutional Court has been seen to do just that in regard to the role of good faith in South African contract law. This cannot be said for the conservative SCA, which has somewhat hindered the development and furtherance of good faith. It is submitted that the reasons put forth by the SCA for its reluctance in accepting good faith, being legal certainty and freedom of contract, is rather unfounded. It cannot be reasonable to hold these concepts in such high regard where it is inevitable that unfairness and injustice will follow. Nevertheless, the Constitutional Court does not echo the same sentiments, and seems to vouch for good faith becoming a stand-alone concept.

The English and Australian courts seem to be encountering the same issue, as their courts are at odds with the position that good faith ought to play in contract law. It is submitted that for good faith to be awarded the position it deserves, our courts need to collectively adopt approaches that favour good faith. There needs to be synergy. Diverging approaches are unworkable, as is evident from the different judgements and opinions of the SCA and Constitutional Court in South Africa and other jurisdictions such as England and Australia.

It is about time that the precarious position of good faith in South African contract law be made definitive and clear once and for all. It is only fitting that a concept so boldly emphasised in the Constitution be given the recognition and place that it deserves. However, it is easier said than done and the only way for this to be achieved is through the actions of our legislature, courts and people of South Africa.

BIBLIOGRAPHY

I. Primary Sources

Statutes

Constitution of the Republic of South Africa Act 108 of 1996.

Cases

South Africa

AB v Pridwin Preparatory School 2019 (1) SA 327 (SCA).

Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA)

Bank of Lisbon and South Africa v De Ornelas 1988 (3) 580 (A)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Beadica v Oregon Trust for the time being of the Oregon Trust and Others [2020] ZACC 13 (Neutral citation)

Biyela v Harris 1921 NPD 83

Botha v Rich NO 2014 (4) SA 124 (CC)

Bredenkamp v Standard Bank of South Africa Ltd 2010 (4) SA 468 (SCA)

Brisley v Drotsky 2002 (4) SA 1 (SCA)

Eastwood v Shepstone 1902 TS 294

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 1 SA 256 (CC)

Magna Alloys & Research (S.A.) (Pty) Ltd. v Ellis 1984 (4) SA 874 (A)

Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd 2018 (2) SA 314 (SCA)

S v Theus 2003 6 SA 505

SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A)

Sasfin (Pty) Ltd v Beukes 1989 1 All SA 347 (A)

South African Forestry Co Ltd v York Timbers 2005 (3) SA 323 (SCA)

Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA202 (SCA)

England

Bristol Groundschool Ltd v Intelligent Data Capture Ltd [2014] EWCH 2145 (Ch)

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433

Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200

Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111(QB)

Australia

Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349

Biotechnology Australia Pty Limited v Pace (1988) 15 NSWLR 130

Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL [2005] VSCA 228

GSA Group Pty Ltd v Siebe PLC (1993) 30 NSWLR 573

Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (1993) 31 NSWLR 91

Renard Construction (ME) v Minister for Works (1992) 26 NSWLR 234

II. Secondary Sources

Journal Articles

Andrew Hutchison 'Good Faith in Contract: A Uniquely South African Perspective' (2019) *Journal of Commonwealth Law*

Bhana D and Pieterse M (2005) 'Towards reconciliation of contract law and constitutional values' Brisley and Afrox revisited' 122 *South African Law Journal*

Brighton Mupangavanhu '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' (2013) *Speculum Juris*

Carole Lewis 'The uneven journey to uncertainty in contract' (2013) 80 *THRHR*

Dale Hutchison 'from bona fides to Ubuntu: the quest for fairness in the South African law of contract' (2019) *Acta Juridica*

R Zimmermann 'Good faith and equity: Southern Cross, Civil Law and Common Law in South Africa" (1996)

David Ferguson and Julia Bracun, 'The Implied Condition Of Good Faith In Contractual Performance' (1999) *Australian Construction Law Newsletter*

Davis D 'Private law after 1994: Progressive development or schizoid confusion?' (2008) 24 *South African Journal for Human Rights*

Deeksha Bhana, 'Contract law and the Constitution : *Bredenkamp v Standard Bank of South Africa Ltd* (SCA) : case note' (2014) 29 *Southern African Public Law*

Du Plessis H ‘Harmonising Legal Values and Ubuntu: The Quest for Social Justice in the South African Common Law of Contract’ (2019) *PER/PELJ* 22

Du Plessis H. M. ‘Legal Pluralism, uBuntu and the Use of Open Norms in the South African Common Law of Contract’ (2019) 22 *PELJ*

Du Plessis P ‘Good faith and equality in the law of contract in the civilian tradition’ (2002) 65 *Tydskrif vir Hedendaagse Romeins Hollandse Reg*

Elisabeth Peden ‘Contractual Good Faith: Can Australia benefit from the American Experience?’ (2003) *Bond Law Review*

Himonga, Taylor and Pope ‘Reflections on Judicial Views of Ubuntu’ (2013) 16 *PER / PELJ*

Irma Kroeze ‘Contract, constitution and confusion : the case of *Brisley v Drotsky*’ (2006) 47 *Codicillus*

J W Carter and Elisabeth Peden, ‘Good Faith in Australian Contract Law’ (2003) 19 *Journal of Contract Law*

Jaco Barnard-Naudé ‘Justice Moseneke and the emergence of a new master-signifier in the South African law of contract’ (2017) *Acta Juridica*

JY Mokgoro ‘Ubuntu and the law in South Africa’ (1998) *PER/PELJ*

L Hawthorne ‘Frontiers of Change and Governance in Contractual Agreements: The Possible Role of Exploitation - Uniting Reformed Church *De Doorns V President of the Republic of South Africa 2013 5 SA 205 (WCC)’* (2014) *PER / PELJ*

L Hawthorne ‘Public policy: the origin of a general clause in the South African law of contract’ (2013) *Fundamina*

Leo Boonzaier ‘Rereading *Botha v Rich*’ (2020) 137 *South African Law Journal*

Marcel Gordon ‘Discreet Digression: The Recent Evolution of The Implied Duty of Good Faith’(2007) 19.2 *Bond Law Review*

Mbigi L and Maree J Ubuntu: The Spirit of African Transformation Management’ (1995) *Sigma Press Johannesburg*

Philip Thomas ‘The development of the Cape common law during the early nineteenth century: William porter, James Kent and Joseph Story’ (2014) *Fundamina*

R.A Bauman (1996) ‘The Interface of Greek and Roman Law’

R-M Jansen, B.S. Smith ‘Hospital disclaimers : Afrox Health Care v Strydom: Chronicle (2003) 28 *Journal for Juridical Science*

Robert Sharrock ‘Unfair enforcement of a contract: a step in the right direction? Botha v Rich and Combined Developers v Arun Holdings’ (2015) 174 *SA Merc* LJ

Sergio Freire, ‘Implied Obligation Of Good Faith In Contracts: Only Vulnerable Parties Need Apply’ (2006) 25 *Australian Resources and Energy Law Journal*

Simon Thompson ‘*Beadica 231 CC* : an end to the trilogy?’ (2020) 137 *South African Law Journal*

TE Coleman, “Reflecting on the Role and Impact of the Constitutional Value of uBuntu on the Concept of Contractual Freedom and Autonomy in South Africa" (2021) *PER / PELJ*

TW Bennet ‘Ubuntu: An African Equity’ (2011) 14 *PER / PELJ*

Books

Elisabeth Peden *Good Faith in the Performance of Contract Law* (LexisNexis Butterworths, 2003)

Stephen Corones and Philip H Clarke *Australian Consumer Law – Commentary and Materials* 5ed (2015)

Internet Publications

Lenee Veldsman, Birgit Kuschke 'The *Exceptio Doli Generalis* – back again?' *Without Prejudice* 2012 available at https://repository.up.ac.za/bitstream/handle/2263/20245/Kuschke_Excptio%282012%29.pdf?sequence=1&isAllowed=y, accessed 29 May 2021

Theses

Hanri Magdalena Du Plessis, The harmonisation of good faith and Ubuntu in the South African common law of contract (unpublished PhD thesis, University of South Africa, 2017)

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Miss Tashri Govender (217008805)
School Of Law
Howard College

Dear Miss Tashri Govender,

Protocol reference number: 00012979
Project title: The Role of Good Faith in South African Contract Law

Exemption from Ethics Review

In response to your application received on 23 June 2021 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

[redacted]----------

Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law