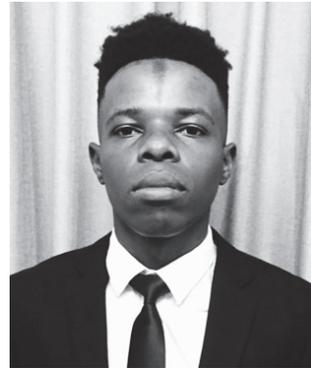


THE CONCEPT OF GOOD FAITH IN THE LAW OF CONTRACT: REDEFINED AND REIMAGINED

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Abstract

In civil, and some common law, jurisdictions, good faith is recognised as a fundamental principle informing the law of contract and is often invoked by some law courts to set aside contracts found not to have been concluded in good faith. It is a counterpoise to the dominant idea of freedom of contract. Whilst it cannot be denied that the Constitution of the Republic of South Africa, 1996 has had a positive impact on the doctrine of good faith in South African jurisprudence, good faith still has a larger role to play to ensure justice and fairness whilst preventing commercial immorality. It is, therefore, against this backdrop that this paper will examine the role of good faith and fairness in South African contract law. It is found that the concept of good faith plays an important role in contract law as it can be a determining factor in the validity or invalidity of a contract. It is inextricably linked to the concept of fairness and has the effect of counteracting contracts that are unfair or unconscionable. The article further looks at the role of good faith in the contract law of foreign jurisdictions and sets out the lessons we can draw from these jurisdictions.

* LLB Candidate, University of the Western Cape. ORCID Number: 0000-0001-8348-5688 Infinitely grateful to my mother, friends and the rest of my family for their unwavering and unfaltering support. A special thank you to my mentors and icons, Dr Kasker and Dr Osiki of the University of the Western Cape for their guidance and the tremendous impact they have had on my career. Without the support of Prof Glazewski, Adv Nqabayethu Buthelezi and Mxolisi Ngulube, I dare say, my childhood dream of becoming a lawyer would not be possible. Lastly, I would be remiss if I neglected to convey my infinite indebtedness to the Canon Collins Trust for the support, which extends beyond financial support.

1 Introduction

The South African common law of contract stems from a combination of Roman-Dutch law and English common law. An analysis of the great *Corpus Juris Civilis*, or the Code of Justinian, shows that good faith initially played almost no role under Roman law in *stricti iuris* contracts as long as the formalities of the contract were complied with.¹ In other words, the contract was binding irrespective of whether it was induced by fraud.² This frequently led to injustices, and therefore, there was a need for legal development in this area of contract law.³ Good faith later developed as a procedural instrument under which an equitable discretion was bestowed upon judges to adjudicate a case before them fairly and reasonably.⁴ This meant that courts had the power to vary the rights and obligations of the parties to a contract by invoking concepts such as justice, fairness and reasonableness.⁵ The effect of this development in Roman-Dutch law was that contracts were based on consent and parties were required to act in good faith.⁶ However, there is uncertainty regarding whether courts had an equitable discretion to decide a matter based on the failure of either party to act in good faith. Moreover, if the courts held such discretion, the scope of its exercise is unclear. There are conflicting writings regarding this question and the correct position remains unclear. English law was largely considered supplementary to Roman-Dutch law.⁷ South African courts often turned to English law to decide commercial law disputes.⁸

2 The meaning of good faith and fairness

Good faith and fairness mean that a party to a contract must act in a way that he or she believes is acceptable, the party's belief must be based on honesty and rationality, grounded in morality, and there must be reasonable standards of fair dealings.⁹ The content, role and scope of good faith and fairness in contract law are not clear.¹⁰ It appears from case law that good faith entails that parties to a

1 A Rodger 'Developing the law today: National and international influences' *TSAR* (2002) 15.

2 D Hutchison et al (ed) *The law of contract in South Africa* (2017) 22.

3 E Fagan 'Roman-Dutch law in its South African historical context' in R Zimmermann & D Visser (eds) *Southern Cross: Civil and common law in South Africa* (1996) 218.

4 Hutchison (n 2) 22.

5 South African Law Commission 'Unreasonable stipulations in contracts and rectification of contracts' Working Paper 54 Project 47 1994 para 2.1.

6 Hutchison (n 2) 22.

7 Fagan (n 3) 57.

8 Fagan (n 3) 57.

9 Hutchison (n 2) 17.

10 Hutchison (n 2) 24.

contract must deal with each other honestly and fairly.¹¹ Perhaps the justified expectations of the parties to a contract is an accurate description of the term 'good faith'. For instance, the rendering of an imperfect performance will be a manifestation of *mala fide*. The minority judgment of the Appellate Court in *Eerste Nationale Bank van Suidelike Afrika Bpk v Saayman*¹² took the view that the function of good faith is to give expression to the community's sense of what is fair, just and reasonable.¹³ Today, this view manifests in the notion of public policy¹⁴.

The meaning of good faith and fairness is multifaceted. There appears to be a close nexus between good faith and public policy. Public policy represents the legal convictions or general sense of fairness of the community.¹⁵ The law of contract should be flexible to allow arbiters of the law to import open-ended standards such as good faith and reasonableness to ensure fairness in contracts. However, a court is not entitled to refuse to enforce a contract on the basis that a judge regards this as unreasonable or unfair.¹⁶ This flows from the Supreme Court of Appeal (SCA) jurisprudence that reasonableness and fairness are not free-standing requirements for the exercise of a contractual right.¹⁷ It can be deduced from this that good faith and fairness are not requirements for the validity of a contract, and therefore, may be accurately described as principles underlying contract law.

3 The determination of good faith and fairness

Ngcobo J ruled that public policy, in the context of the law of contract, must be determined with reference to the Constitution.¹⁸ This means that public policy is now rooted in the Constitution. In other words, a contractual term that is contrary to public policy inadvertently violates the Constitution.¹⁹ Moreover, the Constitutional Court developed a helpful two-legged reasonableness test in the matter of *Barkhuizen v Napier*.²⁰ First, it considers

11 For example, the Appellate Division in *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) 651C, observed that in terms of Roman law, courts generally had wide powers to interpret contractual terms in accordance with the concepts of justice, reasonableness and fairness and in turn these concepts constitute good faith.

12 1997 (4) SA 302 (A).

13 *Eerste Nationale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) 87.

14 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 122.

15 *Barkhuizen* (n 14) para 73.

16 *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 5 BCLR 449 (CC) 25.

17 *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) 28.

18 *Barkhuizen* (n 14) para 29.

19 *Barkhuizen* (n 14) para 29.

20 2007 (5) SA 323 (CC).

whether the clause in question was reasonable.²¹ Thereafter, if it was reasonable, it had to be established whether the clause should be enforced in particular circumstances which prevented compliance with the clause.²² The first leg calls on the courts to weigh competing interests and rights.²³ For example, the principle of sanctity and freedom of contract with the right of a party to seek judicial redress. The second leg requires the claimant to justify his non-compliance with the contract.²⁴ In this regard, a court can take into consideration the circumstances of the claimant and the circumstances surrounding the conclusion of the contract.

The ruling in *Barkhuizen v Napier* has been welcomed and has developed contract law jurisprudence by strategically construing the rights in the Bill of Rights and values underlying the Constitution with the law of contract. It laid the foundation for the much-needed development of the law of contract.²⁵ This is apparent in the subsequent rulings of the Constitutional Court. In the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd*,²⁶ the Constitutional Court reiterated the importance of good faith in contracts and went as far as to express a desire to infuse the concept of ubuntu and other constitutional values into the law of contract.²⁷ Two years after this ruling, the Constitutional Court took the same view and held that contractual relationships are subject to the values of good faith, fairness and other values that underlie the Constitution.²⁸

In the recent case of *Beadica 231 CC v Trustees of the time being of the Oregon Trust*,²⁹ the Constitutional Court referred to these judgements with approval and concurred with the SCA regarding the role of good faith in the law of contract.³⁰ However, the Court took it a step further and opined that public policy is informed by concepts of reasonableness, good faith, and fairness.³¹ The Constitutional Court also restated the need for the infusion of constitutional values into contract law.³² This is, of course, a welcomed development as

21 *Barkhuizen* (n 14) para 56.

22 *Barkhuizen* (n 14) para 56.

23 *Barkhuizen* (n 14) para 57.

24 *Barkhuizen* (n 14) para 58.

25 Citing *Barkhuizen* with approval in *Everfresh*, Moseneke DCJ pronounced, obiter, at para 71 that:

“Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact.”

26 2012 (1) SA 256 (CC).

27 *Everfresh* (n 26) para 71.

28 *Botha v Rich* NO 2014 (4) SA 124 (CC) 24.

29 2020 (9) BCLR 1098 (CC).

30 *Beadica* (n 29) para 176.

31 *Beadica* (n 29) para 35.

32 *Beadica* (n 29) para 76.

the introduction of constitutional values may curb commercial immorality which is prevalent in present-day commercial dealings. Any argument against such an approach must contend with the fact that South Africa is founded upon the supremacy of the Constitution, which informs all other laws, with commercial law being no exception.³³

4 The role of good faith in contract law

The role of good faith in contract law can be seen as having a controlling function.³⁴ In this regard, good faith can be considered as one of the factors a court must consider in deciding whether to enforce a contract. The SCA has held that good faith is not an independent cause of action that can be used in a matter to challenge a contract but must be seen as an underlying value influenced by other more technical doctrines.³⁵ In subsequent cases, the Constitutional Court somewhat deviated from the conservative approach of the SCA.³⁶ Despite this deviation, the Constitutional Court regrettably did not make an unequivocal statement about the role of good faith in the law of contract. The lack of clarity regarding the role of good faith in the law of contract is evident from the recent case *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments*.³⁷ In its judgment, the SCA did not refer to the two-legged reasonableness test developed by the Constitutional Court in *Barkhuizen v Napier*. It also did not consider the Constitutional Court's judgments endorsing the importance of good faith.³⁸ The SCA only cited *Beadica* and conceded that good faith underlies and informs the law of contract. However, the Court held that it is not a free-

33 Section 1 of the Constitution of the Republic of South Africa 1996 provides as follows:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

Section 2 states that 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

34 *Brisley v Drotzky* 2002 (4) SA 1 (SCA) 22.

35 *Brisley* (n 34) para 22

36 *Everfresh* (n 26); *Barkhuizen* (n 14); *Beadica* (n 29).

37 [2021] 3 All SA 647 (SCA).

38 The matter of *Everfresh* (n 26) para 69, for example, wherein the Constitutional Court acknowledged the importance of good faith in contractual law.

standing principle that can be used to interfere with freedom of contract.³⁹

In *Coral Lagoon*,⁴⁰ Capitec Bank entered into a subscription of shares agreement with Coral in terms of which it would issue Coral with shares with the proviso that under clause 8.3 permission was required for Coral to dispose of the shares to a non-B-BBEE⁴¹ compliant third party.⁴² Subsequently, Capitec Bank refused to give such permission and Coral sought judicial redress asserting that the withholding of consent was unreasonable and in breach of the good faith required by the agreement.⁴³ The High Court found that withholding consent was contrary to good faith and reasonableness and ordered Capitec Bank to consent to the sale.⁴⁴

On appeal, in a unanimous SCA judgment the Court set aside the order of the High Court on the basis that good faith cannot be used to determine the terms of a contract and cannot justify the imposition of a duty to give consent where Capitec Bank had the right to refuse to consent.⁴⁵ The SCA went as far as ruling that even where a party changes its stance cynically on an issue, a court is not allowed to use good faith to deviate from the agreement.⁴⁶ Inconceivably, the SCA did not consider the reasonableness test enunciated in *Barkhuizen*, let alone apply it. It is the author's view that the matter called upon the Court to consider whether the clause requiring consent was reasonable and whether the clause was enforceable in the circumstances. Capitec Bank did not, in the view of the author, withhold its consent impermissibly as it was entitled to do so in terms clause 8.3 of the subscription of shares agreement. Both the High Court and SCA conflated the issues that were before them. It was common cause that Capitec Bank was entitled to consent to the disposal of its shares or even withhold consent for want of compliance with the B-BBEE.⁴⁷

In instances where the entity or person to whom the shares are disposed to comply with B-BBEE Act with the result that Capitec Bank's empowerment credentials in terms thereof remained intact, Capitec has no choice but to give consent.⁴⁸ The clause itself was

39 *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99 [2021] 3 All SA 647 (SCA) para 63.

40 [2021] 3 All SA 647 (SCA).

41 BEE equate to broad-based black economic empowerment, which in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 is the economic empowerment of black people including women, workers, youth, people with disabilities and people living in rural areas.

42 *Coral Lagoon* (n 39) para 27.

43 *Coral Lagoon* (n 39) para 23.

44 *Coral Lagoon* (n 39) para 65.

45 *Coral Lagoon* (n 39) para 68.

46 *Coral Lagoon* (n 39) para 56.

47 Act 53 of 2003.

48 *Coral Lagoon* (n 39) para 30.

reasonable in that it had the effect of allowing Capitec Bank to fulfil at all times its black-empowerment obligations in terms of the B-BBEE Act.⁴⁹ Both the *court a quo* and the SCA were supposed to confine their inquiry to whether the consent was unreasonably withheld by considering whether Capitec Bank will continue to be compliant with the B-BBEE Act by looking at its black shareholding subsequent to the disposal of the shares. The second leg of the test required the SCA to consider the justification for non-compliance and the circumstances that prevented Coral from complying with the clause that required consent from Capitec Bank.⁵⁰ It is therefore evident that there is a need for a binding and unequivocal ruling of the Constitutional Court on the role of good faith in contracts.

The matter of *AB v Pridwin Preparatory School*⁵¹ in which the Constitutional Court once again overruled the decision of the SCA further highlights the clear division between the SCA and the Constitutional Court. In this case, the SCA adopted a restrictive approach to the interpretation of the contract and refused to infuse constitutional principles when it clearly should have⁵². It incorrectly held that section 29(1) of the Constitution⁵³ does not apply to independent schools on the basis that they do not provide basic education.⁵⁴ Respectfully, it also misdirected itself by not applying the appropriate constitutional standard, namely the best interest of the child.⁵⁵

Conversely, the Constitutional Court decided that the decision to terminate the contract was unconstitutional because the school failed to afford parents an opportunity to be heard on the best interests of the children affected and the interference with the children's right to basic education.⁵⁶ This, despite the existence of a contract between the school and the parents which entitled the school to terminate the contract. In its judgment, the Constitutional Court did not refer to good faith, but, in the author's view, it could be argued that the failure to provide an opportunity to be heard is a manifestation of *mala fide*. The Constitutional Court did consider the good faith measures that were taken by the school such as taking alternative

49 *Coral Lagoon* (n 39) para 1.

50 As it was articulated in *Barkhuizen* (n 14) para 58.

51 *AB and another v Pridwin Preparatory School and others* 2020 (9) BCLR 1029 (CC).

52 *Pridwin* (n 51) para 10.

53 Section 29(1) of the Constitution of the Republic of South Africa, 1996 provides that "Everyone has the right –
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

54 *Pridwin* (n 51) para 10.

55 Section 28(2) of the Constitution of the Republic of South Africa, 1996 provides that "A child's best interests are of paramount importance in every matter concerning the child."

56 *Pridwin* (n 51) para 61.

measures to termination and assisted the parents in finding another private school.⁵⁷

5 The role of good faith and fairness within a constitutional framework

Good faith and fairness are inextricably linked with open-ended standards such as public policy, equity, and reasonableness.⁵⁸ This lays a foundation for courts to infuse the common law of contract concept of good faith with the founding values of the Constitution, such as human dignity and the achievement of equality.⁵⁹ The latter constitutional value is of particular importance in instances where there is unequal bargaining power between parties. In this regard, there has been statutory intervention in the form of the Consumer Protection Act 68 of 2008 to rescue vulnerable parties.⁶⁰ However, it is important to note that this statute does not apply to all contracts, it only applies to contracts involving the supply of goods or services concerning vulnerable consumers, including small businesses.⁶¹ Therefore, the Consumer Protection Act covers only a distinct part of the law of contract. The law of contract is still largely regulated by the rules of the common law.⁶²

Courts are obliged by the Constitution to develop the common law. Section 8(3) of the Constitution enjoins a court to develop the common law when applying a provision of the Bill of Rights insofar as legislation does not give effect to that right.⁶³ Section 39(2) goes further and places courts under an obligation to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law.⁶⁴ Lastly, Section 173 provides that all superior courts have, taking into account the interests of justice, the inherent power to protect and regulate their own procedure to develop the common law.⁶⁵ Regrettably, the courts

57 *Pridwin* (n 51) para 207.

58 *Hutchison* (n 2) 43.

59 In terms of section 1 of the Constitution of the Republic of South Africa, 1996, the Republic of South Africa is founded on, inter alia, human dignity and the achievement of equality.

60 The preamble to the Consumer Protection Act 68 of 2008 provides that this Act aims to fulfil the rights of historically disadvantaged persons and protect consumers from exploitation or abuse.

61 Section 5 of the Consumer Protection Act 68 of 2008.

62 In terms of section 5(2)(b) of the Consumer Protection Act 68 of 2008, the Act does not apply to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction equals or exceeds the monetary threshold, which as at the time of writing was fixed at R2 million, which monetary threshold is calculated in accordance with GN 294 of 1 April 2011.

63 The Constitution of the Republic of South Africa, 1996.

64 The Constitution of the Republic of South Africa, 1996.

65 The Constitution of the Republic of South Africa, 1996.

have largely failed to use the concept of good faith and other open-ended concepts to infuse the law of contract with constitutional values and allow for flexibility in the adjudication of contractual disputes.

For many years, the courts failed to use the discretion bestowed upon them by the Constitution to develop the common law concept of good faith.⁶⁶ The Constitutional Court has questioned whether the limited role assigned to good faith is appropriate in the new constitutional dispensation but found it unnecessary to address that issue.⁶⁷ This has caused uncertainty in the commercial and academic world regarding the role of good faith in light of the prescripts of the Constitution. The Constitutional Court has favoured public policy, ruling that the correct approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy, with reference to the values that underlie the Constitution, and which find expression in the Bill of Rights.⁶⁸

The Constitutional Court subsequently had another opportunity to clarify the role of good faith in contract law considering the Constitution in the *Everfresh*.⁶⁹ The Constitutional Court respectfully misdirected itself by not referring the matter back to the High Court to develop the common law, on the basis that there were no prospects of success in the case.⁷⁰ They further refused to hear the matter holding that without the benefit of the views of the High Court and SCA, it was not in the interests of justice for the Court to hear the claim and that no special circumstances existed for it to hear the matter as a court of first instance and therefore refused to grant leave to appeal.⁷¹ Both the majority and minority were in agreement that *Everfresh's* claim to have the common law of contract developed presented a constitutional case of substance and yet, the majority declined to address the constitutional issue.⁷²

The precepts of good faith require honesty and fairness between contractual parties. This, in turn, promotes the spirit, purport and objects of the Bill of Rights. According to *S v Makwanyane*, ubuntu is an integral part of constitutional values.⁷³ The concept of ubuntu carries in it the ideas of humaneness, social justice and fairness.⁷⁴ Ubuntu can be an appropriate principle to use to inform the new developments in the law of contract, to ensure that it is brought in

66 K Christie 'The Law of Contract and the Bill of Rights' in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (2006) 38.

67 *Barkhuizen* (n 14) para 82.

68 *Barkhuizen* (n 14) para 29.

69 *Everfresh* (n 26) para 19 and 48.

70 *Everfresh* (n 26) para 69.

71 *Everfresh* (n 26) para 77.

72 *Everfresh* ((n 26) para 88.

73 *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 225.

74 *Makwanyane* (n 73) 237.

line with the aims and objectives of the Constitution.⁷⁵ It brings forth flexibility and discretion for each particular case to be decided on its own merits. Of course, such discretion must be exercised judiciously. The flexibility of ubuntu is advantageous, and as a foundational principle, it has a certain unchanging and unyielding focus on the greater good, communal interest and dignity.⁷⁶ It is seemingly compatible with the concept of good faith and public policy.⁷⁷ Good faith also promotes fairness, humanness and social justice as it requires sincerity between contractual parties, therefore, circumventing fraud.

The concept of good faith in contract law promotes the spirit, purport and objects of the Bill of Rights. In *Everfresh*, the Court emphasised the central importance of good faith in contract law and the desirability of infusing the law of contract with constitutional values, including ubuntu.⁷⁸ Therefore, it is to be hoped that courts will, in the future, exercise their constitutional mandate and develop the common law of contract to include good faith as a standard or, ideally, requirement for the validity of a contract as this approach is consistent with the Constitution and its values. Parties should then have an election to contract out of this standard or requirement or limit its application, provided that the enforcement of such a contract will not be patently unfair or violate public policy as discerned from the values embodied in the Constitution. This approach gives effect to both the principle of freedom of contract in terms of the common law and the values embodied in the Constitution.

The minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*⁷⁹ argued that the function of good faith was to give effect to the community's sense of fairness, reasonableness, and appropriateness where a contractual matter arose.⁸⁰ Moreover, the Constitutional Court has held that what constitutes public policy must be discerned in light of the fundamental values embodied in the Constitution, particularly the Bill of Rights.⁸¹ The role of good faith is still, unfortunately, a matter for debate and there is a need for the Constitutional Court or the legislature to intervene in respect of the position of good faith and fairness in contract law.

75 E Van der Sijde 'The role of good faith in the South African law of contract' unpublished LLM Dissertation, University of Pretoria, 2012 at 64.

76 Van der Sijde (n 75) 64.

77 Van der Sijde (n 75) 69.

78 *Everfresh* (n 26) para 44.

79 1997 (4) SA 302 (SCA).

80 *Eerste Nasionale Bank* (n 79) para 32.

81 *Barkhuizen* (n 14) para 82.

6 Lessons South Africa can learn from other jurisdictions

South Africa can learn numerous lessons from other jurisdictions in respect of the role of good faith in contract law. According to section 39(1)(c) of the Constitution, a court, forum, or tribunal when interpreting the Bill of Rights may consider foreign law.⁸² In many civil law systems, good faith is recognised and enforced as an overriding principle that in conclusion and performance of contracts.⁸³ In such systems, contrary to what has been wrongfully claimed by some legal academics and judicial officers, this view does not defeat legal and commercial certainty.⁸⁴ Rather, it promotes certainty by limiting freedom of contract and, accordingly, parties know what is expected of them.

For example, in Germany, under the German Civil Code, contracting parties must observe good faith in both negotiation and performance of the contract.⁸⁵ This means parties are under an obligation to display honesty even before contracting and must act under the legitimate and reasonable expectations of the other party. They must also show a sincere intention to enter into a contract.⁸⁶ In the absence of good faith, an aggrieved party is entitled to rely upon the absence thereof as a ground to have the contract revoked.⁸⁷ In contrast, case law in New Zealand supporting the doctrine of good faith is currently meagre.⁸⁸ The main judicial proponent of the doctrine is the judgment in *Livingstone v Roskilly*,⁸⁹ where the Supreme Court asserted, *obiter*, that it would not exclude from the common law of New Zealand the concept that, generally the parties to a contract must act in good faith in concluding and performing contracts.⁹⁰ There is no authority in New Zealand expressly rejecting

82 Constitution of the Republic of South Africa, 1996.

83 J Steyn 'The role of good faith and fair dealing in contract law: A hair-shirt philosophy' (2012) 1 *Denning Law Journal* at 131.

84 *Potgieter & Another v Potgieter N.O. & Others* 2012 (1) SA 637 (SCA) para 32 wherein the SCA overturned the judgement of the North Gauteng High Court and held that while good faith, reasonableness and fairness are fundamental to the law of contract, they cannot be invoked by courts so as to intervene in contractual relations as such an approach will introduce legal and commercial uncertainty.

85 A Mehren 'The French civil code and contract: A comparative analysis of formation and form' (1955) 15 *Louisiana Law Review* at 698.

86 P Giliker 'Contract negotiations and the common law: A move to good faith in commercial contracting?' (2022) 43 *Liverpool Law Review* at 176.

87 Giliker (n 86) 176.

88 J Bayley 'A doctrine of good faith in New Zealand contractual relationships' unpublished LLM thesis, University of Canterbury, 2009 at 397.

89 [1992] 3 NZLR 230.

90 *Livingstone v Roskilly* [1992] 3 NZLR 230 237.

the doctrine of good faith. Similar to the South African position, the issue of good faith in contracts is a developing area of the law.⁹¹

In English jurisprudence, there is no general obligation of good faith.⁹² Such an obligation may be included in express or implicit terms in the contract. For instance, in *Walford v Miles*,⁹³ the House of Lords, in ruling that each party to contract negotiations is entitled to pursue their own interest, so long as he avoids making misrepresentations, seemingly precluded such a duty.⁹⁴ The role of good faith in England's contract law is to some extent similar to that of South Africa, save for the Unfair Contract Terms Act,⁹⁵ which, when read with the Unfair Terms in Consumer Contracts Regulations, defines an unfair term to be a term which has not been individually negotiated and contrary to the requirement of good faith in that it causes a significant imbalance in the rights and obligations of the parties.⁹⁶ In England and South Africa the role of good faith is limited.⁹⁷ However, in South Africa the role of good faith has been aided by the Constitution.⁹⁸

Unlike the majority of the common law countries, the United States (US) has accepted the doctrine of good faith in contract law. This is done in terms of three sources of law. The first is the Uniform Commercial Code which imposes an obligation of good faith in the performance or enforcement of every contract.⁹⁹ This is a set of laws that regulates all commercial transactions in the US.¹⁰⁰ Every state has adopted the Code, although some states have made modifications to certain of its provisions.¹⁰¹ Second, the American Law Institute's Restatement of the principles of contract at common law provides that every contract imposes on each party a duty of good faith and fair

91 Bayley (n 88) 28.

92 *Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371.

93 [1992] 2 AC 128.

94 *Walford v Miles* [1992] 2 AC 128 at 138.

95 1977.

96 Section 62(4) of the Consumer Rights Act, 2015, which Act consolidates the provisions of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 insofar as they applied to consumers, provides as follows:

“A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.”

97 Under English Jurisprudence, good faith is solely confined to contracts concluded between a seller or a supplier and a consumer.

98 See *Everfresh* (n 26) para 71 wherein the Constitutional Court expressed the desire to develop the common law of contract by infusing it with constitutional values, including values of good faith and ubuntu.

99 Uniform Commercial Code 1952 articulates obligations of good faith in 60 sections and provides a general good faith definition and definitions specific to particular sections.

100 Uniform Commercial Code 1952.

101 For example, the Uniform Commercial Code of the District of Columbia § 28:1-101 (Public Law 88-243-Dec. 30, 1963) has adopted the Uniform Commercial Code with some modifications.

dealing in its performance and its enforcement.¹⁰² Although this is a secondary source of law, it is heavily relied upon by courts and has been cited with approval numerous times. US courts often turn to it as an interpretative aid of the common law. Third, the United Nations Convention on Contracts for the International Sale of Goods, to which the United States is a party,¹⁰³ suggests the observance of good faith in international trade, in its article 7(1).¹⁰⁴

The courts in the US have also on occasion imposed an obligation of good faith in contractual performance, in circumstances where the Uniform Commercial Code does not apply, by applying the common law.¹⁰⁵ This can be seen in the ruling of the US Court of Appeals for the Ninth Circuit,¹⁰⁶ in which it applied the duty to act in good faith by relying upon an earlier judgement of the California Supreme Court.¹⁰⁷ The District Court for the Eastern District of Pennsylvania has similarly held that 'every contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract'.¹⁰⁸ In US jurisprudence, good faith is treated as an implied provision in the contract and the duty of good faith cannot be waived, although parties may, in the exercise of their freedom of contract, limit or define the scope of the duty.¹⁰⁹

From the above examples, it can be seen that uncertainty in the role of good faith in contract law may be eliminated by either statutory or judicial intervention. In many civil law jurisdictions, good faith in contract law is an overriding principle. Therefore, a legislature may, in this regard, enact legislation that will regulate the law of contract and similarly incorporate good faith as an overriding principle. Legislation could also require parties to observe good faith in both negotiation and performance of the contract, as is done in Germany. The South African legislature may also take inspiration from US law and impose on contractual parties a duty of good faith and fair dealing. US courts further regard good faith as an implied provision in the contract.

These jurisdictions should serve as examples for South African courts so that they may exercise their constitutional mandate to develop the common law and consider good faith as an implied provision. In light of the role of good faith in other jurisdictions, the

102 EA Farnsworth *The restatement (second) of contracts* (1981) at 340.

103 The US ratified the Treaty on 11 December 1986.

104 Art 7(1) United Nations Convention on the Contracts for the International Sale of Goods, 1980 United Nations General Assembly Resolution 33/93 19 ILM 668.

105 EA Farnsworth 'Good faith performance and commercial reasonableness under the uniform commercial code' (1962) 30 *University of Chicago Law Review* 666.

106 *Seaman's Direct Buying Service v Standard Oil Co. of California*, 36 Cal.3d 752, 768, 686 P.2d 1158, 1166, 206 Cal.Rptr. 354, 362 (1984).

107 *Los Angeles Memorial Coliseum Commission v National Football League*, 791 F.2d 1356.

108 *City of Rome v Glanton*, 958 F. Supp. 1026, 1038-39.

109 Bayley (n 88) 397.

Constitutional Court or the legislature should clarify the position of good faith in contract law to promote legal and commercial certainty. The current uncertain position of good faith gives wide discretion to courts when adjudicating contractual matters and therefore opens the room for endless and uncertain litigation which is both time-consuming and expensive. This is not in accordance with the principle of legal certainty.

7 Good faith and fairness are not requirements

Good faith and fairness can, at best, be seen as the underlying principles of the law contract. This means good faith or fairness cannot be used as an independent and direct defence to have a contract set aside.¹¹⁰ Consequently, the lack of good faith in a contract does not automatically make it invalid. Good faith could, however, be used indirectly to set a contract aside. This was established in the case of *Sasfin (Pty) Ltd v Beukes*,¹¹¹ where it was held that contractual terms that were unconscionable and exploitative may be set aside on the grounds of violating public policy.¹¹² These terms could also be considered as being *mala fide* and unfair.¹¹³ Good faith and fairness form part of public policy in that public policy indirectly ensures that contracts are in good faith and are fair, as unjust contracts are unenforceable because they are against public policy.¹¹⁴ Although good faith is fundamental to the law of contract, it is, however, not an independent rule that a court can make use of directly to find a contract invalid or interfere in a contractual relationship.¹¹⁵

The SCA has held that good faith is a sub-component of public policy, and it is applied in the interest of the public.¹¹⁶ There are certain cases in specific instances where the lack of good faith could amount to a breach. This was confirmed in the case of *Silent Pond*

110 This is best captured by using the words of Brand JA in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27 wherein he profound as follows:

“although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder.”

111 1989 (1) SA 1 (A).

112 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) para 37.

113 Hutchison (n 2) 58.

114 As per Ngcobo J’s ruling in *Barkhuizen* (n 14) paras 23-30.

115 *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA) para 31-32.

116 *Eerste Nasionale Bank* (n 79) para 318.

Investments CC v Woolworths (Pty) Ltd,¹¹⁷ where parties agreed they would observe utmost good faith in their relationship, and in this case, it was also expressly stated in the contract.¹¹⁸ So an obligation was created for the parties of the contract to act in good faith. This fortifies good faith and creates grounds for a party to be found in breach based on failure to act in accordance therewith.¹¹⁹ This essentially means that if a party to a contract does not act in good faith, they have failed to fulfil their contractual obligation which could, depending on the terms of the contract and prayer of the aggrieved party, lead to the contract being set aside. Parties may well be advised to include an express clause in the contract requiring the observation of good faith and, for the sake of practicality, define the conduct or omission that will amount to bad faith and the consequences thereof. This is usually an act that undermines the contractual rights of the other party, such as an imperfect performance of contractual obligations or withholding material information.

8 Conclusion

The role of good faith and fairness in contract law is regrettably uncertain. In practice, this has caused commercial and legal uncertainty. Great strides have been made by the Constitutional Court in developing the concepts of good faith and fairness in contract law. Unfortunately, this is not enough as the role of these concepts continues to remain uncertain. There are lessons that South Africa can learn from other jurisdictions. For example, South Africa may, by statutory enactment, recognise good faith as an overriding principle like the majority of civil law countries. The South African legislature may also take inspiration from US jurisprudence and impose on contractual parties a duty of good faith and fair dealing. Nothing prevents courts from regarding good faith as an implied provision in every contract in the exercise of their constitutional mandate to develop the common law. It is, therefore, evident that there is a need for an intervention by the Constitutional Court or through statute that clearly and explicitly clarifies the role of good faith and fairness in contract law. It is unacceptable that, in an unequal society, good faith and fairness are not overriding principles underpinning our law of contract, let alone an obligation on contractual parties to act in accordance therewith. In this regard, this is an important constitutional issue, albeit in a commercial setting. The correction of this constitutional blemish is necessary for achieving equality as outlined in the founding provisions of the Constitution.

117 2011 (6) SA 343 (D).

118 *Silent Pond Investments* (n 117) para 66.

119 *Silent Pond Investments* (n 117) para 84.