

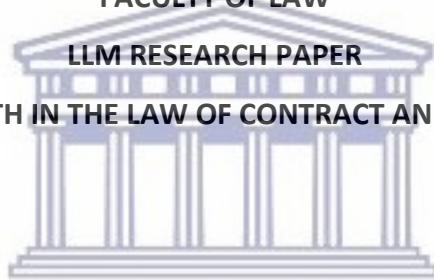


**UNIVERSITY of the
WESTERN CAPE**

FACULTY OF LAW

LLM RESEARCH PAPER

A REVISED ROLE OF GOOD FAITH IN THE LAW OF CONTRACT AND EMPLOYMENT CONTRACTS



ASIPHE MGWEBA

**UNIVERSITY of the
WESTERN CAPE**

Student Number: 3149000

Supervisors:

Supervisor: D Y Mupangavanhu

Co-supervisor: Prof K Malherbe

PLAGIARISM DECLARATION

I declare that 'A revised role of good faith in the law of contract and employment contracts' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

SIGNATURE: A.Mgweba

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KEY WORDS

Contract law

Employment contracts

Employment relationship

Fairness

Good faith

Public Policy

Sanctity of contract

Ubuntu

Subordination

Implied duty of trust and confidence



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CHAPTER 1: INTRODUCTION

1. Background

Good faith is an open ended concept which refers to fair and honest dealings. The function of this concept is to give expression to the community's sense of what is fair, just and reasonable.¹ The concept of good faith has and continues to acquire a meaning wider than mere honesty or the absence of subjective bad faith. It is an objective concept that includes other abstract values such as justice, reasonableness, fairness and equity.² There is competition between the two underlying values or cornerstones of the law of contract, namely that of sanctity of contract (*pacta sunt servanda*) and fairness. Y Mupangavanhu holds that 'it is becoming axiomatic that sanctity of contract and fairness are competing values that need to be balanced by courts'.³ Differently put, Hutchison holds that:

'The tension between these competing goals of contract law is quite evident...every time a court enforces an unreasonably harsh contractual provision, a price is paid in terms of the ordinary person's sense of what justice requires; conversely every time a court allows a party to escape liability under what is thought to be a binding contract, a price is paid in terms of legal and commercial certainty'.⁴

Courts are often called upon to assess the abovementioned tension.

South African courts have, however, shown reluctance in balancing the competing principles and have instead been opting to uphold the principle of sanctity of contract in the spirit of preserving certainty in the law of contract. Public policy, *ubuntu* and good faith are all mechanisms that are aimed at achieving fairness in contract law. The apparent preference of the courts to uphold the

¹ *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman* 1997 (4) SA 302 (SCA).

² Brand F 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The influence of the Common Law and the Constitution' (2009) 126 *The South African Law Journal* 73.

³ Mupangavanhu Y 'Fairness is a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' (2015) *De Jure* 117.

⁴ Hutchison D *The Law of Contract in South Africa* 2 ed (2012) 22.

sanctity of contract above all else, falls short of achieving fairness and reasonableness.⁵

Public policy functions as an alternative doctrine of equity, fairness and good faith in contract law.⁶ As such, the idea is that a contract that is contrary to public policy is illegal and should not be enforced.⁷ Although there is no clear definition of public policy, B Mupangavanhu opines that the 'doctrine of public policy, while difficult to comprehensively define, can be understood to refer to courts consideration of what is in the interest of society or community when interpreting contracts'.⁸ In other words, it represents the legal convictions of the community or the general sense of justice of the community and the values that are held most dear by the society.⁹

Public policy is rooted in the Constitution and its fundamental values enshrined in the Bill of Rights, namely - human dignity, achievement of equality, advancement of human rights and freedom, non-racialism and non-sexism.¹⁰ The notion of fairness, justice, equity and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals and it is informed by the concept of *ubuntu*.¹¹ Public policy, however, incorporates and endorses freedom and sanctity of contract.¹² There is thus a need to develop the traditional common law of contract to fulfil the spirit and purports of the Bill of Rights taking cognisance of the realities that ordinary contracting parties often encounter – realities such as victimisation and imbalance of power. There is a need for a revised robust role of good faith in the law of contract.

⁵ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

⁶ Brand 'The role of good faith, equity and fairness in the South African law of contract – the influence of the common law and the Constitution' (2009) 126 *SALJ* 74.

⁷ Brand 'The role of good faith, equity and fairness in the South African law of contract – the influence of the common law and the Constitution' (2009) 126 *SALJ* 75.

⁸ Mupangavanhu B '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* 155.

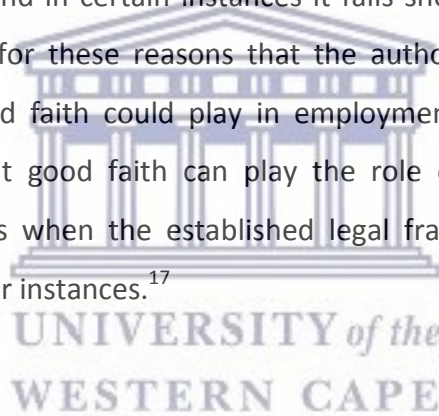
⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 331.

¹⁰ Mupangavanhu B '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* 156.

¹¹ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) para 2.

¹² Hutchison and Pretorius (eds) *The Law of Contract in South Africa* (2017) 33.

The role of good faith in employment contracts is also problematic and complex. This is because employment contracts are different from general contracts. Employment contracts are unique in nature, characterised by trust and highly regulated by labour legislation. They are entered into by parties who wish to establish an employment relationship for a period of time and with the intention of securing reciprocal advantages for themselves.¹³ There is legislation in place largely regulating the employment relationship. Statutory regulation such as the Basic Conditions of Employment Act (BCEA) and Labour Relations Act (LRA),¹⁴ provide a measure of protection against the inclusion of unfair contractual provisions by regulating basic conditions for employees and prohibiting the inclusion of provisions that detract from these protections even those purportedly agreed to.¹⁵ However, this established legal framework does not offer protection to all employees,¹⁶ and in certain instances it falls short in achieving fairness in the employment relationship. It is for these reasons that the author argues that the role that a common law principle like good faith could play in employment contracts is problematic to ascertain. The argument is that good faith can play the role of ensuring full protection of employees' constitutional rights when the established legal framework does not adequately protect an employee in particular instances.¹⁷



2. Problem Statement

Although in theory contracting parties have equal bargaining power and freedom of contract, the practical reality is that ordinary individuals contracting with large corporates have far less bargaining power.¹⁸ More often than not, standard form contracts are used – contracts that unfairly favour the party with the bargaining power. As such, an individual contracting with a

¹³ Van Jaarsveld MI 'The role of contractual principles in contemporary employment relationships in Germany: Is there a lesson to learn for South Africa?' 2008 *Obiter* 24.

¹⁴ See Basic Conditions of Employment Act 75 of 1997 and Labour Relations Act 66 of 1995.

¹⁵ Cohen T 'Implying fairness into the employment contract' (2009) 30 *ILJ* 2290.

¹⁶ See chapter 3 part 3.2.

¹⁷ Bosch C 'The implied term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 30.

¹⁸ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 24.

party with greater bargaining power has no option but to accept the terms and conditions of the contract because there is no room for negotiation.¹⁹

Likewise, it is important to note that in employment contracts, employers and employees do not negotiate on equal footing.²⁰ Employees are often the vulnerable party in the employment relationship.²¹ Also important to note is that, jobs are scarce and candidates are desperate for jobs and that creates an unpleasant situation where candidates settle for anything offered, often on unfavourable terms.²² Hence, Cohen argues that 'in reality the markedly unequal bargaining powers of employers and employees produced employment contracts that reflected the will of the stronger party, the employer, followed by an assumption that the agreement was freely chosen'.²³ Unfortunately, this position has not changed.

The concern is that these contracts continue to be enforceable based on the notion that both parties had voluntarily and freely entered into the contract. In other words, these contracts remain binding despite the fact that the provisions are contrary to the dictates of good faith.

In response to these problems, it is important to consider the following:

1. What good faith is;
2. The role of good faith in contract law;
3. The status of good faith in the employment context;
4. The appropriateness of infusing the role of good faith as seen in contract law into the employment contract;

¹⁹ Lewis J 'Fairness in South African Contract Law' (2003) 120 *SALJ* 347.

²⁰ Jeffrey A, Williamson Brian H, & Kleiner 'New developments concerning the covenant of good faith and fair dealing' (2003) *Management Research News* 36.

²¹ Bosch C 'The implied term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 33.

²² Reddy, V., Bhorat, H., Powell, M., Visser, M. and Arends, A 'Skills Supply and Demand in South Africa' (2016) *Human Sciences Research Council* 82.

²³ Cohen T 'Implying fairness into the employment contract' (2009) 30 *ILJ* 2272.

5. The extent in which good faith can be infused into the employment contracts.

3. Research questions

What role does good faith continue to play in contract law in the constitutional dispensation?
To what extent is good faith required in employment contracts?

4. Significance of study

This study is meant to give insight on how a robust role of good faith would be appropriate in South African contract law and employment contracts. An otherwise legal and enforceable contract could be set aside if it manifests outcomes that are contrary to good faith. Parties who would not have otherwise successfully challenged a contract on technicalities would need to challenge the enforceability of the contract based on the principle of good faith. This would potentially protect contracting parties with less bargaining power or employees in an employment relationship inherently dominated by the element of subordination.

5. Research Methodology

The research method will be in the form of a desk study. It will rely on materials available from various primary sources, inclusive of case law and national legislation. National legislation will be looked at to illustrate the legislative shortcomings that the principle of good faith can potentially fill. Moreover, the case law discussion will illustrate the developments of the role of good faith as interpreted by different South African courts. Secondary sources will include academic books and journal articles, which will consider the academic views by different authors on the role of good faith.

6. Chapter outline

The research paper will comprise of four chapters:

6.1.1 Chapter One

This is the introductory chapter which consists of the background and a problem statement outlining the current difficulties that contracting parties with less bargaining power continue to face in the absence of good faith. Furthermore, this chapter discusses the rationale of the study, research objectives and methodology. It also provides a chapter outline followed by a conclusion.

6.1.2 Chapter Two

Chapter two discusses the historical role of good faith and the current position of the role of good faith in contract law. It focuses on the recent judgments in this area and the effect of these judgments on the role that good faith continues to play.

6.1.3 Chapter Three

Chapter three examines the role of good faith in employment contracts. It particularly examines the element of subordination in employment contract and how good faith can be used to protect employees. The discussion is followed by a brief discussion of instances where good faith has been used by the employer to protect their interest and how employees could also rely on good faith to protect their interest.

6.1.4 Chapter Four

This chapter firstly provides an analysis of the role of good faith in contract law and employment contract as well as the lessons that could be learnt. The analysis will be followed by a conclusion and recommendations with regard to the potential revised role of good faith in the constitutional dispensation both in contract law and employment contracts, and what the robust role of good faith entails.



CHAPTER 2: THE ROLE OF GOOD FAITH IN CONTRACT LAW

2. Introduction

This chapter discusses the status of good faith in South African contract law. It also highlights the need for inclusion of good faith as a fundamental principle in contract law. The developments in this area of law are also examined as well as the current role of good faith. This is achieved by critically analysing recent case law which seems to reshape the role of good faith in contract law and the critiques thereof by academics about the role of good faith in light of the recent cases. Moreover, this chapter seeks to articulate the difficulties that contracting parties with less bargaining power often encounter. The focus of this chapter is thus to revisit the status of good faith in contract law by looking at case law which has dictated the status of good faith in contract law for a number of years.

2.1 The status of good faith in contract law as influenced by historic case law

In the past, contracting parties used to rely on the *exceptio doli generalis* as basis for setting aside an unfair contract. *Exceptio doli generalis* provided a remedy to a party who wished to escape the enforcement of an unfair contract or the enforcement of a contract in unfair circumstances.²⁴ In other words, it was an equitable defence that allowed a defendant to resist a claim for performance under a contract when there was something unconscionable about the plaintiff seeking to enforce the contract (or a clause thereof) in the specific circumstances of that case.²⁵

The question that arises is whether good faith could be used to import fairness in contracts. Good faith seems to be perceived in the same way as the principle of *exceptio doli generalis*. When the defence of *exceptio doli* was abolished, the idea of good faith lived on as an informing principle of the law of contract.²⁶

²⁴ Christie RH *The Law of Contract in South Africa* 4ed (2001) 15.

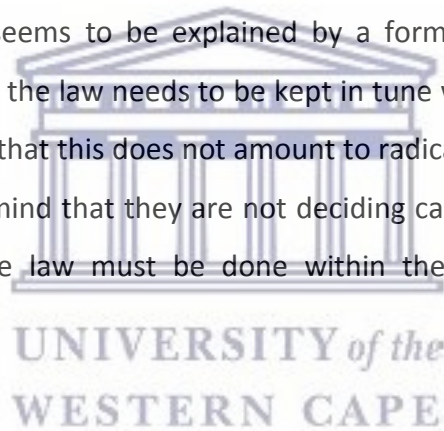
²⁵ Glover G 'Lazarus in the Constitutional Court: an exhumation of the *exceptio doli generalis*?' 2007 (124) *SALJ* 449.

²⁶ Hutchison, Naude, & Floyd et al *The Law of Contract in South Africa* 3 ed (2017) 28.

The parties were required to conduct themselves in a manner consistent with good faith.²⁷ However, good faith continues to be seen as a superfluous abstract value which underpins and informs the substantive law of contract. It is not a self-standing or free-floating principle but a mere creative or basic concept in South African law.²⁸ The notion of good faith cannot therefore be employed by a judge when setting aside a contract. The problem with this position is that contracting parties with less bargaining power will not be able to directly rely on the principle of good faith to escape from a contract.²⁹

It is important to note that there seems to be a tension between the views of academics and the Supreme Court of Appeal (SCA). Most academics are of the view that good faith is appropriate and needed in South African contract law.³⁰ The SCA, on the other hand has adopted a conservative and narrow approach in relation to the integration of good faith in contract law.³¹

The reason for this approach seems to be explained by a former judge Brand of SCA in his article.³² Although he notes that the law needs to be kept in tune with the changing social needs and values he, however, argues that this does not amount to radical change. Judge Brand further adds that judges must keep in mind that they are not deciding cases for themselves but for the future and any changes to the law must be done within the framework of existing legal principles.³³



²⁷ Hutchison, Naude, & Floyd et al *The Law of Contract in South Africa* 3 ed (2017) 28.

²⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 82.

²⁹ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27.

³⁰ See Van der Merwe, Van Huyssteen, Reinecke, et al *Contract General Principles* 2 ed (2003) 293, Louw AM 'Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?' [2013] 16 PER 48 & Opperman A 'Good faith: a Bona Fide get-out-of-jail-free card or a failed breakaway attempt' (2007) *WITHOUT PREJUDICE* 11.

³¹ See *Sasfin (Pty) Ltd v Beukus* (149/87) [1988] ZASCA 94; [1989] 1 All SA 347 (A), *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) & *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

³² Brand FDG 'The role of good faith, equity and fairness in the South African law of contract – the influence of the common law and the Constitution' (2009) 126 *SALJ*.

³³ Brand FDG 'The role of good faith, equity and fairness in the South African law of contract – the influence of the common law and the Constitution' (2009) 126 *SALJ* 72.

What this indicates is that good faith will continue to acquire a limited role in contract law in preference of existing established legal principles and judges are cautioned not be quick in incorporating good faith in contract law. This might explain to some extent the reluctance and hands off approach adapted by South African courts insofar as the enforcement of unfair contracts is concerned. It follows that courts often guard against setting a contract aside because it is deemed unfair. This is because one's sense of what is fair might be different from another.³⁴ It is argued that the court's failure to recognise the central importance of good faith appears to fall short to provide an independent substantive equity defence in contract law.³⁵

The Constitution has introduced horizontal application of fundamental rights and foundational values to the law of contract through the portals of sections 8(1) to 8(3) and section 39(2).³⁶ This means that;

'the law of contract which regulates transactions between private parties, may be tested for compliance directly against a provision in the Bill of Rights as contained in sections 8(1) to 8(3), or the law of contract may be adapted in accordance with the values of human dignity, equality and freedom under section 39(2)'.³⁷

The court in *Barkhuizen v Napier*,³⁸ preferred an indirect horizontal approach. This means that the court must determine whether the term challenged is contrary to public policy as evidenced

³⁴ *Sasfin (Pty) Ltd v Beukus* (149/87) [1988] ZASCA 94; [1989] 1 All SA 347 (A).

³⁵ Louw AM 'Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?' [2013] 16 *PER* 57.

³⁶ S 8(1) "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state", S 8 (3) " When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court— (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1) & S 39 (2) " When interpreting the Bill of Rights, a court, tribunal or forum".

³⁷ Moseneke D 'Transformative constitutionalism: Its implications for the law of Contract' (2009) 1 *STELL LR* 9. 2007 (5) SA .

³⁸ 2007 (5) SA 323 (CC).

by the constitutional values, in particular, those found in the Bill of Rights. The court outlined that this approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.³⁹

Generally, courts have been slow in allowing the fundamental rights or values of the Constitution to influence the law of contract. Courts often acknowledge that the duty to develop the law of contract is in harmony with the Constitution but stop short of embracing the consequences.⁴⁰ It seems courts value the principle of *pacta sunt servanda* which gives effect to the central constitutional values of freedom and dignity. Further, self-autonomy or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.⁴¹

Regardless of the abovementioned imperatives of the Constitution, courts prefer to be guided and influenced by precedent of cases decided some of them prior to the Constitution. The difficulty with this is that such cases were decided in the absence of the abovementioned constitutional provisions and they may not be fully aligned with the constitutional imperatives.

Reference to pre constitution cases⁴² may give rise to undesirable and unintended results. The law of contract has continued to be stagnant and it has been out of step with reality. This is because some of the old cases that have remained a landmark in the law of contract do not promote the spirit of *ubuntu* and the principle of good faith.

In *Sasfin (Pty) Ltd v Beukes*,⁴³ Sasfin was a company that carried on business as a financier. Beukes was an anaesthesiologist. The parties entered into a discounting agreement in terms of which Beukes was obliged to sell Sasfin any book debts he wished to sell. The purchase of the

³⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 30.

⁴⁰ Moseneke D 'Transformative constitutionalism: Its implications for the law of Contract' (2009) 1 *STELL LR* 10.

⁴¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57.

⁴² See *Barkhuizen v Napier* 2007 (5) SA 323 (CC), *Breedenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (5) SA 304 (GSJ), *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) & *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

⁴³ 1989 1 All SA 347 (A).

book debts by Sasfin was governed by the discounting agreement. On the same date, Beukes executed a deed of cession in favour of Sasfin, Sassoons and Simplex. A dispute arose between the parties. Sasfin claimed that Beukes had breached certain warranties contained in the discounting agreement and purported to cancel the agreement. Beukes disputed any breach on his part as well as Sasfin's right to cancel. He further contended that Sasfin, on the other hand, had breached certain of the terms of the discounting agreement. Sasfin instituted motion proceedings in the Witwatersrand Local Division.

The majority judgment held that the interests of the community or public are of paramount importance in relation to the concept of public policy. The court weighed fairness against legal certainty, and held that no court should shrink from the duty of declaring a contract contrary to public policy when the occasion so demanded. However, the court cautioned that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases. The court concluded that one must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.⁴⁴ The court dismissed Sasfin's application with costs on the ground that the deed of cession was contrary to public policy and therefore invalid and unenforceable. Sasfin appealed this decision.⁴⁵

In *Afrox Healthcare Bpk v Strydom*,⁴⁶ the court had to decide on an issue where the respondent, Strydom, had been admitted to the hospital for surgery and post-operative medical treatment. On his admission, the parties concluded an agreement, that Afrox's nursing staff would treat him in a professional manner and with reasonable care. The admission document, however, signed by Strydom during his admission to the hospital, contained an exemption clause, providing that he absolved the hospital and/or its employees and/or agents from all liability and indemnified them from any claim instituted by any person for damages or loss of whatever nature.⁴⁷ The court held that the exemption clause found in the admission document was not objectively

⁴⁴ *Sasfin v Beukes* 1989 (1) SA 347 (A) 8C-D.

⁴⁵ *Sasfin (Pty) Ltd v Beukes* 1989 1 All SA 347 (A).

⁴⁶ 2002 6 SA 21 (SCA).

⁴⁷ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 1-3.

unexpected. As a result there is no legal duty on Afrox to bring this clause to the respondent's attention. Therefore, the respondent was in terms of the clause bound as if he had read the clause and explicitly agreed to it.

The court in *Brisley v Drotsky*⁴⁸ had to decide whether the principles of *bona fide* can be invoked to enforce an ejection order. In this case, the lessor claimed the ejection of the lessee. The lessee claimed that the contractual clause in dispute ought not to be enforced because it would be in the circumstances be unreasonable, unfair and in conflict with the principles of *bona fide*.⁴⁹ The court found in favour of the lessor and it upheld the non-variation clause on the basis that it was a self-imposed formality.

The SCA in the two last cases maintained the same approach to good faith in contract law.⁵⁰ The court in *Brisley v Drotsky* held that it cannot set aside a valid contractual provision as that would result in the principle of *pacta sunt servanda* largely ignored because the enforceability of contractual provisions will depend on what a particular judge in the circumstances considered reasonable and fair. The court continued to observe that the measure thereof would not be the law but the judge.⁵¹ It was further held that with regard to the status of good faith it should be more widely accepted that good faith operates indirectly, in that it is always mediated by other, more specific rules or doctrines.⁵²

In *Barkhuizen v Napier*⁵³ inferences were drawn from the remarks made in *Brisley v Drotsky* and it was held that as the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance, good faith is given effect to by the existing common law rule that contractual clauses that are impossible to comply with should not be enforced. Ngcobo J questioned the limited role that is being played by

⁴⁸ 2002 (4) SA 1 (SCA).

⁴⁹ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 11 (A).

⁵⁰ See *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA); [2002] 4 All SA 125 (SCA) at para 4; *Brisley v Drotsky* at para 9.

⁵¹ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 23.

⁵² *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 26.

⁵³ 2007 (5) SA 323 (CC).

the notion of good faith in view of the new constitutional dispensation but found it unnecessary to address the issue. The court did not therefore in this case deal with the issue of whether the limited role of good faith under the Constitution is sufficient or not.⁵⁴

The court in *Barkhuizen v Napier* had to decide on the constitutionality of a time limitation clause in a short-term insurance policy. The court in this case developed a two stage approach in determining fairness. The first question entailed whether the clause itself is unreasonable.⁵⁵ This involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. The extent to which the contract was freely and voluntarily concluded is an important factor as it will determine the weight that should be afforded to the values of freedom and dignity.⁵⁶ The second question involves an inquiry into the circumstances that prevented compliance with the clause. The question posed is whether it is unreasonable to insist on compliance with the clause or impossible for the person to comply with the clause.⁵⁷

It was held in *Barkhuizen v Napier* that there is no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness. The reasons advanced were that the Constitution recognises that the right to seek judicial redress may be limited in certain circumstances where it is sanctioned by a law of general application and where the limitation is reasonable and justifiable. The Constitution thus recognises that there may be circumstances when it would be reasonable to limit the right to seek judicial redress. This too reflects public policy.⁵⁸

It is on the above premises that the argument advanced is that public policy alone is not sufficient to set aside an unfair contract. What is needed more is good faith to harness the consequences

⁵⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 82.

⁵⁵ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 56.

⁵⁶ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57.

⁵⁷ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 58.

⁵⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 48.

that might occur due to enforceability of an otherwise valid but unfair contract. The requirement of good faith will preclude one from insisting on compliance to a valid contractual clause when it will potentially result in unjust outcomes.⁵⁹ Courts have adopted a narrow approach to good faith. Economic interests, legal certainty and the principle of *pacta sunt servanda* have been valued above the perceived open-ended concepts such as good faith and fairness.⁶⁰ It has been, however, correctly argued that South Africa's history and the vulnerability of most of the people necessitates the development of good faith.

2.2 Recent developments in contract law

Different courts in South Africa have been applying different approaches towards the notion of good faith. The following discussion seeks to highlight the differences and the effect they have on the role of good faith in modern contract law.

2.2.1 High Court decisions

The Western Cape High Court in *Combined Developers v Arun Holdings and 2 others*⁶¹ refused to enforce a contractual provision which was described as "startlingly draconian and unfair". The court in this case had to decide on whether clause 7.2 of the lease agreement properly construed and where the non-payment of R86.57 is common cause, failure to pay the said amount would trigger a claim of R7.6 million. The court had to also decide whether such an approach to clause 7.2 would be in accordance with public policy.⁶²

The court in this case heavily relied on the realms of public policy which embraces the principle of good faith. The court held that the implementation of clause 7.2 as sought by applicants is so startlingly draconian and unfair that this particular construction of the clause must be in breach of public policy. It was stated that some form of communication to pay a measly sum of R86.57 immediately following payment of the large principal sum should surely have been required. In

⁵⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 79.

⁶⁰ Opperman A 'Good faith: a Bona Fide get-out-of-jail-free card or a failed breakaway attempt' (2007) *WITHOUT PREJUDICE* 12.

⁶¹ (6105/2013) [2013] ZAWCHC 132; 2015 (3) SA 215 (WCC) (5 August 2013).

⁶² *Combined Developers v Arun Holdings and Others* (6105/2013) [2013] ZAWCHC 132; 2015 (3) SA 215 (WCC) (5 August 2013) page 17.

other words, it cannot be consistent with public policy that a demand, in an ambiguous form can first be met with silence because R86.57 has not been paid and then a week later the full weight of clause 7.2 be applied by the applicant to gain massive commercial advantage to the significant disadvantage of respondent.⁶³ The court in this case heavily relied on the dictates of good faith. Similarly, the court in *P Christodolous & Sons Textiles CC and another v Woolworths (Pty) LTD*⁶⁴ had to decide on the fairness of the contract by evaluating the conduct of one of the contracting parties. On the day of opening of the franchise which was chaotic and without prior discussion, Woolworths presented the franchisee with an addendum to the franchise agreement which needed to be signed urgently. The franchisee during this period did not have a moment to read nor consider the contract. It was led to believe by Woolworths that the document was an addendum which dealt with "turnovers, how to conduct the business and commission structures". Given the above circumstances and the extreme pressure, the franchise representative signed the addendum. Unbeknown to the franchisee, the addendum, extended the franchise agreement only until September 2013 and not 2019 as had always been understood by the parties.⁶⁵

In ordering that the agreement be rectified to extend the term of the franchise agreement until 2019, the court found that Woolworths' conduct was sufficient to constitute a misrepresentation which had the effect of misleading the franchisee when signing the addendum.⁶⁶ Further, it was held that the terms of the agreement did not reflect the common intention of the parties. Properly construed the contract between the parties required the parties regardless of the uncertainty to adhere to the principle of good faith which required that the parties act honestly in their commercial dealings. The parties' contractual good faith obligations towards one another further led the court to the conclusion that Woolworths was required not to promote its own

⁶³ *Combined Developers v Arun Holdings and Others* (6105/2013) [2013] ZAWCHC 132; 2015 (3) SA 215 (WCC) (5 August 2013) page 26.

⁶⁴ *P Christodolous & Sons Textiles CC and another v Woolworths (Pty) LTD* ZAWCHC unreported Case number: 3541/12 (12 June 2013).

⁶⁵ *P Christodolous & Sons Textiles CC and another v Woolworths (Pty) LTD* ZAWCHC unreported Case number: 3541/12 (12 June 2013).

⁶⁶ *P Christodolous & Sons Textiles CC and another v Woolworths (Pty) LTD* ZAWCHC unreported Case number: 3541/12 (12 June 2013).

interests in an unreasonable manner against its franchisee, as it had purported to do.⁶⁷ In the absence of the application of good faith, the contract would have otherwise been enforceable since it satisfied all the elements of a valid contract. One would argue that the franchise should have carefully read the addendum before signing. However, taking into account that the addendum was presented to the franchise during a busy time and was misrepresented, the franchise would not have possibly applied their mind when signing the addendum.⁶⁸

Furthermore, in *Silent Pond Investments CC v Woolworths (Pty) Ltd*,⁶⁹ the court upheld an interdict preventing Woolworths from establishing a retail outlet in a shopping complex located adjacent to Silent Pond's petrol station where a Woolworth's convenience store was operated. The two parties had entered into a contract to the effect that:

'in implementation of this agreement the parties hereto undertake to observe the utmost good faith and they warrant in their dealings with each other that they shall neither do anything nor refrain from doing anything which might prejudice or detract from the rights, assets or interest of the other of them'.⁷⁰

Notwithstanding that there was no clause in the agreement that gave Silent Pond an exclusive trading area, the court held that Woolworths was not acting in good faith. It held that Woolworths had actively taken steps to reduce the profitability of Silent Pond's business and, by so doing, it had placed itself in a position in which its duty to Silent Pond conflicted with its own interests. The court further held that Silent Pond was entitled to have enforced the good faith clause in its agreement with Woolworths and to obtain an interdict that prevented Woolworths from opening a store in the adjacent shopping centre.⁷¹

⁶⁷ *P Christodolous & Sons Textiles CC and another v Woolworths (Pty) LTD* ZAWCHC unreported Case number: 3541/12 (12 June 2013).

⁶⁸ *P Christodolous & Sons Textiles CC and another v Woolworths (Pty) LTD* ZAWCHC unreported Case number: 3541/12 (12 June 2013).

⁶⁹ 2011 (6) SA 343 (D).

⁷⁰ *Silent Pond Investments CC v Woolworths (Pty) Ltd* 2011 (6) SA 343 (D).

⁷¹ Davis T 'Courts give teeth to obligation to act in good faith' available at <https://www.cover.co.za/courts-give-teeth-to-obligation-to-act-in-good-faith/> (accessed 4 September 2017).

The case of *Uniting Reformed Church de Doorns v President of the Republic of South Africa*⁷² is also instructive. In this case the matter concerned the constitutional validity of clause 16 contained in each of the three notarial lease agreements entered into between the applicant as lessor and the Department of Local Government, Housing and Agriculture as lessee.⁷³ Clause 16 of the said agreement contained a provision in terms of which the applicant was obliged at the end of a 20 years period to transfer the property free of charge to the House of Representatives.⁷⁴

The applicant disputed the third respondent's right to enforce the lease agreements contending that the agreements are against public policy, void and unenforceable.⁷⁵ The applicant advanced two grounds for its contention. First, that at the time of the conclusion of the lease agreement between it and the State there was unequal bargaining power. Secondly, the enforcement of clause 16 of the said agreements would result in the arbitrary deprivation of its property in contravention of section 25 of the Constitution.⁷⁶ The third respondent disavowed any argument on inequality of power and argued that there was no evidence to support the applicant's contention that it was in a weaker position than the State at the time of the conclusion of the said agreements and that the effect thereof was that the contract was harmful to the public interest.⁷⁷

The court highlighted that there are two competing interests which should be borne in mind when considering fairness of the provisions of the lease. On the one hand, public policy requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken (freedom of contract doctrine). Essential to this doctrine is the idea that individuals should be left free to conclude contracts and that the role of courts is merely to enforce contracts and that judicial intervention should be kept at minimum.⁷⁸ On the other end

⁷² *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC).

⁷³ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) para 2.

⁷⁴ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) para 4.

⁷⁵ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) para 6.

⁷⁶ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) para 9.

⁷⁷ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) para 23.

⁷⁸ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) para 32.

of the scale, there is public policy consideration which recognises that all persons have a right to seek judicial redress and that the role of the courts is not merely to enforce contracts but also to ensure that a minimum degree of fairness, which will include consideration of the relative position of the contracting parties is observed.⁷⁹

The court concluded that provisions of clause 16 in seeking to deprive the applicant of its properties are unnecessarily overbroad. The enforcement of clause 16 would have completely extinguished the applicant's ownership in the relevant properties for which the applicant would receive no compensation. It is clear that the provisions of clause 16 constituted a disguised form of expropriation which the court would not allow to stand.⁸⁰ Therefore, clause 16 of the said agreements sought to deprive the applicant of its properties without creating an obligation on the third respondent to pay compensation, and the court concluded that this amounts to unfairness and is contrary to public policy.⁸¹

These cases demonstrate that the Western Cape High courts have not been hesitant to intervening in contractual relationships when called to do so by one of the parties.⁸² The High Courts have been showing some willingness to embrace the notion of good faith in contracts.

2.2.2 Supreme of Appeal Court decisions

The court in case of *Potgieter & Another v Potgieter*⁸³ had to decide on whether the substantial variation of the trust deed pertaining to the Buffelshoek Familie Trust, pursuant to an agreement between the founder and the trustees of the trust, is legally binding. The appellants contended that the variation was invalid and of no force. This contention was based on the argument that the variation was not done within the ambits of clause 21 which required their consent. Subsequently, the variation placed them at a disadvantaged position. The respondents the on the other hand took up the contrary position that the variation agreement was valid and

⁷⁹ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) para 34.

⁸⁰ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) para 41.

⁸¹ *Uniting reformed church de Doorns v President of the Republic of South Africa* 2013 (5) 205 (WCC) 40.

⁸² Van Rensburg WJ 'Do our courts interfere in unfair contracts?' Cliffe Dekker Hofmeyr Publications 2 December 2015 available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2015/dispute-resolution/dispute-resolution-matters-2-december-do-our-courts-interfere-in-unfair-contracts.html> (accessed 20 September 2017).

⁸³ 2012 (1) SA 637 SCA.

enforceable.⁸⁴ The SCA in this case had an opportunity to adopt a more progressive approach towards good faith. However, the court overturned a judgment of the Gauteng High Court where it was found that:

‘under our new constitutional dispensation it is part of our contract law that, as a matter of public policy, our courts can refuse to give effect to the implementation of contractual provisions which it regards as unreasonable and unfair’.⁸⁵

In reversing this judgment as being fundamentally unsound, the SCA was adamant in stating that 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.⁸⁶

The SCA continues to favour sanctity of contract over good faith as was shown in the recent case of *Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd*.⁸⁷ This case involved an appeal against the judgment of the Gauteng Local Division of the High Court. It arises from an application in which the appellant, Mohamed’s Leisure Holdings (Pty) Ltd, the owner and lessor in terms of a written lease agreement of immovable property, sought an order for the eviction of the respondent, Southern Sun Hotel Interests (Pty) Ltd. The eviction was sought on the basis that the respondent had breached clause 20 of the agreement by failing to make payment of the rental on due date.⁸⁸ It was a material term of the agreement that should the respondent fail to pay the rental on due date, then the appellant would be entitled to cancel the lease and retake possession of the property.⁸⁹

Important to note is that during the period of the lease the respondent maintained regular and prompt payment of the rental in terms of the agreement, and the reason for the non-payment of the rental was due to the fault of Nedbank to process the rental money into the appellant’s account. Nedbank further admitted to the appellant that the fault was theirs and it was caused

⁸⁴ *Potgieter & Another v Potgieter N.O. & Others* 2012 (1) SA 637 (SCA) para 1.

⁸⁵ *Potgieter & Another v Potgieter N.O. & Others* 2012 (1) SA 637 (SCA) para 31.

⁸⁶ *Potgieter & Another v Potgieter N.O. & Others* 2012 (1) SA 637 (SCA) para 32.

⁸⁷ (183/17) [2017] ZASCA 176.

⁸⁸ *Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* (183/17) [2017] ZASCA 176 para 1.

⁸⁹ *Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* (183/17) [2017] ZASCA 176 para 5.

by change in Nedbank's process.⁹⁰ The error caused by Nedbank continued for a period of three months and at this point the appellant had invoked clause 20 of the lease agreement which entitled the appellant to evict the respondent upon non-payment, despite Nedbank continuously admitting fault.⁹¹

The High Court first accepted that the respondent breached clause 20 of the lease agreement. However, it was also in light of the above circumstances which led to the non-payment of rental that the High Court reasoned that the implementation of the cancellation clause would be manifestly unreasonable, unfair and offend public policy. Thus, it concluded that the common law principle, *pacta servanda sunt*, should be developed by importing or infusing the principles of *ubuntu* and fairness in the law of contract. Further, the High Court held that the judicial precedent set in *Venter v Venter*⁹² (which dealt with the principle of *pacta sunt servanda*) is no longer good law and cannot be applied in the new Constitutional era.⁹³

The SCA in reaching its decision considered the objective terms of the lease agreement. The SCA further balanced and weighed the two considerations, namely the principle of *pacta sunt servanda* and the considerations of public policy which includes constitutional imperatives.⁹⁴ The SCA therefore held that:

'The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract'.⁹⁵

The court therefore reached the conclusion that the fact that a term in a contract is unfair or

⁹⁰ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* (183/17) [2017] ZASCA 176 para 7.

⁹¹ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* (183/17) [2017] ZASCA 176 para 8.

⁹² *Venter v Venter* 1949 (1) SA 768 (A).

⁹³ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* (183/17) [2017] ZASCA 176 para 1.

⁹⁴ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* (183/17) [2017] ZASCA 176 para 21

⁹⁵ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* (183/17) [2017] ZASCA 176 para 23.

may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue.

There is no evidence that the respondent's constitutional rights to dignity and equality were infringed. It was impermissible for the High court to develop the common law of contract by infusing the spirit of *ubuntu* and good faith so as to invalidate the term or clause in question.⁹⁶ B Mupangavanhu correctly holds that the enforceability of a general duty to negotiate in good faith remains a grey area in South African law of contract.⁹⁷

The SCA recently dealt with the issue of negotiating in good faith in the case of *Roazar CC V The falls Supermarket*⁹⁸ and unsurprisingly the SCA rejected that parties have a general duty to negotiate in good faith. The court in this case had to decide whether a contract can be terminated without entering into negotiations conducted in good faith. The respondent in this case was faced with eviction due to fact that the lease agreement was not renewed by the appellant and the respondent alleged that the negotiations that were done were not conducted in good faith despite the lease agreement stipulating that parties may negotiate to renew the lease agreement on terms agreed by both parties.⁹⁹

The court held in declining to endorse the principle of good faith in contract law, particularly on the issue of negotiating in good faith, that the respondent did not state how long the negotiations were required to take place and the contract is silent on this issue. It also does not state what criterion would be used to determine whether either of the parties was negotiating in good faith.¹⁰⁰ Further, in instances of breach, there are adequate legal remedies available. It is difficult to conceive how a court, in a purely business transaction, can rely on *ubuntu* to import a term that was not intended by the parties, to deny the other party the right to rely on the terms

⁹⁶ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd* (183/17) [2017] ZASCA 176 para 30.

⁹⁷ Mupangavanhu B '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* 156.

⁹⁸ (232/2017) [2017] ZASCA 166.

⁹⁹ *Roazar CC V The falls Supermarket* (232/2017) [2017] ZASCA 166 para 4.

¹⁰⁰ *Roazar CC V The falls Supermarket* (232/2017) [2017] ZASCA 166 para 22.

of the contract to terminate it.¹⁰¹

As seen above, the SCA has not been positively contributing to the role of good faith in contract law. The court continues to adopt a conservative approach it has been applying a decade ago neglecting the effect of the Constitution and the court's proactive role in developing common law as envisaged by the Constitution.¹⁰²

2.2.3 Constitutional Court decisions

Regardless of the approach the SCA chooses to apply, there are statements found in Constitutional Court judgments that indicate the shift of the tide in this area of law. It was held in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* that:

'contract law cannot confine itself to colonial tradition alone...values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution, and indeed it is highly desirable, in fact necessary, to infuse the law of contract with constitutional values including values of ubuntu which aspire much of our constitutional compact'.¹⁰³

The court in this case was required to consider the circumstances in which the Court should intervene in order to infuse the law of contract with constitutional values as a result of a lease agreement concluded by the parties, which had arbitrary effects. Further, the case concerned of the development of the common law of contract in the light of the spirit, purport and objects of the Bill of Rights in our Constitution.¹⁰⁴

The Constitutional Court in *Botha and Another v Rich NO and Others* relied heavily on fairness in their decision.¹⁰⁵ The case concerned an issue of whether the respondents were obliged, in terms of s 27(1) of the Alienation of Land Act (the Act) to register the transfer of property in the name of the first applicant after more than half of the purchase price of the immovable property

¹⁰¹ *Roazar CC V The falls Supermarket* (232/2017) [2017] ZASCA 166 para 24.

¹⁰² S 39 (1) of the Constitution of the Republic of South Africa, 1996.

¹⁰³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 23.

¹⁰⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 1.

¹⁰⁵ *Botha and Another v Rich NO and Others* [2014] ZACC 11.

had been paid. Moreover, the matter concerned the constitutionality of an enforcement of a cancellation clause in a contract of sale of immovable property where more than 50 percent of the purchase price has been paid. The applicants contended that cancellation, in these circumstances would be contrary to public policy.¹⁰⁶

The Trust wanted to cancel the transfer of the property to the applicant when the applicant defaulted on payment of instalments. The applicant contended that cancellation without restitution of the amount paid towards the purchase price is contrary to public policy. The cancellation of the contract was found to be hostile to the community, contrary to the public policy and thus unenforceable.¹⁰⁷

The court held that the Constitution is located in a history which involves the transition from a society based on injustice and exclusion from the democratic process to one founded on the supremacy of the Constitution, the rule of law and the values of human dignity and equality. The guidance provided by s 39(2) of the Constitution to statutory interpretation under our constitutional order means that all statutes must be interpreted through the prism of the Bill of Rights. Therefore, s 27(1) of the Act when interpreted, must promote the spirit, purport and objects of the Bill of Rights.¹⁰⁸

The court concluded that the Act seeks to ensure fairness between sellers and purchasers. Its provisions are in accordance with the constitutional values of reciprocal recognition of dignity, freedom and equal worth of others, in this case those of the respective contracting parties. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Good faith is the lens through which one comes to understand contracts in that way. In this case, good faith is given expression through the principle of reciprocity and the *exceptio non adimpleti contractus*.¹⁰⁹ It is relying on the above interpretation that the court ordered the Trustees to transfer the property to the applicant on condition that Mrs Botha repays the

¹⁰⁶ *Botha and Another v Rich NO and Others* [2014] ZACC 11 para 2.

¹⁰⁷ *Botha and Another v Rich NO and Others* [2014] ZACC 11 para 19.

¹⁰⁸ *Botha and Another v Rich NO and Others* [2014] ZACC 11 para 28.

¹⁰⁹ *Botha and Another v Rich NO and Others* [2014] ZACC 11 para 46.

outstanding amount.¹¹⁰

The above position shows a disjunction between the approaches of the Constitutional Court and the SCA. According to Hutchison and Pretorius the tension between the two courts is causing some degree of uncertainty in the legal and commercial field.¹¹¹

In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,¹¹² important remarks were made about the role of good faith. It was held that:

‘good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. Further, many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in South Africa’.¹¹³

Indeed, there is a need for greater recognition of good faith in South Africa. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. Unequal bargaining power may thereby lead to exploitation of the party in a weaker position.¹¹⁴

2.3 The need for good faith in contract law

This part seeks to emphasise on the need for the principle of good faith to be given an expansive role in contract law. Louw argues that it seems strange that a concept such as good faith - which deals so fundamentally with issues of fairness and fair dealing between individuals, should remain so elusive or under-valued in the law of contract. This is more especially in light of the Constitution and the effect that good faith might have in developing the spirit, purport and the

¹¹⁰ *Botha and Another v Rich NO and Others* [2014] ZACC 11 para 51.

¹¹¹ Hutchison and Pretorius (eds) *The Law of contract in South Africa* (2017) 34.

¹¹² 2012 1 SA 256 (CC).

¹¹³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 23-24.

¹¹⁴ See Hawthorne L ‘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)17 *PER/PELJ* 2832 & Y Mupangavanhu ‘Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008’ *De Jure* (2015) 116.

objects of Bills of Right.¹¹⁵

Freedom of contract remains a foundational value in the South African legal system and its protection is in the interest of economic growth.¹¹⁶ The argument to a certain extent is that - freedom of contract should remain in commercial dealings where parties ought to have equal bargaining power and only minimal judicial intervention should be allowed. However, freedom of contract should not be unnecessarily imposed on contractual relations where parties have unequal bargaining power. Although good faith is also needed in commercial dealings, it is needed even more in ordinary contractual relations especially when there is unequal bargaining power. Having said that, it was noted in *Afrox Healthcare Bpk v Strydom*¹¹⁷ that inequality of bargaining power in itself does not justify the conclusion that a term which favours the "stronger" party will necessarily be unfair. It must be accepted that inequality of bargaining power is a factor which together with other factors can play a role in the consideration of public policy.¹¹⁸ It was acknowledged in *Barkhuizen v Napier* that many people in South Africa conclude contracts without any bargaining power and without understanding what they are agreeing to and that will often be a relevant consideration in determining fairness.¹¹⁹ As such, recent case law should seek to align the law with this reality.

Opperman correctly argues that courts should steer clear of the too-narrow concept of contract law as completely divorced from values that underpin the society in which it operates.¹²⁰ She further contends that courts must be mindful, especially in light of South Africa's socio-economic and historical past that contracts entered into are often between parties of unequal bargaining power. These parties frequently comprise powerful companies on one hand, poor and

¹¹⁵ Louw AM 'Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?' [2013] 16 *PER* 48.

¹¹⁶ Hutchison A 'Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?' (2011) 128 *SALJ* 290.

¹¹⁷ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).

¹¹⁸ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12.

¹¹⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 65.

¹²⁰ Opperman A 'Good faith: a Bona Fide get-out-of-jail-free card or a failed breakaway attempt' (2007) *WITHOUT PREJUDICE* 12.

vulnerable individuals on the other. The former, using its superior economic standing, can more easily disregard any contractual undertaking with a view to promote its own interests at the expense of the other party.¹²¹ This however, is in blatant disregard of the doctrine of good faith and the philosophy of ubuntu.¹²²

2.4 Some views from academics

Louw notes that good faith continues to be seen as one of the fundamental principle in contract law even though it continues not to be the most important principle.¹²³ This is mostly attributed to the conservative approach often used by SCA as discussed above.¹²⁴ Louw argues that:

‘one might surmise that the necessary development of the role of good faith in contract could probably be effected merely by a reconsideration of the SCA's absurd treatment of good faith vs. freedom of contract - which are both frequently referred to as underlying principles of our law of contract, but which have had such varied careers in the SCA’.¹²⁵

Unfortunately as shown in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interest (Pty) Ltd*,¹²⁶ the approach of the SCA has not changed in this regard.

Opperman in her article correctly notes that:

‘good faith and its role in the South African legal system is a principle that is becoming increasingly necessary to unpack.’¹²⁷ It is quickly becoming apparent that, should the

¹²¹ Opperman A ‘Good faith: a Bona Fide get-out-of-jail-free card or a failed breakaway attempt’ (2007) *WITHOUT PREJUDICE* 12.

¹²² Opperman A ‘Good faith: a Bona Fide get-out-of-jail-free card or a failed breakaway attempt’ (2007) *WITHOUT PREJUDICE* 12.

¹²³ Louw AM ‘Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ [2013] 16 *PER* 51-52.

¹²⁴ See part 2.2.2

¹²⁵ Louw AM ‘Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?’ [2013] 16 *PER* 57.

¹²⁶ (183/17) [2017] ZASCA 176.

¹²⁷ Opperman A ‘Good faith: a Bona Fide get-out-of-jail-free card or a failed breakaway attempt’ (2007) *WITHOUT*

courts fail to lay down the law regarding the ambit of this concept, paying particular attention both to the extent and the limitations of its application; South African contract law will be caught in a legal quagmire'.¹²⁸

As shown in the Western Cape High Court and Constitutional Court decisions,¹²⁹ the courts are willing to lay down the parameters and scope of good faith when the opportunity presents itself. However, the SCA on one the other hand, refuses to accept and potentially incorporate the principle of good faith in contract law. As such, the status of the principle of good faith in contract law will remain unclear and parties will often be unsure to what extent they need to rely on good faith. Bhana also argues that it is the application of the legal concepts by courts which yields to unsatisfactory results.¹³⁰ The “all or nothing” approach which courts normally apply without finding middle ground through the lens of good faith is problematic.¹³¹ The law needs to be developed to allow for a more active role of good faith in South African law of contract.¹³²

While the above discussion of the Western Cape High Court’s decisions indicates its readiness to embrace the notion of fairness and good faith in contract law as demonstrated by recent cases, the position in the SCA is yet to change. Unfortunately, most cases do not go as far as the Constitutional Court and there hasn’t been a final pronouncement on the development of good faith.¹³³ The Constitutional Court has not been presented with a case where good faith was

PREJUDICE.

¹²⁸ Opperman A ‘Good faith: a Bona Fide get-out-of-jail-free card or a failed breakaway attempt’ (2007) *WITHOUT PREJUDICE* 11.

¹²⁹ See part 2.2.1 & 2.2.3.

¹³⁰ Bhana D ‘The role of judicial method in the relinquishing of the constitutional rights through contract’ (2008) 24 *SAJHR* 301.

¹³¹ Bhana D ‘The role of judicial method in the relinquishing of the constitutional rights through contract’ (2008) 24 *SAJHR* 304.

¹³² Opperman A ‘Good faith: a Bona Fide get-out-of-jail-free card or a failed breakaway attempt’ (2007) *WITHOUT PREJUDICE* 12.

¹³³ Mupangavanhu B ‘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* 156.

properly raised or pleaded. There is, however, indication of some willingness to develop the role, nature and scope of good faith in contract law. Both the High Court and Constitutional Court appear to be joining forces and are prepared for a robust role of good faith in contract law as opposed to the reluctance shown by the SCA.

2.5 Conclusion

South African courts are well-suited to ensure that the development of contract law promotes Constitutional values in an orderly and harmonious manner.¹³⁴ The fear often expressed about the development of good faith as a fundamental principle in contract law is uncalled for as courts are obliged to develop common law. Put differently, the Constitution and the value system which it embraces requires contract law to be in tune with reality. There is no doubt that there is an urgent need to change the status quo of a highly inequitable society, and to develop the law to ensure that it meets the need of the new South African society. As such, and in the light of the supremacy of the Constitution, its transformative role in the development of legal rules and doctrines is and should be the norm.¹³⁵ To privilege legal and commercial certainty in cases of rogue contracting would be to pursue an outcome that is at odds with our Constitution. Accordingly, the courts can no longer apply only legal rules that favour the perpetuation of a system of contract law that allows unfairness in the dealings between individuals.¹³⁶ The need to infuse the law of contract with principle of fairness and good faith cannot be over-emphasised.

Perhaps what is needed and what many academics hope for is an appropriate case to facilitate such development of the law before the Constitutional Court.¹³⁷ This is based on the premise evident in *Barkhuizen v Napier* and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* where the Constitutional Court left the door open for the development of the role of good faith. The court created the possibility that good faith may in the future become a substantive

¹³⁴ Moseneke D 'Transformative constitutionalism: Its implications for the law of Contract' (2009) 1 *STELL LR* 13.

¹³⁵ Louw AM 'Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?' [2013] 16 *PER* 68.

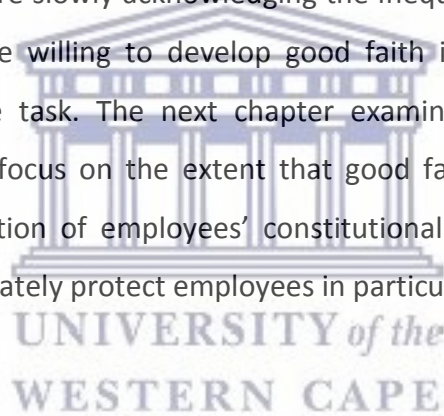
¹³⁶ Louw AM 'Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?' [2013] 16 *PER* 69.

¹³⁷ Louw AM 'Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?' [2013] 16 *PER* 46.

principle rather than marginalised since it is not opposed to the role it could play in contract law.¹³⁸

The current role of good faith is still not clear-cut. The role of good faith prior and post the Constitution has remained the same. What has been interesting to observe recently is a major call by academics for the scope of notion of good faith to be developed in contract law. The High Courts and the Constitutional Court have been reacting positively to the call for the development of good faith. This reaction and a progressive approach is what is needed to ensure that the majority of the people that are uneducated and illiterate are not exploited in contractual dealings. Courts seem to be developing and expanding concepts such as, good faith with the hope that the issues of unfairness and inequality will be eliminated.¹³⁹

It is commendable that courts are slowly acknowledging the inequalities suffered by contractual parties and are becoming more willing to develop good faith in response to these realities without shying away from the task. The next chapter examines the role of good faith in employment contract and will focus on the extent that good faith is needed in employment contracts to ensure full protection of employees' constitutional rights, when the established legal framework does not adequately protect employees in particular instances.



¹³⁸ See *Barkhuizen v Napier 2007 (5) SA 323 (CC) & Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)*.

¹³⁹ Mupangavanhu 'Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' *De Jure* (2015) 135.

CHAPTER 3: GOOD FAITH IN EMPLOYMENT CONTRACTS

3. Introduction

The previous chapter sought to illustrate the role that good faith continues to play in contract law in the constitutional dispensation. It was shown that the role that good faith continues to play in general contracts is not clear-cut. However, recent case law indicates that the tide is shifting; courts are slowly acknowledging the inequalities suffered by contractual parties and are becoming more willing to develop the principle of good faith in response to these realities, without shying away from the task. This chapter will focus on the extent that good faith is needed in employment contracts to ensure full protection of employees' constitutional rights, when the established legal framework does not adequately protect employees in particular instances.¹⁴⁰

This chapter is based on the concern that although ideally employment contracts are intended to be the product of negotiation between the contracting parties, they are often standard form contracts containing generic terms and conditions drafted by the employer's legal representative. Such contracts, particularly those concluded with unskilled and vulnerable people, are often reflective of the employer's interests.¹⁴¹ As such, this chapter provides an overview of some aspects of the nature of the employment relationship by evaluating the implied duty of good faith, the concept of subordination which is an inherent element in employment contracts and the concept of fairness as dealt with in the Constitution, in order to determine the extent to which good faith is needed in employment contracts. In addition, this chapter looks at the right to fair labour practices as provided for in legislation and interpreted by courts and tribunals. Further, this chapter also discusses instances where good faith has been directly and indirectly applied in influencing the desired outcomes.

¹⁴⁰ Bosch C 'The implied term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 30.

¹⁴¹ Cohen T 'Implying Fairness into the Employment Contract' (2009) 30 *ILJ* 2290.

3.1 Legal framework: Fair Labour Practice

3.1.1 Constitutional Perspective

The central and fundamental concept of South African labour law is fairness.¹⁴² Section 23(1) of the Bill of Rights provides that everyone has the right to fair labour practices, a right that is implied in every aspect of the employment relationship.¹⁴³ Louw holds that:

‘in the light of the universal coverage of the constitutional guarantee of fair labour practices, the relational nature of the employment contract and the dignity of work, it is submitted that an implied duty of fair dealing in the employment relationship must be taken to be a *naturalium* of the bargain between the contracting parties’.¹⁴⁴

It has been pointed out that the court in *Council for Scientific & Industrial Research v Fijen*,¹⁴⁵ held that the duty of good faith is reciprocal and the court suggested that it was more a *naturalia contractus* than an implied term (that is, it is not derived from the intention of the parties or inferred from the facts, but rather a term implied *ex lege*, which arises due to the existence of an employment contract). It was further suggested that the term ‘should be viewed as an *essentialium* of the employment contract, as without it the contract would not be one of employment’.¹⁴⁶

While labour legislation has been enacted to give content to the right to fair labour practices, the continued role of the common law as envisaged by section 8(3) of the Bill of Rights requires that a court must apply or, if necessary develop the common law to give effect to a right in the Bill of Rights, to the extent that legislation does not do so.¹⁴⁷ Louw argues that when compared to

¹⁴² Van Niekerk A et al *Law@work* 4 ed (2018) 45.

¹⁴³ Du Toit D et al *Labour Relations Law: A comprehensive guide* 6 ed (2015) 108.

¹⁴⁴ Louw A “‘The Common Law is ... not what it used to be’’: Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 3’ (2018) 21 *PER* 13.

¹⁴⁵ *Council for Scientific & Industrial Research v Fijen* 1996 17 *ILJ* 18 (A).

¹⁴⁶ Louw A “‘The Common Law is ... not what it used to be’’: Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 1’ (2018) 21 *PER* 14.

¹⁴⁷ Du Toit D et al *Labour Relations Law: A comprehensive guide* 6 ed (2015) 109.

other branches of law, South African legislation aims to give effect not only to constitutional values, but to the constitutional right to fairness – this is unique not only compared to labour law regulation in other jurisdictions, but it is also unique in comparison with other branches of law which lack the express constitutional entrenchment of fairness.¹⁴⁸

3.1.2. Role of labour law and interpretation of labour law - principle of fairness

Labour legislation is enacted to give content to the constitutional right to fair labour practices, to create a protective framework that regulates the fair and equal treatment of all employees, and to balance the interests of both employer and employee.¹⁴⁹ Section 186(2) of the Labour Relations Act, although not meant to provide an exhaustive list, lists instances of unfair labour practices.¹⁵⁰ Jordaan argues that the regulation of unfair labour practices in terms of the LRA is different from the general and wide regulation of fair labour practices in terms of the Constitution.¹⁵¹ The regulation in terms of the LRA merely extends the constitutional right to fair labour practices.¹⁵²

3.1.3 Common law Perspective

Employment contracts were once based and governed strictly by general contract law principles.¹⁵³ As a consequence, the express terms of a contract were regarded as being reflective of the mutual intention of the contracting parties and, in the interests of legal certainty, were enforced by the courts free from considerations of equity and fairness.¹⁵⁴ Moreover, in reality the unequal bargaining powers of the parties created employment contracts that reflected the will of the stronger party, the employer, and resulted in the creation of forms of subordination under what is presumed to be freely chosen agreements.¹⁵⁵ The traditional

¹⁴⁸ Louw A '“The Common Law is ... not what it used to be”: Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 1' (2018) 21 *PER* 9.

¹⁴⁹ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2273.

¹⁵⁰ Labour Relations Act 66 of 1995.

¹⁵¹ Jordaan B *Understanding the Labour Relations Act* (2009) 194.

¹⁵² Jordaan B *Understanding the Labour Relations Act* (2009) 194.

¹⁵³ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2272.

¹⁵⁴ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2272.

¹⁵⁵ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2272.

common law position thus gave little weight to considerations of fairness.¹⁵⁶

Cohen notes that in the past the common law of contract has been criticised as being an unsuitable vehicle for the delivery of fairness to the employment relationship. Furthermore, that 'the common law of contract is supposedly static and one-dimensional in nature, characterised by a strict adherence to the principles of freedom and sanctity of contract, therefore incapable of accommodating the relational nature of the employment contract'.¹⁵⁷

The inability of the application of the common law to deliver fairness and equity to the employment relationship influenced the new constitutional and statutory dispensation.¹⁵⁸ Differently put, 'the unfettered application of the common law of contract has thus been replaced by a fairness based dispensation, where considerations of equity trump a literal application of contractual terms'.¹⁵⁹ Cohen holds that the common law of contract, interpreted appropriately, is capable of making a meaningful and significant contribution to the achievement of fair labour practices.¹⁶⁰ As such, the employment contract now takes the form of a social compact in which the parties acquire rights and obligations shaped by principles of good faith and fairness that underpin the Constitution.¹⁶¹ At present, common law has a significant role to play in ensuring that fairness is imported into the employment relationship.¹⁶²

It is noteworthy that employment relationships in South Africa are heavily regulated by means of labour law.¹⁶³ It is however submitted that, although there is a great deal of labour legislation regulating the employment relationship, the common law remains relevant.¹⁶⁴ Workers falling

¹⁵⁶ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 1' (2018) 21 *PER* 9.

¹⁵⁷ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2271.

¹⁵⁸ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2273.

¹⁵⁹ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2273.

¹⁶⁰ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2271.

¹⁶¹ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2286.

¹⁶² Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 1' (2018) 21 *PER* 9.

¹⁶³ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 1' (2018) 21 *PER* 2.

¹⁶⁴ Bosch C 'The implied term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 29.

outside the definition of 'employee' are excluded from certain legislation such as, the Basic Conditions of Employment Act (BCEA) and the LRA, but their employment will still be regulated by their individual common law contracts of employment.¹⁶⁵ Consequently workers who fall outside the protection of labour legislation directly rely on section 23(1) of the Constitution.¹⁶⁶ However, it is trite in South African labour law that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the constitution before challenging that legislation as falling short of the constitutional standard.¹⁶⁷ Therefore, direct reliance on section 23(1) of the constitution proves to be challenging.

Courts have at least shown a willingness to develop the common law to specifically address the concept of fairness. In *Murray v Minister of Defence* it was held that all contracts of employment contain an implied term that employers must treat employees fairly.¹⁶⁸ This development is referred to as a high point as it expressly recognised the implied duty of fair dealing between employers and employees.¹⁶⁹ Moreover, in *Jonker v Okhahlamba Municipality & others* it was held that an ordinary breach of contract may infringe the employee's wider constitutional right to fair labour practices.¹⁷⁰ In *Tsika v Buffalo City Municipality* it was also emphasised that employers owe an implied duty of fairness to employees in terms of the contract of employment particularly with regard to pre-dismissal procedure.¹⁷¹

The above promising position was unfortunately overturned to a certain degree by the Supreme Court of Appeal decision in *SA Maritime Safety Authority v McKenzie* where it was held that the common law contract of employment contains no implied duty of fairness, and more specifically, no implied right not to be unfairly dismissed. Such an implication can only be drawn from the

¹⁶⁵ Le Roux R and Jordaan B *Contract of Employment* 2009:E1-2.

¹⁶⁶ Louw A "'The Common Law is ...not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 1' (2018) 21 *PER* 17.

¹⁶⁷ *SA National Defence Union v Minister of Defense & others* (2007) 28 *ILJ* 1909 (CC) para 51.

¹⁶⁸ *Murray v Minister of Defence* (2008) 29 *ILJ* 1369 SCA para 5.

¹⁶⁹ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 3' (2018) 21 *PER* 2.

¹⁷⁰ *Jonker v Okhahlamba Municipality others* (2005) 26 *ILJ* 782 (LC) para 22.

¹⁷¹ *Tsika v Buffalo City Municipality* (2009) 30 *ILJ* 105 E & *Mogothle v Premier of the Northwest Province & another* (2009) 30 *ILJ* 605 (LC) para 56.

common law or legislation. It is, however, possible that parties expressly or tacitly agree on the inclusion of such a duty. The court, however, accepted the possibility that the common law should be developed in the case of employees not covered by the LRA.¹⁷² Louw points out that the court in this case did not deny the existence of a general implied duty of fair dealing but denied the recognition of an implied term not to be unfairly dismissed, as the term derives from reading the LRA's dismissal provisions into the employment contract.¹⁷³ Louw further points out that this does not constitute a 'wholesale' rejection of the judicially recognised implied duty of mutual trust and confidence or of the constitutionally developed implied duty of fair dealing, as applied in the *Murray* case.¹⁷⁴

Labour legislation does not always protect an employee sufficiently in order to give full effect to the constitutional right to fair labour practices.¹⁷⁵ Louw provides examples of instances where the applicable labour legislation does not provide the relief needed in order to illustrate the need for the importation of the duty of fair dealing in employment relationships:

One example is where an employer may unfairly, and with an improper motive, present an employee with a decision to transfer him or her to another workplace in circumstances that may significantly impact on the employee's lifestyle or family responsibilities. It is important to note that the physical transfer of an employee to another workplace is not one of the listed unfair labour practices in section 186 (2) of the LRA. Hence Louw argues that, if the LRA does not protect such an employee, the common-law duty of fair dealing should provide a basis in terms of which the employee may access a court to obtain an order for specific performance or an award of damages, alternatively direct reliance on the Constitution.¹⁷⁶ Another possible scenario that may present itself is where, for example, psychological harm to an employee arises from persistent and

¹⁷² *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA).

¹⁷³ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 2' (2018) 21 *PER* 10.

¹⁷⁴ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 2' (2018) 21 *PER* 14.

¹⁷⁵ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 3' (2018) 21 *PER* 5.

¹⁷⁶ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 3' (2018) 21 *PER* 5.

abusive conduct by an employer, which does not amount to victimisation in terms of the LRA.¹⁷⁷

Louw argues that in all of these cases the implied duty of fair dealing could bring satisfactory relief to employees who 'may fall through the legislative cracks'.¹⁷⁸ Its recognition through the constitutional development of the common-law contract would not fall foul of section 8(3) of the Constitution, where the relevant legislation does not sufficiently give effect to these employees' right to fair labour practices.

As illustrated above, there is a need for the implied term of fair dealing where statutory protection falls short of the constitutional standard.¹⁷⁹ The direct reliance on a constitutional right, as shown above, proves to be challenging,¹⁸⁰ and vulnerable workers falling outside the ambit of labour legislation will often be left with no recourse in the absence of an implied term of fair dealing.

3.2 Nature of employment relationship

The foundation of an employment relationship is the contract of employment. Employment contracts have been largely influenced and continue to be influenced by common law principles.¹⁸¹ In the past, if there was an 'agreement' in place, the employee could be pressurised to accept almost anything. Although the employer was obliged to pay remuneration, such remuneration could easily be withheld if the employer was, for example, not satisfied with the services or due to the illness of the employee.¹⁸² However, there has been considerable change in the nature of employment contracts: they have developed from the position illustrated above which demonstrates employment relationship highly influenced by common law of contract to

¹⁷⁷ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 3' (2018) 21 *PER* 6.

¹⁷⁸ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 3' (2018) 21 *PER* 6.

¹⁷⁹ Louw A "'The Common Law is ... not what it used to be"*: Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 3' (2018) 21 *PER* 7.

¹⁸⁰ See fn 25.

¹⁸¹ Conradie M 'The Constitutional right to fair labour practices: A consideration of the influence and continued importance of the historical regulation of (un)fair labour practice pre-1977' (2016) 22 *Fundamina* 196.

¹⁸² Conradie M 'The Constitutional right to fair labour practices: A consideration of the influence and continued importance of the historical regulation of (un)fair labour practice pre-1977' (2016) 22 *Fundamina* 189.

traditional permanent employment, to flexible employment.¹⁸³ Du Toit opines that the ‘fourth industrial revolution’, which involves the emergence of digitalisation, automation and robotics etc, is accelerating the process by creating space for new forms of irregular work.¹⁸⁴ As a result, over the years the increase of competition and different demand for goods and services has displaced the contract of employment as the only foundation on which South African labour legislation is based.¹⁸⁵ Put differently, the changes in the nature of employment appeal less to the existing legislation and often, employees in these new forms of work are left with no legal protection available to them.¹⁸⁶

The disappointing reality is that the new forms of ‘work’ do not always fit within the parameters of the employment relationship.¹⁸⁷ The major changes in the nature of work itself have led to situations in which the legal scope of the employment relationship which usually determines whether or not those who work are entitled to protection by labour legislation does not accord with the realities of work arrangements.¹⁸⁸ Further, centralised legislation is not efficient in accommodating the abovementioned technological changes.¹⁸⁹ Effectively the above categories of workers are without the protection of legislation.¹⁹⁰

3.2.1 Subordination in employment relationship

South African labour legislation has been introduced to deal with the relation between a bearer of power and one who is not a bearer of power.¹⁹¹ The element of subordination is thus unavoidable in employment contracts. By definition, the employment contract is characterised

¹⁸³ Fourie ES ‘Non-standard workers: The South African context, international law and regulation by the European union’ (2008) 11 *PER* 110.

¹⁸⁴ Du Toit D ‘Platform Work and Social Justice’ (2019) 40 *ILJ* 1.

¹⁸⁵ Fourie ES ‘Non-standard workers: The South African context, international law and regulation by the European union’ (2008) 11 *PER* 143.

¹⁸⁶ Du Toit D ‘Platform Work and Social Justice’ (2019) 40 *ILJ* 4.

¹⁸⁷ Rosioru F ‘The changing concept of subordination’ (2009) 30 *Comparative Labor law & Policy Journal* 5.

¹⁸⁸ Rosioru F ‘The changing concept of subordination’ (2009) 30 *Comparative Labor law & Policy Journal* 18

¹⁸⁹ Du Toit D ‘Platform Work and Social Justice’ (2019) 40 *ILJ* 6.

¹⁹⁰ Theron J ‘Employment is Not What It Used to Be’ (2003) 24 *ILJ* 1251.

¹⁹¹ Davies PL & Kahn-Freund O *Kahn-Freund's Labour and the Law* (1983) 18.

by elements of supervision and control. A contract of employment can be defined as 'a contract between two persons, the master and servant, for letting and hiring of the latter's services for reward, the master being able to supervise and control the servant's work'.¹⁹² The abovementioned position is well described by Du Toit to the effect that 'in its inception it is an act of submission, in its operation it is a condition of subordination, this is loosely translated to contract of employment'.¹⁹³

One of the factors considered by South African courts in determining the existence of an employment relationship, as opposed to an independent contractor-client relationship, is probing whether the employer has a right of supervision and control over the employee.¹⁹⁴ Van Niekerk opines that the employer's control is likely to remain a significant indicator in the employment relationship.¹⁹⁵

The term 'subordination' describes the condition of being under the control of another, of having a boss that you have to answer to, and the inability to influence the manner the work is performed and to choose the work to be performed. All of this can be 'broadly described as democratic deficits in the employment relationship'.¹⁹⁶ Subordination is normally accompanied by the economic dependence of the worker, whose survival depends on the remuneration for their work.¹⁹⁷

However, Du Toit argues that part of the problem about employee subordination and employer's control is that it does not present itself as a problem; in fact subordination is argued to be a self-evident and defining feature of the employment relationship, as opposed to an independent contracting relationship.¹⁹⁸ The reason why subordination is not seen as a problem is that both the employer and employee are protected by the Bill of Rights. Therefore, the contractual

¹⁹² Grogan J *Workplace Law* 12 ed (2017) 14.

¹⁹³ Davies P.L & Freedland M.R *Kahn-Freund's Labour and the Law* 3 ed (1983) 18.

¹⁹⁴ Van Niekerk et al *Law@work* 4 ed (2018) 64.

¹⁹⁵ Van Niekerk et al *Law@work* 3 ed (2015) 64.

¹⁹⁶ Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 11.

¹⁹⁷ Rosioru F 'The changing concept of subordination' (2009) 30 *Comparative Labor law & Policy Journal* 11.

¹⁹⁸ Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 1.

subordination of the employee to the employer may not infringe the employee's basic rights guaranteed by the constitution such as the, right to dignity, privacy, freedom of religion, belief and opinion, expression, or movement.¹⁹⁹

Du Toit further argues that:

'the purpose of seeking a balance between the competing rights of the employer and employee is not to determine which right is more important than the other, but to interpret the two competing rights in such a manner that there is harmony instead of conflict.²⁰⁰ Consequently, the employee's subordination should be given a narrow meaning compatible with its stated purpose, namely that of achieving efficiency by enabling the employer to supervise the employee where necessary. On this basis subordination attains a measure of voluntarism in that the employer's role becomes one that is necessary for, and supportive of, employees' performance of their duties. By the same token, there would be no scope for inferring a duty of respect or deference beyond carrying out necessary instructions. The aim should be to construe lawful instructions on this basis in order to leave intact the employee's right to equality and dignity, in contrast to doing work that actually requires direction'.²⁰¹

The position outlined above however disregards the challenges and implications of subordination. 'The reality of subordination is that it infiltrates the contract as a whole, infusing other terms implied by the common law in the employer's favour and further wearing down the employee's position'.²⁰² Du Toit argues that this is illustrated by the mutual and 'seemingly neutral' duty of good faith.²⁰³ 'The seemingly neutral duty of good faith, translates into very

¹⁹⁹ Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 11.

²⁰⁰ Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 12.

²⁰¹ Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 12.

²⁰² Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 13.

²⁰³ Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than

specific duties placed on the employee to further the employer's business interests and avoid any conflict of interest with the employer. Unfortunately, there is no 'corresponding duty that rests on the employer to devote itself to its subordinate's interests beyond the payment of remuneration, providing reasonably safe working conditions, and compliance with specific duties prescribed by legislation'.²⁰⁴ In fact, when an employee fails to show subordination towards the employer, the employer may dismiss such employee on the grounds of insubordination.²⁰⁵

A robust role of good faith in employment contracts is thus needed to comply with the constitutional right to fair labour practices, equality and balance of power as sought by labour legislation by interpreting these rights purposively and generously.

3.2.2 Implied duty to act in good faith & implied term of mutual trust and confidence

Certain terms can be inferred into an employment contract in order to give expression to the intention of the contracting parties or to give business efficacy to a contract.²⁰⁶ While the principles of contract presuppose a free agreement representing the mutual will of the parties, constitutional and statutory regulation of the employment relationship, as well as the common law, import terms and consequences not necessarily consented to by the parties.²⁰⁷ In South Africa the implied term of trust and confidence has been paralleled to the duty of good faith.²⁰⁸

In every contract of employment there is a reciprocal implied term of trust and confidence. This translates to an understanding that the employer will not unreasonably and without good cause conduct himself in a manner that is likely to destroy or damage the relationship of confidence and trust between the parties.²⁰⁹ The court's interpretation of the above in *Murray v Minister of Defence* led the SCA to the view that trust and confidence underpin the entire employment relationship, and that without these elements the continued employment relationship becomes

others?' (2016) 37 *ILJ* 13.

²⁰⁴ Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 14.

²⁰⁵ The Code of Good Practice: Dismissal, Item 3 (4).

²⁰⁶ Cohen T 'Implying Fairness into the Employment Contract' (2009) 30 *ILJ* 2275.

²⁰⁷ Du Toit D et al *Labour Relations Law: A comprehensive guide* 6 ed (2015) 108.

²⁰⁸ Bosch C 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 47.

²⁰⁹ Bosch C 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 28.

intolerable.²¹⁰ It follows that conduct clearly inconsistent with the abovementioned entitles the innocent party to cancel the agreement.²¹¹

3.3 Application of implied duty to act in good faith & implied term of mutual trust and confidence

The application of the implied duty to act in good faith and implied term of mutual trust and confidence has been tested in different instances, and for purposes of this discussion there will be an evaluation of derivative misconduct cases, social media misconduct and the amendments in Chapter IX of the Labour Relations Act. In the following discussion the direct and indirect reliance on good faith to influence the desired outcome will be shown.

3.3.1 Derivative misconduct

Cases of derivative misconduct occur when an employee does not disclose to the employer knowledge relevant to the misconduct committed by fellow employees.²¹² As a result of the duty of good faith that an employee owes to an employer, and which includes in such instances an obligation on the employee to assist the employer in the investigation of misconduct,²¹³ breach of this duty of good faith, as will be shown below, can justify the dismissal of an employee, when the employee fails to disclose to the employer knowledge relevant to misconduct committed by fellow employees.²¹⁴

The above concept was recently dealt with in *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others*.²¹⁵

The case involved a dismissal of the entire workforce; the employees participated in a protected strike which endured for about a month and which was characterised by serious violence in

²¹⁰ *Murray v Minister of Defence* (383/2006) [2008] ZASCA para 57 & 58.

²¹¹ *Murray v Minister of Defence* (383/2006) [2008] ZASCA para 8.

²¹² Poppesqou T 'The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences' (2018) 39 *ILJ* 41.

²¹³ Poppesqou T 'The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences' (2018) 39 *ILJ* 34.

²¹⁴ Poppesqou T 'The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences' (2018) 39 *ILJ* 41.

²¹⁵ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018).

contravention of an interdict granted by the Labour Court.²¹⁶ The Labour Appeal Court (LAC) had to determine whether the dismissal of the employees who were not positively and individually identified as being present when violence was committed was unfair.²¹⁷

The LAC held that the application of the concept of derivative misconduct must be limited to instances that seek to serve the sustainability of trust and confidence in an employment relationship. Therefore, derivative misconduct finds appropriate application to proven circumstances in which a number of employees find themselves potentially implicated in misconduct by reason of their membership of a relevant group, and in respect of which, on reasonable grounds, suspicion arises that the persons comprising the group must know of material information relevant to the perpetration of harm to the employer by persons within that group. Such knowledge includes knowledge of facts that may help to identify the actual culprits within the group.²¹⁸ Accordingly, once it can be inferred from the evidence that the appellant employees probably were present during the violence, the onus to prove that they know of material information relevant to the perpetration of harm to the employer shall be satisfied.²¹⁹

The LAC agreed with the LC when the LAC noted that the arbitrator adopted a narrow approach to the evidence by requiring the individual identification of each employee as being present as a prerequisite for the employees falling into a category of employees implicated on the basis of derivative misconduct. On the premise that presence or absence had to be established on a preponderance of probabilities, it must follow that indirect evidence in the form of inferences drawn from the whole body of evidence was a necessary category of evidence to assess.²²⁰ The

²¹⁶ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018) para 1.

²¹⁷ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018) para 5.

²¹⁸ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018) para 25.

²¹⁹ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018) para 29.

²²⁰ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018) para 32.

LAC reached the conclusion that the appellant employees' breach of the duty of good faith was serious enough to warrant dismissal and that it was wholly appropriate in the circumstances.²²¹

It is trite in labour law that employers cannot simply dismiss an employee without a fair reason and following a fair procedure.²²² Employers are required to adhere to the parameters of fair reasons for dismissals. For example, an employer needs to show that a particular employee has engaged in misconduct which provides grounds for their dismissal.²²³ The issue however with derivative misconduct is that, because of the flexibility provided by considerations of duty of good faith,²²⁴ courts are able to bend the strict requirements provided for in the LRA in that an employer is not expected to prove that each and every employee is guilty of misconduct.²²⁵ The consequence of the above is that, although the dismissal is designed to target the perpetrators of the original misconduct, derivative misconduct is wide enough to implicate those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence.²²⁶ It suffices that the employee was aware of the misconduct of co-employees but did not assist the employer in bringing the co-employees into book.²²⁷

It is however interesting to note that the implied duty of good faith is to a certain degree one-sided. It is expected from employees that they must act in good faith at all times, and that any conduct contrary to that may result in a breach of the employment contract, without a comparable duty being imposed upon the employer. As pointed out above, specific duties are placed on the employee, duties, such as furthering the employer's business interest; however there is minimal or no corresponding duty that rests on the employer to devote itself to its

²²¹ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018) para 40.

²²² Schedule 8 of the Labour Relations Act 66 of 1995, Code of Good Practice: Dismissal.

²²³ Schedule 8 of the Labour Relations Act 66 of 1995, Code of Good Practice: Dismissal.

²²⁴ Cohen T 'The relational contract of employment' (2012) 2012 *Acta Juridica* 22.

²²⁵ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018) para 32.

²²⁶ *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) para 33.

²²⁷ *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (DA16/2016) [2018] ZALAC 19 (17 July 2018) 31.

subordinates interests beyond the payment of remuneration,²²⁸ except where that is explicitly provided for.²²⁹

3.3.2 Social media misconduct

The reciprocal implied term of trust and confidence that the employer will not unreasonably and without good cause conduct themselves in any way likely to destroy or seriously damage the relationship of confidence and trust between the parties, has been extended extensively in recent years to conduct committed by employees on social media. In terms of South African law the right to freedom of expression enshrined in the Constitution may not be exercised to infringe other rights contained in the Bill of Rights, and the right to freedom of expression is limited and meant to exclude hate speech.²³⁰ As a consequence of the principle of good faith in employment relationships, the policing of an employee's use of social media becomes particularly relevant in the employment relationship. An employee's outbursts on a social media platform about their employer, their client/customer, or their distasteful views about any subject in general, could easily violate the principle of good faith.²³¹

Courts have had an opportunity to develop social media law in employment relationships. In *Juda Phonyogo Dagane v South African Police Services (SAPS)*,²³² the LC had to decide whether the dismissal of Mr Dagane, a police officer, was fair as a result of the racist comments that he had made on the Facebook page of the leader of the Economic Freedom Fighters, Mr Julius Malema.²³³ Amongst the comments he made, were the following: 'Fuck this white racist shit! We must introduce Black apartheid. Whites have no ROOM in our heart and mind. Viva MALEMA.' 'When the Black Messiah (NM) dies, we'll teach whites some lesson. We'll commit a genocide on

²²⁸ Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 14.

²²⁹ *Boxer Superstores Mthatha v Mbenya* (2007) 28 *ILJ* 2209 (SCA); *Murray v Minister of Defence* (2008) 29 *ILJ* 1369 (SCA).

²³⁰ See section 16 (2) of the Constitution of RSA, 1996.

²³¹ <https://www.labourguide.co.za/latest-news-1/2166-how-far-is-too-far-for-employees-on-social-media> accessed on 23 October 2018.

²³² *Dagane v SSSBC and Others* (2018) 39 *ILJ* 1592 (LC).

²³³ *Dagane v SSSBC and Others* (2018) 39 *ILJ* 1592 (LC) para 1.

them. I hate whites.²³⁴ The comments which he made were subsequently published in a newspaper article and his manager received a complaint from the Parliamentary Portfolio Committee.²³⁵ An investigation was conducted by SAPS which proved that the comments were indeed made by Mr Dagane but that he had subsequently deleted the comments. Extensive online articles, however, were found and information pertaining to his comments on Facebook which included a copy of his post on Malema's Facebook page.

The LC had to determine whether the Commissioner was correct in holding that there is a rule within the workplace that governed SAPS members' conduct and outlawed discrimination based on race and whether the decision reached by the Commissioner was a decision that any reasonable decision maker could have arrived at. In doing so, the LC examined the considerations that the Commissioner looked at to reach her findings, which include the Constitution, the SAPS Code of Ethics and the SAPS Code of Conduct. All these prohibited discrimination and urged citizens of South Africa to treat everyone with equal respect and to create a safe and secure environment for all South Africans. The Court agreed with the Commissioner's finding there was a rule within the workplace that governed SAPS members' conduct and outlawed discrimination based on race.²³⁶

Further, the Court was of the view that the Commissioner was reasonable in finding that the applicant was employed as a police officer with a mandate to protect South Africa's citizens irrespective of their race, colour and creed. She considered that to threaten the safety of the community was wrong and that the conduct of the applicant did have the effect of bringing the SAPS into disrepute.²³⁷ The Court therefore found the dismissal to be fair.²³⁸

It is important to note that the principle of good faith was not expressly dealt with in the above case. However, it can be reasonably argued that it is partly on the basis of good faith that the employer has a reasonable expectation of the employee to conduct himself in a manner that will not bring the name of the employer into disrepute beyond the premises of their business. Based

²³⁴ *Dagane v SSSBC and Others* (2018) 39 ILJ 1592 (LC) para 1.

²³⁵ *Dagane v SSSBC and Others* (2018) 39 ILJ 1592 (LC) para 4.

²³⁶ *Dagane v SSSBC and Others* (2018) 39 ILJ 1592 (LC) para 27.

²³⁷ *Dagane v SSSBC and Others* (2018) 39 ILJ 1592 (LC) para 40.

²³⁸ *Dagane v SSSBC and Others* (2018) 39 ILJ 1592 (LC) para 52.

on the principle of good faith employees are expected to conduct themselves in a manner that will not unreasonably and seriously damage the relationship of trust between the parties beyond the normal cause of business. When there is breach of the above, the employer is able to dismiss the employee on the premise of good faith if the employee is found to have conducted himself in a manner that seriously damages the element of trust between the parties, as long as the dismissal is also procedurally fair in terms of the LRA.

3.3.3 Amendments in Chapter IX of the Labour Relations Act²³⁹

The indirect application of good faith has positively influenced South Africa's labour law. The Labour Relations Amendment Act of 2014, which came into effect on 1 January 2015, amended s 198 and introduced s 198A that seeks to prevent abusive practices which are the result of the placement of workers by temporary employment services (TES), also referred to as labour brokers.²⁴⁰

In terms of the LRA "temporary employment service" means 'any person who, for reward, procures for or provides to a client other persons -

- (a) who render services to, or perform work for, the client; and
- (b) who are remunerated by the temporary employment service'.²⁴¹

The issue with this triangular relationship is that labour brokers have structured their relationships with the workers they place with clients so that these workers do not receive the protection of statutory wage-regulating measures,²⁴² and this has also resulted in uncertainty as to the identity of the employer which has the consequence of leaving placed workers without the protection of labour law.²⁴³

²³⁹ *Labour Relations Amendment Act 6 of 2014.*

²⁴⁰ Benjamin P 'Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act' (2016) 37 *ILJ* 28.

²⁴¹ Section 198 of the Labour Relations Act 66 of 1995.

²⁴² Benjamin P 'Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act' (2016) 37 *ILJ* 30.

²⁴³ Benjamin P 'Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act' (2016) 37 *ILJ* 34.

Labour broking has been utilised by firms to reduce standard employment in order to cut labour costs and minimise risks associated with employment. Research conducted by the CCMA has indicated that there is usually inequity between contracted workers and permanent employees in respect of job security, equal treatment, equitable pay and benefits.

The Constitutional Court in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* had the opportunity to deliver judgement on the correct interpretation of the amendments to section 198.²⁴⁴

Section 198A(3)(b) provides that an employee who earns less than the stipulated threshold set by s 6(3) of the BCEA and is contracted through TES to a client for more than three months, is deemed to be employed by that client.²⁴⁵ The issue that the court had to decide was to figure out what happens to the employment relationship under the LRA between the placed employee and the TES once the deeming provision applies. In particular, does section 198A(3)(b) give rise to a dual employment relationship where a placed employee is deemed to be employed by both the TES and the client? Or does it create a sole employment relationship between the employee and the client for the purposes of the LRA?²⁴⁶

The dispute in this case emanated from when Assign Services placed 22 workers with Krost, and the workers rendered services at Krost on a full-time basis for a period in excess of three consecutive months. This continued employment, post the three-month period of a temporary employment service, triggered section 198A(3)(b) of the LRA. Several of the placed employees were members of NUMSA.²⁴⁷

A dispute arose between Assign Services, Krost and NUMSA regarding the interpretation and effect of section 198A(3)(b). Assign Services was of the view that the consequences of the deeming provision were that the placed workers remained their employees for all purposes but were also deemed to be Krost's employees for purposes of the LRA. Assign Services termed this

²⁴⁴ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22.

²⁴⁵ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 1.

²⁴⁶ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 1.

²⁴⁷ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 13.

the 'dual employer' interpretation of section 198A(3)(b). NUMSA disagreed and was of the view that Krost became the only employer of the placed workers when section 198A(3)(b) was triggered. NUMSA termed this the 'sole employer' interpretation.²⁴⁸

The argument advanced by Assign Services throughout the case was that there is nothing in sections 198 and 198A that reflects a decision by the Legislature to impose a ban on TESs, whether as a consequence of the deeming provision taking effect or not. They asserted that, while it is clear that for the first three months the TES is the only employer, once the three-month period lapses the deeming provision does not terminate the commercial agreement between the client and the TES. It also does not terminate the contractual employment relationship between the TES and the placed workers. Assign Services asserted that the dual employer interpretation provides greater protection for placed workers.²⁴⁹

NUMSA disagreed and argued that sections 198 and 198A create two separate deeming provisions that cannot operate simultaneously. It submitted that this interpretation does not ban TESs. However, it regulates them in respect of only lower paid placed employees in employment for more than three months. Placed employees earning above the BCEA threshold can continue to be employed through TESs without restraint. The deeming provision only alters the contract between the placed worker and the TES; it does not affect the contract between the TES and the client. The TES may continue to perform services relating to the employee to the extent that it does not purport to employ them.²⁵⁰

The court in deciding the correct approach to interpreting these sections recalled the widespread protest against labour broking during the promulgation of these amendments and how the 2014 amendments did not ban labour broking as envisaged by trade unions. Instead, the amendments aimed at providing greater protection for workers placed in temporary employment services. First, by protecting marginal workers in temporary employment and secondly for temporary services to remain truly temporary.²⁵¹ The court emphasised that the restriction of TES

²⁴⁸ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 14.

²⁴⁹ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 17.

²⁵⁰ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 31.

²⁵¹ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 65.

employment to genuine temporary work affords the clarity and precision needed by the LRA to realise the constitutional rights to fair labour practices and meaningfully to participate in trade union activity.²⁵²

In conclusion the court held that the correct interpretation of these sections was as follows. Section 198A(3)(a) provides that when vulnerable employees are performing a temporary service as defined they are deemed to be employees of the TES as contemplated in section 198(2). Section 198A(3)(b)(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client. The deeming provisions in sections 198(2) and 198A(3)(b)(i) cannot operate at the same time. When marginal employees are not performing a temporary service as defined, then section 198A(3)(b)(ii) replaces section 198(2) as the operative deeming clause for the purposes of determining the identity of the employer.²⁵³

It will be noted that the principle of good faith was not directly invoked in the case discussed above. However, the court in providing the correct interpretation of the amendments outlined the fact that these amendments seek to provide greater protection to marginalised workers in temporary employment thereby importing public policy considerations and fairness into the application of these amendments.

3.4 Areas of development of the current legal framework

The employment relationship and the labour market are dynamic, and the rights, obligations and needs of the parties change all the time.²⁵⁴ As a result the employment contract has to adapt to the changes.

As outlined above, labour legislation was drafted to protect employees in the traditional full-time employment model, and is currently, to a certain extent, inadequate to provide protection to workers employed in new forms of non-standard employment.²⁵⁵ Moreover, South African

²⁵² *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 67.

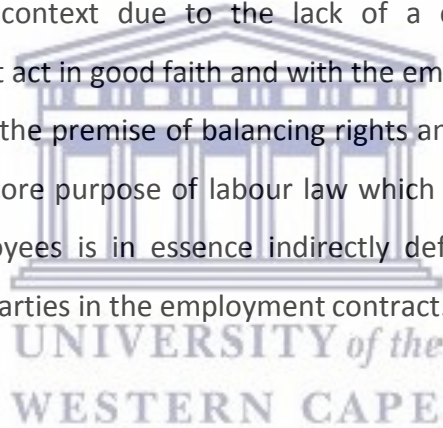
²⁵³ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 para 83.

²⁵⁴ Cohen T 'The relational contract of employment' (2012) 2012 *Acta Juridica* 84.

²⁵⁵ Fourie ES 'Non-standard workers: The South African context, international law and regulation by the European union' (2008) 11 *PER* 111.

labour law is not fully abreast of these constant changes. The effect thereof is that the neediest remain neglected.²⁵⁶ As a result, those who fall beyond the realm of labour legislation rely on the common law which needs to be developed to include a more robust role for good faith to afford better protection.

The issue, however, with the principle of good faith in employment contracts, as seen above, is that in the instance of derivative misconduct and social media misconduct, good faith has been mainly developed for the benefit and interest of the employer. The extent to which employees may use this principle in the employment relationship remains unclear. The above illustrated scenarios in which employees are not getting adequate protection from the applicable legislation may rely on good faith, however, these scenarios remain untested. What remains to be of concern is the imbalanced application of this principle. The principle of good faith is not well-balanced in the employment context due to the lack of a corresponding duty owed to employees; that employers must act in good faith and with the employees' interest at heart at all times. Labour law continues on the premise of balancing rights and powers between employers and employees. However, this core purpose of labour law which is to strike a balance of rights between employers and employees is in essence indirectly defeated by the lack of equally developing good faith for both parties in the employment contract.



3.5 Conclusion

An analysis of the role of good faith in contract law and employment law will be undertaken in the final chapter. The analysis will discuss the similarities and differences in these two areas of law and any guidance which can be obtained from each area of law. A conclusion and recommendations will therefore follow the analysis.

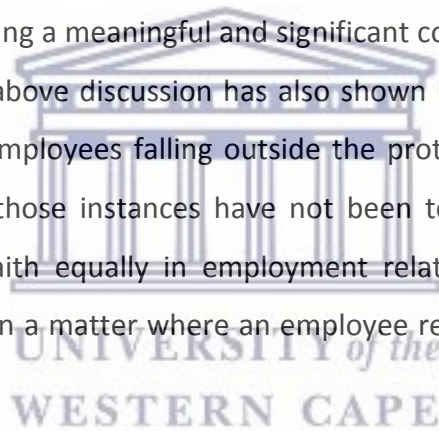
In the above discussion different instances of the direct and indirect application of good faith were looked at. Although it is well accepted that the fundamental principle of employment contracts is fairness, the development of good faith as a principle that informs fairness on the other hand has been faced with a stumbling block.

As noted above, the world of work is changing and is becoming more technological and contract

²⁵⁶ Le Roux R 'A dodo or simply living dangerously' (2014) 35 *ILJ* 37.

based; therefore it is important to insist on the development of the principle of good faith. In the light of the present inequality of power evidenced by the element of subordination, the role of good faith in employment relationships is needed even more to protect employees who are likely to be in a weaker position than that of the employer. This position is not only much needed in the employment relationship, but also fits squarely within the ambit of the purpose of labour legislation and as explicitly required by the constitutional right to fair labour practices. Currently there is an uneven incorporation of the principle of good faith as shown in instances of derivative misconduct and social media misconduct as seen above. The status quo can be attributed to the reality that courts have not been given the opportunity to decide on a matter where employees rely on the principle of good faith to influence the outcome.

Cohen has also correctly pointed out that the common law of contract, interpreted appropriately, is capable of making a meaningful and significant contribution to the achievement of fair labour practices.²⁵⁷ The above discussion has also shown instances in which the duty of fair dealing could be used by employees falling outside the protection of labour legislation to yield fair outcomes; however, those instances have not been tested. Therefore, the hope of developing the role of good faith equally in employment relations exist if courts are given enough opportunity to decide on a matter where an employee relies on good faith to influence the outcome.



²⁵⁷ Cohen T 'Implying Fairness Into the Employment Contract' (2009) 30 *ILJ* 2271.

CHAPTER 4: CONCLUSION

4. Overview

The previous chapters illustrated the revised role of good faith in the constitutional dispensation in general contracts and employment contracts. This chapter will briefly conduct an analysis of the role of good faith in general contracts and employment contracts. The analysis will discuss the similarities and differences in these two areas of law and any guidance which can be obtained from each area of law. The analysis will therefore be followed by a conclusion of the discussion of the role of good faith done in the previous chapters and recommendations thereof.

4.1 Analysis of the role of good faith in contract law and in employment contract

General contracts and other specific forms of contracts (such as consumer contracts, insurance contracts, building contracts) are not governed by a constitutional right to fairness.²⁵⁸ On the one hand, employment contracts are influenced by fairness which is uniquely expressed in the Constitution.²⁵⁹ The employment contract, on the other hand is a specific form of contract that has unique features that set it apart from other commercial contracts and informed by fairness, remains a contract, and many rules and principles of the common law of contract are applicable to it.²⁶⁰

It is, however, important to note that contracting parties both in general contracts and employment contracts are in most instances unequal. In general, contracting parties frequently comprise of powerful companies on one hand and vulnerable individuals on the other, the former, using its superior economic standing to promote its own interests at the expense of the other party.²⁶¹ Likewise, in employment contracts the contracting parties consists of a bearer of

²⁵⁸ Louw A "The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 1) (2018) 21 *PER* 10.

²⁵⁹ Louw A "The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 1' (2018) 21 *PER* 9.

²⁶⁰ Louw A 'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 3) (2018) 21 *PER* 35.

²⁶¹ See Chapter 2 part 2.3.

power and one who is not a bearer due to the inherent element of subordination in the employment relationship.²⁶²

The abovementioned differences and similarities in general contracts and employment contracts have thus influenced the manner good faith is developed in these respective contracts. As highlighted above, fairness is a highly important principle in employment contracts and unfortunately this is not the case in general contracts. The effect thereof is evident in the level of willingness of the courts in incorporating good faith into these contracts.²⁶³

General contract law is mainly influenced by common law. The common law status of good faith in general contracts was first viewed and continued to be viewed for a number of years as a superfluous, not self-standing or free-floating, principle in South African law.²⁶⁴ In addition, this principle was regarded as a mere creative concept or basic principle incapable of setting aside a contract.²⁶⁵ Preference was given to established legal principles like legal certainty and *pacta sunt servanda* while good faith continued to acquire a limited role in contract law.²⁶⁶ The SCA adapted a narrow (conservative) approach for a number of years with regards to this principle. The SCA's approach placed emphasis on guarding against declaring contracts invalid because they offend one's individual sense of fairness.²⁶⁷ The SCA continued to view the principle of good faith as a principle that operates indirectly, in that it is always informed by more specific rules or doctrines.²⁶⁸ The tide is however now shifting; the Western Cape High Court division and the Constitutional Court are reacting positively towards the incorporation of good faith in contract law, the courts are willing to import fairness into contracts and are more open in developing the principle of good faith in contract law to promote equity.²⁶⁹

Fairness, as a fundamental and central concept in employment contracts, has not made the

²⁶² See Chapter 3 part 3.2.1.

²⁶³ See Chapter 2 part 2.2.2.

²⁶⁴ See Chapter 2 part 2.1.

²⁶⁵ See Chapter 2 part 2.1.

²⁶⁶ See Chapter 2 part 2.1.

²⁶⁷ See Chapter 2 part 2.1 and 2.2.2.

²⁶⁸ See Chapter 2 part 2.1.

²⁶⁹ See Chapter part 2.2.1 and 2.2.3.

development of the principle of good faith an easy task. The incorporation of the principle of good faith is even more complex in employment contracts and this is mainly because employment contracts are regulated by both labour legislation and common law. Often courts are unsure to what extent they need to develop the common law principle to the extent that legislation falls short.²⁷⁰

Moreover, contrary to the narrow approach used by the SCA in importing good faith into general contracts, the SCA interestingly has been progressive in importing good faith or endorsing the application of fairness in employment contracts.²⁷¹ The SCA has noted that all contracts of employment contain an implied term that employers must treat employees fairly.²⁷² However, this position was partly overturned in *SAMSA v McKenzie*.²⁷³ This positive acceptance of fairness by the SCA to a certain extent has influenced the High Courts in their approach of importing fairness into employment contracts. The High Court in *Tsika v Buffalo City Municipality*²⁷⁴ held that employers owe an implied duty of fairness to employees in terms of the contract of employment particularly with regard to pre-dismissal procedure.²⁷⁵ Louw correctly points out that the progressive approach of the SCA in importing fairness into employment contracts is due to the fact that judgments are informed by the specific right to fair labour practices which applies to employment relationships, while in contract law cases there is no constitutional right of fairness.²⁷⁶ As it currently stands, in general contracts courts are incorporating the principle of good faith to achieve a minimum degree of fairness in contracts that are otherwise enforceable and lawful but would ultimately manifest unfairness to one of the parties.²⁷⁷

²⁷⁰ See Chapter 3 part 3.1.

²⁷¹ Louw A “‘The Common Law is ... not what it used to be’”: Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment’ (Part 3) (2018) 21 *PER* 41.

²⁷² See Chapter 3 part 3.1.3.

²⁷³ *SA Maritime Safety Authority v McKenzie* 2010 (31) ILJ 529 (SCA).

²⁷⁴ *Tsika v Buffalo City Municipality* 2009 30 ILJ 105 E & *Mogothle v Premier of the Northwest Province & another* 2009 (30) ILJ 605 (LC).

²⁷⁵ See Chapter 3 part 3.1.3.

²⁷⁶ Louw A “‘The Common Law is ... not what it used to be’”: Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment’ (Part 3) (2018) 21 *PER* 41.

²⁷⁷ See Chapter 2 part 2.4.3.

'The role and applicability of good faith as an independent principle of the law of contract is not clear-cut. However, recent cases create the probability that good faith, with the concept of Ubuntu, will be accepted and applied directly as a principle of the law of contract and constitutional value, rather than being accepted as merely an underlying value with no direct practical implications'.²⁷⁸

On the other hand, courts are developing the principle of good faith in employment law in instances of derivative misconduct and social media conduct through the implied duty of mutual trust and confidence.²⁷⁹

4.2 Conclusion

The employment contract now takes the form of a social compact in which the parties acquire rights and obligations shaped by principles of good faith and fairness that underpin the Constitution.²⁸⁰ Louw correctly holds 'that "the common law is not what it used to be" and has been (and is being) substantially re-shaped with the infusion of constitutional principles by judges engaged, quite rightly and legitimately, in "constitution-making"'.²⁸¹ Moreover, Louw believes that fairness plays a special and important role in the employment space not only because of the legislative intervention; but the Bill of Rights demands that the parties to this relationship must act fairly towards each other, this is required by the right to fair labour practices, which is applicable to both employees and employers.²⁸² As a result, conduct between the parties which occurs within this relationship constitutes "labour practices", therefore the contract which is the basis of this relationship should be characterised by fairness. Because of the above, courts should be therefore more open in recognising a special and meaningful role of fairness in the employment contract.²⁸³

²⁷⁸ Van Huyssteen L.F, Reinecke M.F.B & Lubbe G.F *Contract General Principles* 5 ed (2016) 14.

²⁷⁹ See Chapter 3 part 3.3.1 and 3.3.2.

²⁸⁰ See Chapter 3 part 3.1.3.

²⁸¹ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 3) (2018) 21 *PER* 47.

²⁸² Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 3) (2018) 21 *PER* 36.

²⁸³ Louw A "'The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired

Furthermore, there are indications that the law of contract is now informed by a new ideology which promotes a robust role of good faith.²⁸⁴ In other words, the development of good faith in contract law is taking a positive and progressive direction despite fairness not being the fundamental value in contract law.

It is argued that the application of good faith in employment contracts may provide the ideal vehicle for achieving a constitutionally transformed law of contract which promotes the principles of *ubuntu* in private contracts. This is based on the recognition of the role of fairness and the development of fair dealing as developed in *Murray*.²⁸⁵ It is therefore on the basis of the above reasoning that indeed the principle of good faith in contractual relationships must be taken to be 'ex lege'²⁸⁶. As such, the role of good faith should not only be limited to the exceptional cases of employees who may find themselves insufficiently protected by the legislation. The principle of good faith should be recognised as applying to all employment contracts by operation of law.²⁸⁷

4.3 Recommendations

The above has shown that although fairness is not a central concept in contract law, courts are willing to import good faith in contracts in order to promote equity. However, although employment contracts are highly influenced by fairness, the importation of good faith is not robust despite good faith being needed even more in employment context. The development of the principle of good faith in the employment contract is uneven as shown in the previous chapter in instances of derivative misconduct and social media conduct. Contrary to the assumption that the LRA gives sufficient effect to the constitutional right to fair labour practices,²⁸⁸ the LRA merely extends the constitutional right to fair labour practices. Notably,

Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 3) (2018) 21 PER 36.

²⁸⁴ Louw A "The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 3) (2018) 21 PER 40.

²⁸⁵ Louw A "The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 3) (2018) 21 PER 41.

²⁸⁶ Louw A "The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment Part 3' (2018) 21 PER 13.

²⁸⁷ Louw A "The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 3) (2018) 21 PER 44.

²⁸⁸ Louw A "The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired

there are instances where employees fall through the 'cracks' of the labour legislation and may not be sufficiently protected and this may call for either the constitutional development of the common law or for a constitutional challenge to the relevant legislative provisions.²⁸⁹

It is therefore recommended that because the employment relationship is built on trust, changes all the time and characterised by subordination good faith should not continue to acquire a limited role when it is actually needed even more in the employment context. The good faith principle should be a central theme on all employments contracts, the role of good faith should be robust and the effect thereof should be that, any party who acts in bad faith must be taken to task for breaching this principle. The robust role of good faith therefore should warrant parties to be in a position to bring a claim in which the actual basis thereof is good faith. In other words, the common law principle of good faith can then be relied on to avoid instances of direct reliance on constitutional provisions or constitutional challenge to the relevant legislative provisions.

Likewise, parties in a general contract are in most instances unequal as illustrated in the second chapter, as such fair dealing should also be a central concept in general contracts. Moreover, contract law is mainly governed by common law and in the constitutional dispensation, the common law is purely influenced by constitutional provisions which promotes fairness. Therefore, good faith as a common law principle should be given more recognition and must acquire the same status given to other established principles such as *pacta sunt servanda*. Parties should deal fairly and in good faith. Therefore any breach thereof should trigger a claim for the prejudiced party and the basis for the claim should be the breach of good faith. Parties should therefore be able to directly rely on good faith to bring a claim.

Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 3) (2018) 21 *PER* 4.

²⁸⁹ Louw A "The Common Law is ... not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment' (Part 2) (2018) 21 *PER* 7.

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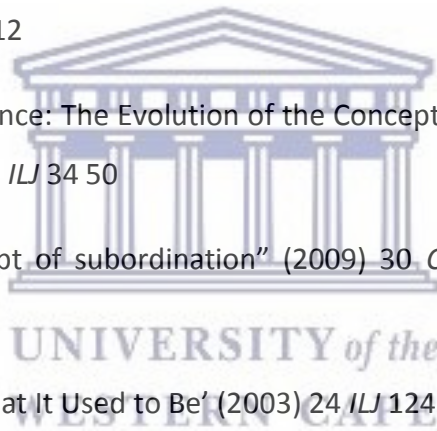
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