

# GIVING PRACTICAL EFFECT TO GOOD FAITH IN THE LAW OF CONTRACT

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## 1 Introduction

According to South African law, all contracts are subject to the requirement of good faith.<sup>1</sup> The implications of this position are not entirely clear, but it at least means the following. Firstly, good faith is an underlying value of the law of contract, which is reflected in its established rules,<sup>2</sup> and which could also be resorted to in justifying the development of new rules. Secondly, courts may take into account good faith when deciding whether to read an implied term into a contract,<sup>3</sup> or when interpreting a contract.<sup>4</sup> Thirdly, good faith is not a “self-standing rule”<sup>5</sup> or “free-floating” basis for courts to exercise a general equitable discretion to refuse enforcing contracts.<sup>6</sup>

It has often been argued that the current position is unsatisfactory, and that promoting greater fairness in the South African law of contract requires more prominence to be accorded to good faith than the limited role set out above. In support of this argument some have pointed out that the private law codes of modern civil-law systems generally contain provisions to the effect that

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<sup>1</sup> See *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 80; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 32. Sometimes it is said that all contracts are *bonae fidei* or subject to good faith (see *Meskin NO v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802 or that parties must relate to each other in good faith (see *Kwa-Zulu Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal* 2013 4 SA 262 (CC) para 17; further see *Bank of Lisbon and South Africa v De Ornelas* 1988 3 SA 580 (A) 601F-G).

<sup>2</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

<sup>3</sup> *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 70-71; R Zimmermann “Good Faith and Equity” in R Zimmermann & D Visser (eds) *Southern Cross - Civil Law and Common Law in South Africa* (1996) 217 244-245; see the text to part 4 3 below.

<sup>4</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 32; *Meskin NO v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802; Zimmermann “Good Faith and Equity” in *Southern Cross* 242-243; see the text to part 2 2 1 below.

<sup>5</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

<sup>6</sup> *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 22, relying on an influential essay by D Hutchison “Non-variation Clauses in Contract: Any Escape from the *Shifren* Straightjacket?” (2001) 118 *SALJ* 720 743-744; F Brand “The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A further Instalment” (2016) 27 *Stell LR* 238.

parties must act according to good faith.<sup>7</sup> In other words, in these codes, good faith is not (only) a value underlying the law of contract; it is given effect to by a general rule that courts may rely on directly to provide relief.

The purpose here is to explore whether foreign experiences suggest that South African law should indeed elevate the status of good faith from that of an underlying value to such a rule or standard. It would be an impossible task to consider all the codified good faith clauses in national laws<sup>8</sup> and in international instruments.<sup>9</sup> The focus consequently will be on arguably the most prominent and far-reaching of these clauses, namely paragraph 242 of the German Civil Code or *Bürgerliches Gesetzbuch* (“§ 242 BGB” or simply “the good faith clause”).<sup>10</sup> It reads as follows:

The debtor must perform in the manner required by good faith, taking into account common usage (*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*).

One hastens to add that even though the wording of the good faith clause suggests that it only applies to *how* an obligation, and more specifically a contractual obligation is to be performed, the provision is generally, and quite generously, interpreted to mean that rights have to be exercised and duties have to be fulfilled according to good faith. The ambit of the clause is therefore not limited to the manner of performance of a contract; in fact, it extends even beyond the domain of the law of contract, or private law in general.

German law has grappled for more than a century with delineating the contours of this provision. These experiences have also enjoyed the attention of South African courts, most notably the seminal judgment of Jansen JA in

<sup>7</sup> See eg L Hawthorne “Abuse of a Right to Dismiss not Contrary to Good Faith” (2005) 17 *SA Merc LJ* 214 217-219; A Louw “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) *PELJ* 68 81 sqq; South African Law Commission *Unreasonable Stipulations in Contracts and the Rectification of Contracts Project 47 Report* (1998) 140 (setting out the submissions of Van der Merwe and Van Huyssteen). The application of good faith in continental European codes is virtually absent as a topic in pre-1980 academic literature; this could be ascribed in part to local sympathy for the Pandectist (pre-codification) approach in German law, which did not favour such an open-ended norm. On this approach see P du Plessis “Good Faith and Equity in the Law of Contract in the Civilian Tradition” (2002) 65 *THRHR* 397 406-407, 409. For an early indication of the value of comparative perspectives in this context, see G Lubbe “Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg” (1990) 1 *Stell LR* 1 19 n 97.

<sup>8</sup> For comparative overviews see eg S Whittaker & R Zimmermann (eds) *Good Faith in European Contract Law* (2000); H Beale et al *Cases, Materials and Text on Contract Law* 2 ed (2010) 775-779, 812-826; D Looschelders, D Olzen & G Schiemann (eds) *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse Einleitung zum Schuldrecht §§ 241 - 243 (Treu und Glauben) § 242* by D Looschelders, D Olzen (2015) paras 1160-1254; S Cornelius “Bepaalde Verskyningsvorme van Goeie Trou in die Kontraktereg” (2001) *TSAR* 241 245-248.

<sup>9</sup> See eg S Vogenauer “Art 1.7” in S Vogenauer (ed) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* 2 ed (2015) 205-225. On the application of Art 7(1) of the CISG see P Schlechtriem “Good Faith in German Law and in International Uniform Laws” (February 1997) <https://www.cisg.law.pace.edu/cisg/biblio/slechtriem16.html> (accessed 9-10-2018).

<sup>10</sup> For overviews in English see S Whittaker & R Zimmermann “Good faith in European Contract Law: Surveying the Legal Landscape” in Whittaker & Zimmermann (eds) *Good Faith* 718-32; W F Ebke & B M Steinhauer “The Doctrine of Good Faith in German Contract Law” in J Beatson & D Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 171. For a broader comparative view of the treatment of good faith in international instruments see J P Schmidt “Art 1:201: Good Faith and Fair Dealing” in N Jansen & R Zimmermann (eds) *Commentaries on European Contract Laws* (2018) 101-156.

*Tuckers Land & Development Corporation (Pty) Ltd v Hovis*,<sup>11</sup> which based an implied duty not to commit anticipatory breach on the requirement that contracts are subject to good faith.

Crucially, the German Civil Code was built on the foundations of uncodified rules of civil law that also underlie much of our law of contract. From a South African perspective it may therefore be of particular interest to establish to what extent these experiences indicate that adopting a good faith rule can promote greater fairness, or whether they rather point in the opposite direction and caution us against according good faith a more prominent role than that of an underlying value.

In these deliberations it will of course have to be borne in mind that German law and South African law do not necessarily share identical values, policies or goals;<sup>12</sup> different social, political, economic and cultural conditions may require different means of giving expression to good faith. This could also influence the determination of the standard of behaviour expected from contracting parties. Nonetheless, in these two systems there at least appears to be strong coherence at the level of the recognition of fundamental rights and constitutional values.

With these introductory observations in mind, let us then first try to obtain a better grasp on the good faith clause itself.

## 2 The good faith clause in the German Civil Code

### 2 1 The background to and general meaning of the good faith clause

#### 2 1 1 *The meaning of good faith*

As is often the case with a code, much is concealed behind the wording. Firstly, when applying § 242 BGB, “good faith” does not simply mean fairness or reasonableness. It bears a more specific meaning, which sometimes is explained by closer examination of the German term, *Treu und Glauben*, of which “good faith” is a rather vague translation. The term essentially requires that a party takes into account the protectable interests of another party (that is, displays *Treu*) and the other party in turn must rely on this (that is, must display *Glauben*).<sup>13</sup> The protection of this reliance lies at the heart of the whole construct of good faith. When used in this sense, the concept is defined “objectively” as a standard of behaviour, as opposed to the “subjective” sense of having the state of mind of being “in good faith”, typically through not knowing something. German law then uses a different term, *guter Glaube*, to describe “subjective” good faith.

<sup>11</sup> 1980 1 SA 645 (A) 652D, commented on by DL Carey Miller “*Judicia Bonae Fidei: A New Development in Contract?*” 1980 (87) *SALJ* 531; further see the references in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 31; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 104.

<sup>12</sup> See Schlechtriem “Good Faith in German Law” 17-18.

<sup>13</sup> See *Staudinger* § 242 para 140-143; *Jauernig - Bürgerliches Gesetzbuch Kommentar* 16 ed (2015) § 242 by H-P Mansel para 3. However, as we have seen, in applying the good faith clause, German lawyers hardly limit themselves to its exact wording; and we are also acting somewhat a-historically when parsing a German expression to give effect to a concept that is essentially Roman in origin (i.e. *bona fides*).

### 2 1 2 *The constitutional dimension*

Secondly, in German law the value system embodied in the Constitution decisively influences the application of the good faith clause.<sup>14</sup> This application may require carefully balancing rights or interests. Thus, while parties should be free to give expression to their autonomy by determining the content of their contract,<sup>15</sup> they may not engage in discriminatory practices. The good faith clause has been invoked, for example, to prevent a party from terminating a contract because it finds the other party's sexual preferences objectionable.<sup>16</sup>

As an open-ended norm, the good faith clause carries with it the risks, as Wieacker put it, of judges being exposed to political and ideological pressures and deciding cases "on purely equitable grounds with no underlying principle".<sup>17</sup> This has sadly been the case in the past, when the clause was resorted to in order to justify interfering with contractual relations for deeply sinister political motives.<sup>18</sup> For example, in order to give practical effect to the racial-political views of National Socialism, German courts relied on the good faith clause to justify allowing non-Jewish employers to terminate the apprenticeships of Jewish employees.<sup>19</sup>

These experiences are potentially relevant in the South African context. At the heart of our constitutional state is a horizontally-applicable Bill of Rights, which provides the broader context in which expression must be given to good faith in our legal system. As we have seen, good faith at present is (only) regarded as a constitutional value that underlies the law of contract. However, German experiences suggest that if it ever were to assume a more prominent position, this constitutional context would be of crucial importance to delineate its contours. This context should not only prevent courts from invoking good faith to justify the extreme ideologically-motivated type of decisions referred to above, but also constrain them from falling in the trap, warned against by Wieacker, of assuming broad equitable powers that exceed their constitutional mandate.

### 2 1 3 *Good faith as general norm, not limited to the law of contract*

Thirdly, the good faith clause is a general provision of the civil code and is not only applicable to the law of contract. Nonetheless, in the contractual context it is especially relevant; here the "special relationship" or special connection (*Sonderverbindung*) between the parties that is required to rely on the provision clearly is present. Furthermore, this connection does not only

<sup>14</sup> *Palandt - Bürgerliches Gesetzbuch* 76 ed (2017) § 242 by C Grüneberg para 8; *Jauernig* § 242 para 3; further see *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 104.

<sup>15</sup> See *Münchener Kommentar - Bürgerliches Gesetzbuch, Schuldrecht Allgemeiner Teil* 7 ed (2016) § 242 by C Schubert para 69; *Jauernig* § 242 para 3.

<sup>16</sup> See *Münchener Kommentar* § 242 para 69. These issues are now governed by legislation.

<sup>17</sup> F Wieacker *A History of Private Law in Europe* transl T Weir (1995) 377; F Wieacker *Zur rechtstheoretischen Präzisierung des § 242 BGB* (1956) 9.

<sup>18</sup> RAG DR 1939, 2041. See *Historisch-kritischer Kommentar zum BGB Band II Schuldrecht: Allgemeiner Teil I. Teilband* (2013) §§ 241-304 by T Duve & H-P Haferkamp paras 23-24, 71-76; *Staudinger* § 242 para 77; U Spellenberg "Individualism and the Balancing of Interests in German Civil Law" in F Diedrich (ed) *Ubuntu, Good Faith and Equity* (2011) 148-151.

<sup>19</sup> RAG DR 1939, 2041.

arise when they are contractually bound, but could exist when they commenced negotiations, or when they are involved in invalid legal transactions.

#### 2 1 4 *Good faith and equity*

Finally, commentaries make it abundantly clear that the good faith clause does not provide judges with a general equitable discretion to decide cases according to subjective notions of fairness. Its application rather requires a careful weighing up of relevant interests,<sup>20</sup> which enables specific new legal instruments to be developed.<sup>21</sup> It has been said that this provision is more appropriately regarded as a “pressure valve”, which provides relief when other means are insufficient.<sup>22</sup> The care which the courts exercise in applying the provision, and the degree of precision required when relying on it, is neatly summarised by the following reaction of Professor Kötz to English commentators who expressed grave reservations about a good faith standard:

Most cases [involving the application of § 242 BGB] can be assigned to one of a number of well-defined rules which have all been developed by the courts under the umbrella of § 242 BGB, but which now lead a separate and independent existence so that figuratively speaking, the statutory foundation of § 242 BGB could be withdrawn without any risk of having the judge-made edifice collapse. It would be a poor advocate who would simply cite § 242 BGB to the judge to invite him to dispense justice to his client according to the principles of good faith and fair dealing. What would be expected of him would be references to the more specific doctrines of say ... frustration, or forfeiture, including the judgements applying these doctrines to individual cases.<sup>23</sup>

Ultimately, therefore, the devil is in the detail: the good faith clause works because specific rules give effect to it. Those rules were hammered out on the anvil of concrete cases and incremental scholarly analysis. We will turn to these rules presently, but before doing so, we first need a better understanding of the broader context in which the general clause operates.

## 2 2 The relationship between the good faith clause and other provisions of the German Civil Code

The domain of a good faith clause can vary substantially, depending on other provisions in the code that could supplement it or give more concrete expression to its demands. These domains can also change over time. German law relatively recently relocated some established applications of the good faith clause, for example on situations involving change of circumstances, into separate provisions of the code.<sup>24</sup> South African observers seeking guidance on the potential role of good faith in our law have to be sensitive to this broader context. It is not sufficient merely to take a comparative snapshot of what the good faith clause currently does; it is also necessary to know what

<sup>20</sup> BGH 49, 153; BGH 135, 337, see *Jauernig* § 242 paras 4, 9. On weighing up interests see esp *Münchener Kommentar* § 242 paras 50-81.

<sup>21</sup> *Jauernig* § 242 para 9.

<sup>22</sup> *Historisch-kritischer Kommentar* § 242 para 88.

<sup>23</sup> H Kötz “Towards a European Civil Code: The Duty of Good Faith” in P Cane & J Stapleton (eds) *The Law of Obligations - Essays in Celebration of John Fleming* (1998) 243 250.

<sup>24</sup> See 6 2 below; A Hutchison “Gap Filling to Address Changed Circumstances in Contract Law – When it Comes to Losses and Gains, Sharing is the Fair Solution” (2010) 3 *Stell LR* 414 415.

the clause does not do, and why this is so. Let us then consider in more detail other provisions in the German Civil Code that define this clause's external boundaries. The choice of provisions is at best a selection of some prominent examples, since ultimately the domain of the good faith clause is influenced by the code as a whole.

### 2 2 1 Rules on interpretation

According to § 157 BGB, contracts are to be interpreted according to the requirements of good faith, taking into account common usage. The wording of this provision closely resembles that of the good faith clause, and in practice the boundaries between them can at times be indistinct.<sup>25</sup> This is because the good faith clause (as we will presently see) can be relied on to supplement contractual terms.<sup>26</sup> It can be a matter of some complexity, however, to establish whether a party is under a particular contractual duty based on the proper interpretation of a contract (according to § 157 BGB), or because a term to this effect may be read into the contract (according to the good faith clause).

This distinction should not be entirely surprising to South African lawyers, for our law of contract recognises a rule of interpretation comparable to § 157 BGB. Thus, in *South African Forestry Co Ltd v York Timbers Ltd*, Brand JA held that:

“In the interpretation process, the notions of fairness and good faith that underlie the law of contract again have a role to play. While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.”<sup>27</sup>

The extent to which ambiguity may still be required when interpreting in this manner, and whether the purpose of interpretation indeed is to determine the intention of the parties may nowadays be disputed, but the underlying idea is clear: when giving meaning to a clause, courts may favour an interpretation that promotes good faith. Thus, a less onerous, commercially more efficacious or fair interpretation would be regarded as closer to the intention of the parties.<sup>28</sup> And where a clause grants a party a discretion to evaluate another party's conduct or performance, such an interpretation could require that the discretion be exercised reasonably.<sup>29</sup> However, as in German law, it is at times not quite apparent whether the exercise is one of interpretation, or

<sup>25</sup> Whittaker & Zimmermann “Good faith in European Contract Law” in *Good Faith* 18-19, 29.

<sup>26</sup> See 4 below. Book 2 Title 1 of the German civil code contains a host of provisions on the duty of performance; these provisions *inter alia* relate to payment of monetary obligations, payment of interest, duties to render accounts, part performance, performance by third parties, the place of performance, and the time of performance.

<sup>27</sup> 2005 3 SA 323 (SCA) para 32.

<sup>28</sup> *Mittermeier v Skema Engineering (Pty) Ltd* 1984 1 SA 121 (A) 128.

<sup>29</sup> See *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 1 SA 700 (A) 706-707; *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 3 SA 373 (C) 383E (relied on in *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 32); and part 5 2 1 2 (b) below.

simply reading in a term or applying a general rule of law, for example on how discretions must be exercised.

### 2 2 2 *Rules on prohibiting abuse of rights or harassment*

The next provision in the German Civil Code that must be distinguished from the good faith clause deals with “abuse of rights” or, as it is less often called, harassment. According to § 226 BGB, a right may not be exercised if its only possible purpose consists in causing another person damage.<sup>30</sup> A classic example is building in front of a neighbouring property merely to obstruct the neighbour’s view. In practice, the provision is not of great relevance. As will be indicated later, less extreme forms of abusive conduct could in any event be covered by the good faith clause. This means that parties would be more inclined to rely on that provision, which is an easier hurdle to cross than § 226 BGB.<sup>31</sup>

The doctrine of abuse of rights is also recognised in South African law, where (like § 226 BGB) it leads a rather marginal existence. It consists of a similarly strict set of requirements for branding the purpose of exercising of a right as improper.<sup>32</sup> The aggrieved party must not only prove that the other party had the “sole or predominant intention to harm” (the subjective requirement), but also that the action “served no appreciable or legitimate interest” of the other party (the objective requirement).<sup>33</sup>

The question remains whether there are situations in South African law where a party is unable to meet the strict requirements of the doctrine of abuse of rights, but should still be able to prevent another from exercising rights in a manner that prejudices his interests. To this issue we will return later.<sup>34</sup>

### 2 2 3 *Rules on fraud and duress as improper means of obtaining consent*

Our third category of rules located beyond the ambit of the German good faith clause deals with various improper ways of obtaining consent. In line with established practice in the civilian tradition, the German Civil Code provides in § 123 BGB that a party may rescind a contract which has been concluded due to another’s intentional misrepresentation or fraud (which could take the form of failing to disclose information), or due to another’s

<sup>30</sup> The *Schikaneverbot* (see *Staudinger* § 242 para 373-375; *Münchener Kommentar* § 242 para 134).

<sup>31</sup> See 5 2 below; Whittaker & Zimmermann “Good faith in European Contract Law” in *Good Faith* 20 n 67.

<sup>32</sup> See J E Scholtens “Abuse of Rights” (1958) 75 *SALJ* 39 48 n 56; J Neels “Tussen Regmatigheid en Onregmatigheid: Die Leerstuk van Oorskryding van Regte en Bevoegdhe” (Deel 1) (1999) *TSAR* 639; (Deel 2) (2000) *TSAR* 317; (Deel 3) (2000) *TSAR* 469; (Deel 4) (2000) *TSAR* 643.

<sup>33</sup> *Koukoudis v Abrina 1772 (Pty) Ltd* 2016 5 SA 352 (SCA) paras 25, 31. In early case law, concern was expressed that abuse of rights cannot be a ground for relief, due to the problem of proof of a party’s motive (for the Bible says that even “the heart of Kings is unsearchable”), but these problems were clearly not regarded as insurmountable. See Scholtens (1958) 75 *SALJ* 39 46-47. Further see J Neethling & J Potgieter “Vonnisbespreking: Bemoeiing met ’n Uitsluitende Kontraktuele Verhouding Getroef deur Vrye Mededinging” *LitNet Akademies* 14(1) (23-3-2017).

<sup>34</sup> See the text to part 5 2 below.

unlawful threats.<sup>35</sup> No need exists to resort to the good faith clause to combat these improper ways of obtaining consent.

None of this should be unfamiliar in the South African context. Our law also recognises that a contract could be invalid as a consequence of fraud or duress, albeit that in the case of fraud it adopts a slightly different perspective. We start by asking whether there was a misrepresentation (whether made fraudulently, negligently, or innocently) and what type of mistake it induced. If the misrepresentation only induced a non-material mistake (in essence one relating merely to the motive behind concluding the contract), the contract is voidable. Fraud is just one type of misrepresentation that could induce such a mistake. And if the misrepresentation induces a material mistake which is also reasonable (that is, a *iustus error*), the contract is void. The fact that a material mistake was caused by a misrepresentation (whether made fraudulently or not), would provide a strong indication that the mistake is reasonable. So ultimately the focus is on the effect of various misrepresentations on consent, and fraud itself enjoys less prominence.<sup>36</sup>

But what do all these rather daunting rules on misrepresentation inducing mistake have to do with good faith? Our courts clearly do not, in addition to these rules, rely on a good faith rule or principle to provide relief in cases of improperly obtained consent.<sup>37</sup> However, this does not mean that good faith is irrelevant to the application of these rules. Thus, in determining when a party's failure to speak constitutes an actionable misrepresentation, it can be argued that courts could be guided by the underlying value of good faith, which requires concern for a contracting party's dignity and expectations in concluding the contract, especially where there are no alternative means of obtaining information vital to the conclusion of the contract.

#### 2 2 4 Rules on wrongful conduct in the course of negotiations

We now move from specific defects of consent to standards of behaviour in the process of negotiation. In this regard German law imposes duties on parties engaging in negotiations to observe a certain degree of concern for each other's positions, more specifically when withdrawing from negotiations would cause another party harm. Historically, this is the domain of the doctrine of *culpa in contrahendo*, which initially was uncodified, but now is contained in § 311

<sup>35</sup> Relief could further be provided under §§ 434 sq BGB to purchasers of defective goods.

<sup>36</sup> L van Huyssteen, GF Lubbe & MFB Reinecke *Contract General Principles* 5 ed (2016) 25-30, 43-44, 98.

<sup>37</sup> The same goes for situations where a party seeking to enforce a contract argues that the other party created a reasonable reliance of assenting to the contract. As *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A) indicates, it would not be *bona fide* to "snap up" a bargain, knowing that the other party possibly mistakenly created the impression. But merely enquiring whether there was such an intention suggests an application of a general good faith norm or principle. The courts are applying established rules relating to liability imposed on objective grounds.

II BGB. Its formulation is rather intractable,<sup>38</sup> but it essentially provides that when parties commence negotiations, a special relationship of trust is created, which requires of them to take account of each other's rights and interests. The failure to honour this duty could give rise to liability to pay damages, unless the party in breach is not responsible for the failure. Liability under this provision is not based on any pre-contractual contract or agreement which the parties may (in any event) conclude to govern their relationship during negotiations. This liability could be regarded as being rooted in good faith, which requires parties to consider each other's interests.<sup>39</sup>

There is no direct South African counterpart to § 311 II BGB. The general position in our law is that parties must enjoy considerable freedom to withdraw from negotiations. There are only limited indications that delictual liability for damages could arise from misleading a party in the course of negotiations,<sup>40</sup> or that a party who is enriched due to the breaking off of negotiations may (theoretically at least) be obliged to disgorge benefits on the basis of unjustified enrichment.<sup>41</sup> One of the major challenges facing our law of contract is to determine whether it should require that parties display greater concern for each other's interests when negotiating a contract. In this regard the German experiences suggest that specific rules imposing such duties can indeed be justified on the basis that they give expression to good faith as underlying value.

### 2 2 5 *Rules on legality: violating statute and public policy*

We now turn to one of the most complex and important areas of interaction between the good faith clause and other provisions of the German Civil Code. German law adopts the point of departure that it respects parties' autonomous decisions concerning with whom and on what terms they wish to contract. However, this general statement is qualified by two important sets of rules. The first set regulates the legality of the substance or content of contractual terms, and the second regulates the way in which valid terms or rights may be exercised or enforced.

As far as the first set is concerned, no legal system accepts that parties have complete freedom to determine the contents of a contract. In this regard § 134 BGB determines that a legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion, whereas § 138 (1) BGB states that a legal transaction which is contrary to public policy is void. As far as the second set is concerned, the good faith clause limits the way in which

<sup>38</sup> According to § 311 BGB, duties under § 241(2) BGB to take account of the rights, legal interests and other interests of the other party, could arise from

(1) commencing negotiations;

(2) initiating a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him; or

(3) similar business contacts.

<sup>39</sup> See Van Huyssteen et al *Contract* 85.

<sup>40</sup> 87.

<sup>41</sup> On the possibilities see A Hutchison "Liability for Breaking Off Contractual Negotiations?" (2012) 129 *SALJ* 104.

a valid right may be enforced or exercised. The boundaries between these two sets of provisions can be rather indistinct,<sup>42</sup> but in general it is only if the “substantive validity” hurdle of the first set of rules (that is, §§ 134 and 138 (1) BGB) is crossed, that enforceability can be tested in terms of the second set (that is, the good faith clause).

The division above is significant in the South African context. In *Barkhuizen v Napier* (“*Barkhuizen*”),<sup>43</sup> the Constitutional Court had to decide whether a time limitation clause was valid and enforceable. The court applied the standard of public policy, which *inter alia* is influenced by considerations of fairness. It then held that two questions must be asked in determining fairness. The first is whether the clause itself is unreasonable. This is the question of substantive validity, which German law deals with under the first set of rules above. If the clause is invalid, the enquiry ends.<sup>44</sup>

However, if the clause is not so unreasonable as to be contrary to public policy, and hence valid, the second question is asked, namely whether the term should be enforced in light of the circumstances.<sup>45</sup> This is the enquiry under the second set of rules above, which in German law is the domain of the good faith clause. South African law does not recognise anything comparable to such a clause, but it is now well-established in cases like *Barkhuizen*<sup>46</sup> that courts may refuse enforcement of a valid term (that is, one that passed the first hurdle of substantive validity) if this would be contrary to public policy. The standard is therefore not that of good faith. Subsequently, in *Bredenkamp v Standard Bank of SA Ltd* (“*Bredenkamp*”),<sup>47</sup> the Supreme Court of Appeal (“SCA”) confirmed that courts may prevent enforcement of a right (or exercising a right – *in casu* the right of a bank to terminate the client’s mandate) in light of public policy, but made it clear that this power is not exercised based on general considerations of “fairness”; it was essential that “some or other public policy consideration found in the Constitution or elsewhere is implicated”.<sup>48</sup>

This prompts the following question. When comparing the German and South African approaches, are there situations where enforcement of a valid

<sup>42</sup> See *Staudinger* § 242 paras 365-371; Whittaker & Zimmermann “Good Faith in European Contract Law” in *Good Faith* 29-30; *Münchener Kommentar* § 242 paras 131-133.

<sup>43</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC).

<sup>44</sup> Thus, in *Neugebauer & Co Ltd v Hermann* 1923 AD 564, the agreement between prospective bidders to collude to keep the price low was in itself substantively unreasonable and contrary to public policy. The parties’ motive was to deceive the seller, and they therefore subjectively acted in bad faith, but this does not mean that a good faith principle, in the sense of some general rule, was the basis for relief. The problem was one of illegality (see G Bradfield *Christie’s Law of Contract in South Africa* 7 ed (2016) 445).

<sup>45</sup> See *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 56, read with para 48.

<sup>46</sup> In *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A), Jansen JA in a minority judgment suggested that public policy could not fulfil such a limiting function, and that the demise of the *exceptio doli* would leave a vacuum (616). But in his reaction to the case, Zimmermann prophetically envisaged an increased role of public policy after the demise of the *exceptio doli* (*The Law of Obligations – Roman Foundations of the Civilian Tradition* (1996) 677). This is exactly what happened when public policy came to be accepted as a standard against which enforcement can be tested (for recognition of this role prior to *Barkhuizen* see *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 31 and for a historical overview of the origins of the public policy rule see L Hawthorne “Public Policy: The Origin of a General Clause in the South African Law of Contract” (2013) 19 *Fundamina* 300).

<sup>47</sup> 2010 4 SA 468 (SCA).

<sup>48</sup> 2010 4 SA 468 (SCA) para 50.

term would violate the good faith clause of German law, yet not meet the South African test that a public policy consideration has to be “implicated” before enforcement can be refused? To this question we will return later when we consider the application of the good faith clause more closely.<sup>49</sup> For the moment, it can be concluded that South African law, like German law, clearly recognises that courts may control the substance and enforcement of clauses, but that South African law, unlike German law, imposes both limitations with reference to the public policy standard.

### 2 2 6 Rules on exploitation of weakness

One final aspect of the rules surrounding the good faith clause requires consideration. It will be recalled that German law provides relief when fraud and duress are used to obtain consent.<sup>50</sup> But these are not the only circumstances where a party whose consent to a contract has been obtained in an improper manner will be provided with relief. In this regard § 138(2) BGB specifically targets the exploitation of certain forms of weakness that result in a clear disproportion between the parties’ performances.<sup>51</sup> This provision is applied in situations when, for example, a weak party, such as an impecunious spouse, undertakes liability as a surety. Crucially, German courts have not followed suggestions by the academic community to apply the good faith clause in these cases.<sup>52</sup> It is under the auspices of an expanded notion of when a contract would be contrary to public policy, covered by § 138(2) BGB, rather than through applying the good faith clause, that courts provide relief. The reader may be forgiven for thinking that we may have descended rather too deeply into the technicalities of the German Civil Code, but the point is important: it shows how closely related these sources of relief are, especially when they have to be applied in situations where there is a combination of terms that are onerous and of weakness on the side of a party who assented to them.

The fact pattern of weak contracting parties entering into onerous agreements is hardly unfamiliar in South African law. Sometimes, the courts have been able to provide relief by applying the established rules on mental capacity,<sup>53</sup> mistake,<sup>54</sup> or undue influence.<sup>55</sup> Sometimes it takes into account the defect of consent more indirectly. As we have seen, courts may invalidate or refuse to enforce terms if they violate public policy. While the focus in such a determination is on the substance of the terms, courts may take into account

<sup>49</sup> See the text to part 5 2 1 2 (e) below.

<sup>50</sup> See the text to part 2 2 3 above.

<sup>51</sup> See § 138(2) BGB:

“In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance”.

Further see *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 104.

<sup>52</sup> See Whittaker & Zimmermann “Good Faith in European Contract Law” in *Good Faith* 29-30; BVerfGE 89, 214 sqq.

<sup>53</sup> See the majority judgment in *Eerste Nasionale Bank Bpk v Saayman NO* 1997 4 SA 302 (A).

<sup>54</sup> See *Katzen v Mguno* 1954 1 SA 277 (T); Bradfield *Christie’s Law of Contract* 208-209 (the signatory of a suretyship did not understand the nature of the document, and the notary failed to explain its import).

<sup>55</sup> See *Preller v Jordaan* 1956 1 SA 483 (A).

the procedural problem of an inequality in the parties' relative bargaining power (albeit that this is rarely decisive).<sup>56</sup>

Furthermore, calls for resorting to good faith as a basis for providing relief in these cases of weakness have been rejected.<sup>57</sup> To some extent, this is understandable; the leading judgment that supported such a development left it rather unclear how the concept of good faith is to be understood, and how it fitted in with established principles, such as the law of undue influence.<sup>58</sup> More recent case law has, however, shown that good faith could indirectly influence determining when a party has exerted undue influence on another.<sup>59</sup> But this still leaves unclear what the position is with other forms of weakness, such as illiteracy, inexperience, and lack of bargaining power.<sup>60</sup> Here courts could go down the road of taking various forms of weakness into account when deciding whether to invalidate or refuse to enforce an onerous contract on public policy grounds (which would be more in line with the German approach), or they could expand the range of categories of defective consent. However, courts traditionally are wary of doing so; the law of undue influence, in particular, has not followed the international trend of protecting a greater range of weak contracting parties.<sup>61</sup>

### 3 Applying the good faith clause in practice: its three main functions and their potential relevance in the South African context

The preceding overview has focussed on some prominent examples of specific provisions in the German Civil Code that could be regarded as giving expression to good faith as a value. It is therefore clearly not the exclusive domain of the good faith clause to perform this task. A comparison with South African law showed that we also recognise a variety of rules that similarly fulfil the function of promoting good faith as value. We turn now to the various fields of application of the German good faith clause, but it should be apparent that understanding it requires a constant awareness of the broader context, set out above, in which this clause operates.

What does the good faith clause of modern German law actually do? Given its extraordinary breadth, it is not surprising that jurists have sought to identify key groupings or categories of cases where this clause could be

<sup>56</sup> See eg *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59; this is an established practice in restraint of trade cases (see *Basson v Chilwan* 1993 3 SA 742 (A)).

<sup>57</sup> See eg *Brisley v Drotosky* 2002 4 SA 1 (SCA).

<sup>58</sup> See the minority judgment of Olivier JA in *Eerste Nasionale Bank Bpk v Saayman NO* 1997 4 SA 302 (A).

<sup>59</sup> See *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 4 SA 500 (GNP) para 22. Tuchten J *inter alia* referred to earlier decisions applying the *exceptio doli* cases to formulate a test of unconscionability requiring "a substantial degree of unscrupulousness, an intention to oppress, or a departure from the values to which right-thinking people subscribe in the relevant context".

<sup>60</sup> See *Beadica 231 CC v Trustees, Oregon Unit Trust* 2018 1 SA 549 (WCC). Davis J held that the parties' failure to exercise an option to renew a lease timeously according to the terms of the contract could be excused, partly because of their inexperience and the need to promote black economic empowerment. An unusual feature of the judgment, at least when viewed from a comparative perspective, is that it does not indicate that there was a conscious exploitation of this weakness.

<sup>61</sup> See eg JE du Plessis "Threats and Excessive Benefits or Unfair advantage" in H MacQueen & R Zimmermann (eds) *European Contract Law – Scots and South African Perspectives* (2006) 176.

applied. The focus here will be on a particularly influential threefold division, which can be traced to Roman notions on the various functions that could be fulfilled by officials entrusted with developing the law.<sup>62</sup> The distinction differentiates between the (i) “supplementing”, (ii) “limiting”, and (iii) “correcting” functions of good faith.<sup>63</sup>

This division has proved to be useful, if not essential in German law to prevent uncertainty over the scope of the good faith clause; it structures the mass of material on its application and alerts judges to relevant decisions that could guide their determinations.<sup>64</sup> It must be emphasised, however, that these descriptive categories are not exclusive, and that in some fact patterns the good faith clause could fulfil more than one function.<sup>65</sup> The boundaries between the categories are also not watertight. Thus, imposing additional or supplementary duties on parties (function i), or correcting a contract by invalidating terms (function iii) could also be described as exercises in limiting parties’ rights (function ii). These problems could be resolved by more exact definitions of what the domain of each function is, but, by and large, these challenges have not subverted the practical application of the division. These three functions will now be considered in turn with a view to determining whether they could also provide guidance on how to give effect to good faith in the South African context.

#### 4 The “supplementing” function of good faith: defining the main parties’ duties and creating ancillary duties

##### 4 1 Introduction

Parties normally have a relatively clear idea about the most important aspects of performance. These aspects could, for example, include what to pay, what object to deliver or make available for use, or what service to render. The parties could also agree on further key issues relating to performance, such as when and where it is to take place. But this still leaves a host of other matters unclear, which the law may be expected to address. To further this purpose, German law has relied on the good faith clause to develop numerous rules

<sup>62</sup> German authors came to appreciate that the basic problem with a general clause like § 242 BGB is that it concerns the relationship between those who have to apply the law and the law itself. They drew an analogy with the role that the praetor played when dealing with the Roman civil law. According to Papinian *D* 1 1 7 1, the praetorian law (*ius praetorium*) is “that which in the public interest the praetors have introduced in aid or supplementation or correction of the civil law (*ius civile*).” On the adoption and refinement of this division in German law see MW Hesselink “Chapter 26 The Concept of Good Faith” in A Hartkamp et al (eds) *Towards a European Civil Code* 3 ed (2004) 475-476, pointing to the role of Siebert; further influential champions include F Wieacker *Zur rechtstheoretischen Präzisierung des § 242 BGB* (1956) 20-21, referring to G Boehmer *Grundlagen der bürgerlichen Rechtsordnung* II, 2 (1952) 20 sqq, esp 73 sq. Further see M Storme “Good Faith and the Contents of Contracts in European Private Law” (2003) 7 *EJCL* para 7.

<sup>63</sup> On the division in general see *Jauernig* § 242 para 5; *Münchener Kommentar* § 242 paras 140-149; *Palandt* § 242 paras 13-14; Schmidt “Art 1:201: Good Faith and Fair Dealing” in *Commentaries on European Contract Laws* 114-116.

<sup>64</sup> See *Historisch-kritischer Kommentar* § 242 para 88.

<sup>65</sup> See *Münchener Kommentar* § 242 paras 133, 148.

that fulfil the “supplementing”<sup>66</sup> function of defining the main obligations more clearly, or of establishing additional or ancillary obligations.<sup>67</sup> Examples of various duties that traditionally arise when the general clause fulfils this function will first be discussed below, followed by a perspective on their potential relevance in the South African context. It must be pointed out, though, that in 2001 the legislature adopted § 241 II BGB, which essentially determines that an obligation may impose (supplementary) duties to take into account the rights and interests of another party. This provision could be regarded as also giving expression to the demands of good faith.

#### 4 2 Examples of duties imposed when the good faith clause performs its supplementing function

##### 4 2 1 *The duty to take into account the interests of the other party when performing the main obligation or when receiving performance*<sup>68</sup>

Our first contractual duty derived from the good faith clause relates to performance of the main obligations. It entails that the debtor must take into account the interests of the creditor when performing, and must do so according to the spirit, rather than the letter of the contract.<sup>69</sup> This duty is breached if, for example, a debtor seeks to perform at an inopportune moment, such as in the evening or on a public holiday.<sup>70</sup> A creditor is further obliged not to refuse performance that deviates only minimally from the agreed standard, for example when a debtor pays by way of a bank guaranteed cheque instead of cash, or by way of a credit transfer to another account of the creditor.<sup>71</sup> These duties of mutual consideration of another’s interests could assume particular significance in the context of long-term relational contracts. For example, a franchisee could be obliged to take the franchisor’s interests into account when marketing the franchise as a whole.<sup>72</sup> Complying with these duties does not, however, require of a party to subject his own interests to that of the other party.

##### 4 2 2 *Ancillary duties to ensure that the purpose of the performance is achieved*<sup>73</sup>

Apart from indicating how the main obligations are to be performed, the good faith clause is also the basis for imposing certain additional or ancillary duties. Parties are under a duty of loyalty to ensure that the purpose of the

<sup>66</sup> Reference has also been made to a “supportive” function of good faith (see Du Plessis (2002) 65 *THRHR* 397 409).

<sup>67</sup> See *Palandt* § 242 paras 22-37; *Jauernig* § 242 paras 17-31; Ebke & Steinhauer “The Doctrine of Good Faith in German Contract Law” in *Good Faith and Fault in Contract Law* 177-178.

<sup>68</sup> The *Rücksichtspflicht* or *Rücksichtnahmepflicht* of the debtor and the creditor - see *Jauernig* § 242 para 17; *Münchener Kommentar* § 242 paras 180-188.

<sup>69</sup> See *Jauernig* § 242 para 17.

<sup>70</sup> See *Münchener Kommentar* § 242 para 181; *Jauernig* § 242 para 17.

<sup>71</sup> See *Münchener Kommentar* § 242 para 182; *Jauernig* § 242 para 18.

<sup>72</sup> See *Münchener Kommentar* § 242 paras 181-182.

<sup>73</sup> The *Leistungstreuepflicht* - see *Palandt* § 242 paras 27-31; *Jauernig* § 242 para 27.

performance materialises, or, to put it negatively, to ensure that its purpose is not subverted. Thus, they could be obliged to take preparatory steps, such as checking that goods are properly packed, or to ensure that the purpose of performance is not subverted retroactively. For example, a seller of technical industrial products may be obliged to keep the necessary replacement parts in stock, or the seller of a business may not after the sale compete with the purchaser in a manner that results in the goodwill being dissipated.<sup>74</sup> The duty to ensure that the purpose of the contract is fulfilled is also clearly breached if a debtor seriously and definitively refuses to perform.

#### 4 2 3 *Ancillary duties to co-operate with the other party*<sup>75</sup>

Ensuring that the contract's purpose is achieved does not only require loyalty, as we have seen above, but also co-operation. Parties are accordingly obliged, in the interests of promoting good faith, to co-operate so that the conclusion or the performance of a contract is officially approved, if such approval is required; this duty also extends to not doing anything to prevent such approval being obtained. Ancillary duties to co-operate according to a good faith standard could further be imposed after a contract has terminated: a former landlord may therefore have to tolerate a display sign indicating that a former tenant has changed premises.<sup>76</sup> Finally, it bears mentioning that a failure to co-operate with the debtor to ensure performance could amount to breach (*mora creditoris*), but that this is regulated separately in the code.<sup>77</sup>

#### 4 2 4 *Ancillary duties to protect or not to harm the other party*<sup>78</sup>

It is trite that a person who wrongfully harms another could be delictually liable to pay damages. But in addition to this liability, German law has relied on the good faith clause to impose duties on parties not to harm each other in preparing for and rendering performance, or during the pre-contractual phase. Thus, business premises must not be hazardous or harmful to the other party's health, and care must be exercised not to harm another party's property while being in possession of it; sometimes, as in the case when a jeweller repairs another's jewellery, there may even be a duty to insure against a loss. Again, duties to protect or to prevent harm to another party could also exist after the contractual relationship has terminated. Thus, a business advisor may be bound by duties of confidentiality, or a doctor may be obliged to grant access to a patient's records.<sup>79</sup>

<sup>74</sup> *Palandt* § 242 para 28; *Jauernig* § 242 para 27; see Carey Miller (1980) 87 *SALJ* 531 535.

<sup>75</sup> The *Mitwirkungspflicht* – see *Palandt* § 242 para 32; *Jauernig* § 242 para 23.

<sup>76</sup> *Jauernig* § 242 para 30.

<sup>77</sup> See §§ 293 sqq.

<sup>78</sup> The *Schutzpflicht* – see *Palandt* § 242 paras 35-36; *Jauernig* § 242 paras 24-26; Schlechtriem “Good Faith in German Law” 13-14.

<sup>79</sup> *Jauernig* § 242 para 31.

#### 4 2 5 Ancillary pre-contractual duties to inform and disclose<sup>80</sup>

There is no general duty in German law to inform or disclose information to a prospective contract partner. Thus, a seller does not have to warn a purchaser that the purchase price might be very high, or that the contract may not generally be to his benefit. The law expects as point of departure that parties have to inform themselves. However, it is recognised that, exceptionally, good faith may oblige one party to inform another about circumstances which are known to him and which are discernibly of decisive importance for the creation of the contract, its proper implementation, or achieving its purpose. Whether such a duty arises depends on the circumstances; thus, it may be vital for the purchaser of land to be aware that building permission is required, or to know whether a party qualifies for a tax deduction: another party who has this information may be liable to disclose it. But, as indicated above, other provisions of the code could apply if a failure to comply with a duty to disclose in the pre-contractual phase amounts to fraud,<sup>81</sup> or amounts to wrongful pre-contractual conduct (*culpa in contrahendo*).<sup>82</sup>

#### 4 3 South African perspective

South African law recognises a number of duties on how performance is to be made or received, as well as on co-operating to ensure that a contract is fulfilled. Some examples relating to performance are quite specific and can be linked to those of German law referred to above. A creditor is obliged not to insist on payment in cash if the impression was created that payment by cheque would suffice,<sup>83</sup> and South African law has rules on what time of day would be appropriate to perform or insist on performance, thereby considering the other party's interests.<sup>84</sup> Some of these duties operate even after the contract was performed. Thus, the seller of a business remains bound to the purchaser not to subvert the purpose of the sale agreement by destroying the goodwill of the business through canvassing its customers.<sup>85</sup> Other duties are more general: a creditor has to co-operate with the debtor to enable performance, and commits breach in the form of *mora creditoris* if he does not do so. Both parties are obliged not to repudiate the contract by evincing the clear intention no longer to be bound by it. In the pre-contractual phase, South African law further recognises that one party may in certain exceptional circumstances have to

<sup>80</sup> On a party's *Aufklärungspflicht* and *Auskunftspflicht* see Ebke & Steinhauer "The Doctrine of Good Faith in German Contract Law" in *Good Faith and Fault in Contract Law* 171-178; *Jauernig* § 242 paras 19-21; *Palandt* § 242 para 37.

<sup>81</sup> See the text to part 2 2 3 above.

<sup>82</sup> See the text to part 2 2 4 above.

<sup>83</sup> See JC de Wet & AH Van Wyk *De Wet en Van Wyk – Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed GF Lubbe (ed) (1992) 265-266.

<sup>84</sup> See Bradfield *Christie's Law of Contract in South Africa* 499; further *cf s* 19(3) of the CPA.

<sup>85</sup> The courts recognized that the seller of corporeal property is bound by duties, such as to warrant against eviction. These duties were extended analogously to protect the purchaser of incorporeal property. See *A Becker & Co (Pty) Ltd v Becker* 1981 3 SA 406 (A) 414G-415B, 418-420; *Grainco (Pty) Ltd Van der Merwe* 2016 4 SA 303 (SCA) paras 25-26; *Van der Watt v Jonker* SCA case no 837/2010 of 23-09-2011 para 9; also see *Den Braven (Pty) Ltd v Pillay* 2008 6 SA 229 (D) para 35.

disclose information to the other, and factors such as involuntary reliance of the one on the other are taken into account in making this determination.

The duties above are contained either in established common-law rules, or in consumer legislation. According to our common law, the courts enjoy the inherent power to imply new terms into contracts,<sup>86</sup> or to change existing implied terms.<sup>87</sup> The duty not to repudiate, for example, has been located in such an *ex lege* implied term.<sup>88</sup> Our courts may also apply standardised rules or *naturalia* to certain types of contracts.<sup>89</sup> Thus, the seller's duty not to canvass customers could be regarded as one of the *naturalia* of a contract of sale.<sup>90</sup> As far as consumer legislation is concerned, sub-sections 19(2) and (3) of the Consumer Protection Act 68 of 2008 ("CPA") contain "implied conditions" regarding the time and place of performance; if no time is specified, suppliers may not require of the consumer to accept delivery or performance of a service at an unreasonable time. Section 65 in turn places a duty on a supplier to exercise care in dealing with the consumer's property in its possession.

If South African law could perform all these "supplementing" tasks with common-law rules or legislation, without relying on a good faith clause, where does good faith fit into the general scheme of things? Traditionally, its effect is only indirect. Thus, in determining whether to read terms into contracts that complement or restrict obligations, courts may take into account or refer to good faith.<sup>91</sup> And the *naturalia* of specific types of contracts have been described as "concrete manifestations of the basic principle of *bona fides*".<sup>92</sup> However, the courts are not willing to resort to good faith to read simply any term into the contract that (they believe) justice may require.<sup>93</sup> When reading terms into contracts, the demands of good faith are not the overriding consideration or test; courts consider further factors, such as public policy, commercial expedience, and even at a general level, what

<sup>86</sup> See *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 28. Courts thereby aid the development of the common law in accordance with s 39(2) of the Constitution of the Republic of South Africa, 1996 (see *South African Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) para 13).

<sup>87</sup> See *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA). The Constitutional Court has warned, however, about the need for sensitivity regarding the impact of these changes on existing contracts – see *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) para 47.

<sup>88</sup> See *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652F.

<sup>89</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 28; further see *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 6; Zimmermann "Good Faith and Equity" in *Southern Cross* 245; Du Plessis (2002) 65 *THRHR* 397 409.

<sup>90</sup> See *Grainco (Pty) Ltd v Van der Merwe* 2016 4 SA 303 (SCA) para 26; further see Bradfield *Christie's Law of Contract in South Africa* 428.

<sup>91</sup> See *Replication Technology Group v Gallo Africa Ltd* 2009 5 SA 531 (GSJ) para 16 n 49; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 28. For a comparative perspective see M Hogg "The Implication of Terms-in-fact: Good Faith, Contextualism and Interpretation" [2017] 85 *The George Washington LR* 1660.

<sup>92</sup> Zimmermann "Good Faith and Equity" in *Southern Cross* 245. See *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 28.

<sup>93</sup> *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A); also see *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 80-82; *Replication Technology Group v Gallo Africa Ltd* 2009 5 SA 531 (GSJ) para 16 n 49; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 28.

parties would expect to be included in the contract.<sup>94</sup> Finally, in the context of pre-contractual disclosure, good faith also plays an indirect role by aiding in determining when a duty to speak arises, but again we are not dealing with a direct application of a good faith rule.<sup>95</sup>

At this stage, the reader may perhaps be puzzled. Why did German law feel the need to resort so extensively to the good faith clause to impose duties that define or supplement the main duties of performance, whereas South African law, which shares civilian roots, imposes at least some of the duties without recognising such a rule? This phenomenon could be explained by examining the way in which German law was codified. A code tries to be comprehensive, but it never can be.<sup>96</sup> When it does not provide a rule, this creates a problem. One way of solving the problem is to rely on an open-ended norm. The codifiers could not include all the rules relating to performance that were recognised in earlier uncodified civil law. They had to restrict themselves to articulating main duties. To recognise some of the duties above, German law had to rely on the good faith clause to provide a basis for their recognition.<sup>97</sup> The uncodified South African common law in turn allows courts, *inter alia* through applying existing rules or reading in implied terms or *naturalia* into contracts, to do work that German courts could only do by invoking the good faith clause.

## 5 The limiting function of good faith: constraints on exercising a right in an improper manner

### 5 1 Introduction

We now approach the second and currently most important field of application of the good faith clause in German law, namely to limit or prevent a party from improperly exercising a right.<sup>98</sup> The application of the good faith clause to fulfil such a function may at first appear rather unusual, if not downright contradictory. If a party has a right, should it not by definition be

<sup>94</sup> See *Alfred McAlpine & Son v Transvaal Provincial Administration* 1974 3 SA 506 (A) 532-533; Van Huyssteen et al *Contract* 272, 276-277. Compare Article 5.1.2 of the UNIDROIT Principles of International Commercial Contracts on implied obligations, which states that they stem from

- (a) the nature and purpose of the contract;
- (b) practices established between the parties and usages;
- (c) good faith and fair dealing;
- (d) reasonableness.

<sup>95</sup> See *Meskin NO v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802; Zimmermann “Good Faith and Equity” in *Southern Cross* 246, 248; *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W) 198. In *Standard Bank of SA Ltd v Prinsloo (Prinsloo Intervening)* 2000 3 SA 576 (C) 584-585, good faith was regarded as the basis for imposing a duty on a party who applied for a bond to disclose to the bank that it had recently entered into a lease agreement.

<sup>96</sup> See Schlechtriem “Good Faith in German Law” 8-9.

<sup>97</sup> 12-13.

<sup>98</sup> *Unzulässige Rechtsausübung* – see *Jauernig* § 242 paras 32-36; *Palandt* § 242 paras 38-41; *Münchener Kommentar* § 242 paras 202-208. Different terminology is used in *Staudinger* § 242 para 211-318. See especially *Jauernig* § 242 para 33 on the risk of judicial overreach (further see the text to part 2 1 2 above). Reference will be made here generally to the situation where a party exercises a right, but this will only be used as a short hand description for a broader range of actions covered by the good faith clause. These actions include raising a defence, exploiting a legal position and invoking legal institutions in an improper manner (see *Jauernig* § 242 para 34).

impossible for the right to be improperly exercised?<sup>99</sup> The short answer is no. It is well-established in the civil-law tradition that in exceptional cases it may be justified to impose such limitations, for example when a party's motives are so suspect, or actions are so contradictory, or so fail to give effect to legitimate interests, that enforcement of a right could be regarded as unreasonable.<sup>100</sup> But these are of course vague descriptions of situations where exercising rights may have to be limited, and to make this category more manageable, commentators have devised various subcategories, describing the most important cases.

The focus will be on three main categories of improperly exercising a right that have been particularly prominent.<sup>101</sup> The first category deals with exercising a right in a manner that can be described as “abusive”, the second with “dishonest prior conduct”, and the third with conduct that “contradicts earlier behaviour”. These categories are admittedly rather abstract (a not uncommon phenomenon in expositions in civil-law commentaries), but they do become more concrete when considering examples that illustrate their respective fields of application.

This notion that good faith could be violated by improperly exercising a right is especially significant from a South African perspective. Our law used to recognise the *exceptio doli*, which was a legal device that our courts could employ to prevent a party from exercising a right in a manner that did not measure up to the good faith standard. In effect, the *exceptio doli* fulfilled a function comparable to the German good faith clause.<sup>102</sup> However, in 1988 it was held in *Bank of Lisbon and South Africa Ltd v De Ornelas* (“*Bank of Lisbon*”)<sup>103</sup> that the *exceptio doli* has no place in our law. Doctrinally, the *exceptio doli* may indeed have had a problematic pedigree. However, our courts must ensure that our common law remains vibrant and responsive to real needs.<sup>104</sup> The question therefore inevitably arises whether abolishing the *exceptio doli* made our law lose an instrument that could serve the purpose of preventing a party from improperly exercising a right. Zimmermann prophesied three decades ago that the *exceptio doli* may “haunt the courts and legal writers from its grave”.<sup>105</sup> As we will soon see, this prophecy has been fulfilled: determining when a party may be prevented from exercising a contractual right is now one of the most pressing problems in modern contract

<sup>99</sup> See *Koukoudis v Abrina 1772 (Pty) Ltd* 2016 5 SA 352 (SCA); *Brisley v Drotosky* 2002 4 SA 1 (SCA) para 12.

<sup>100</sup> See in general *Jauernig* § 242 para 33. Perhaps one could even say that in these cases parties are acting beyond the scope of the right, properly defined, rather than improperly exercising the right.

<sup>101</sup> Commentaries use various headings to classify the relevant material. For the general clause to apply there has to be a special relationship (*Sonderbeziehung*) between the parties (see the text to part 2 1 3 above), but it is not required that the party whose conduct is being objected to has to be at fault, and neither is absence of fault a requirement for seeking relief (see *Jauernig* § 242 para 35).

<sup>102</sup> See Zimmermann “Good Faith and Equity” in *Southern Cross* 226; Whittaker & Zimmermann “Good faith in European Contract Law” in Whittaker & Zimmermann (eds) *Good Faith* 19.

<sup>103</sup> 1988 3 SA 580 (A).

<sup>104</sup> See Erasmus (1989) *SALJ* 666 676-677; *Beadica 231 CC v Trustees, Oregon Unit Trust* 2018 1 SA 549 (WCC) paras 12-16, 43.

<sup>105</sup> *The Law of Obligations* 677.

law.<sup>106</sup> So the question is how to move forward, and to help us address this problem, let us then again turn to German experiences with applying the good faith clause for potential guidance.

## 5 2 Exercising a right in an abusive manner<sup>107</sup>

Our first improper way of exercising a right, and thereby violating the good faith clause, is exercising it in an abusive manner. These are strong words. They require more than merely acting unfairly or unreasonably: one party has to pursue no interest, or significantly less protectable interests than those of the other party, and enforcement must have a grossly unfair effect on such a party. Nonetheless, the standard is not quite as high as that posed in § 226 BGB, which we came across earlier; it will be recalled that that provision, which has a counterpart in the South African common law, covers cases of “abuse of rights” that amount to harassment, where one party’s purpose is purely to harm another.<sup>108</sup> For purposes of applying the good faith clause, exercising a right in an abusive manner does not require such an intention. The following examples illustrate its application.

### 5 2 1 *Exercising a right in pursuit of ulterior purposes, or of interests disproportionate to those of the other party*<sup>109</sup>

#### 5 2 1 1 German law

At the heart of the notion in German law that a party could violate the good faith clause by exercising a right in an abusive manner lies the conviction that rights are granted for particular purposes, and to pursue certain interests. To exercise a right in pursuit of interests that have nothing to do with the right, or are relatively insignificant, could therefore amount to abusive conduct. This application of the good faith clause could be regarded as a modern manifestation of the *exceptio doli*, which has in effect been subsumed under this clause.<sup>110</sup>

A few examples illustrate this general approach. As far as the lack of protectable interests is concerned, a landlord may not exercise a right to terminate a lease merely because the tenant complained about noise pollution,<sup>111</sup> and a lessee may not exercise a right to terminate an agreement of lease and to nominate a sub-lessee if the sub-lessee actually has no interest in using

<sup>106</sup> See the text to part 5 2 1 2 below.

<sup>107</sup> *Missbräuchliche Rechtsausübung* – see *Jauernig* § 242 para 37; further see generally *Münchener Kommentar* § 242 paras 243 sqq 438 sqq; *Staudinger* § 242 para 255-283.

<sup>108</sup> See the text to part 2 2 2 above.

<sup>109</sup> See generally, *Jauernig* § 242 paras 37-43; *Palandt* § 242 paras 50-54; *Münchener Kommentar* § 242 paras 446-490; *Staudinger* § 242 para 255-283. The heading above is a broad generalisation of the German commentaries’ at times rather subtly distinguished sub-categories of situations where rights are exercised in an abusive manner.

<sup>110</sup> See *Jauernig* § 242 para 37. For purposes of obtaining a broader perspective, it may be added that § 275(2) BGB gives effect to good faith by excluding claims for specific performance if the expense and effort required to perform would be “grossly disproportionate” to the creditor’s interest in performance. See 5 2 1 2 below on the relevant South African law.

<sup>111</sup> See *Münchener Kommentar* § 242 para 246 n 769, referring to AG Mannheim, WuM 1973, 3.

the property.<sup>112</sup> It may also be contrary to good faith for a purchaser to cancel a contract due to a temporary breach if the purchaser did not suffer any harm and made full use of the object sold. Thus, the purchaser of a crane may not exercise a right to cancel the sale on the ground that the seller committed breach by not ensuring that the crane displays an official sign of approval, if the approval was obtained before the purchaser tried to cancel the sale.<sup>113</sup>

Abuse of rights by the pursuit of external, irrelevant interests is in turn illustrated by a case involving a bank which had a claim, amply secured by a mortgage bond, against a client, but decided to aid another bank, which had an unsecured claim against the client, by taking cession of that bank's claim and paying it for the cession. Banks may indeed in the normal course of business take cession of third party claims against their clients, but in this case the bank pursued an external, unrelated purpose: the client did not have to expect that its bank would use the security to further the interests of third parties who had nothing to do with the client's relationship with the bank.<sup>114</sup>

Thus far, the emphasis was on cases where it could be said that the party seeking enforcement had no protectable interest at all or an ulterior purpose. But, in accordance with the fundamental underlying notion that good faith requires a reciprocal or mutual consideration of the interests of the parties, enforcement of a right could be denied even though a party seeking enforcement has some interest in pursuing the right, but this interest is disproportional, or pales into insignificance compared to the interests of the other party.<sup>115</sup> It does not require much reflection to appreciate that this principle, noble as it may sound, has to be applied restrictively. Good faith does not require that parties must subject their personal interests to those of the other party; on the contrary, they are generally free to pursue self-interest, and even minor breaches of duties could still have consequences.<sup>116</sup> However, a creditor should not take the drastic step of cancelling a contract due to a debtor's failure to perform by an agreed date for performance if the delay is negligible and is immaterial, taking into account the interests of the creditor; similar constraints could apply to resorting to a penalty clause in these circumstances.<sup>117</sup> Likewise, a right to terminate could be exercised contrary to good faith if the creditor repeatedly tolerated breaches, creating a situation of reliance on this tolerance on the side of the debtor.<sup>118</sup>

## 5 2 1 2 South African perspective

South African courts are not unfamiliar with the challenge of determining whether to limit or restrain parties from exercising certain contractual rights or powers. But our law does not accept that good faith is a standard that courts could resort to directly when a right is exercised in an abusive manner.

<sup>112</sup> See *Jauernig* § 242 para 3b, referring to BGH NJW-RR, 307.

<sup>113</sup> See BGH 90, 198 (204).

<sup>114</sup> BGH NJW 1981, 1600; 1983, 1735 sq.

<sup>115</sup> On *Geringfügigkeit*, and *Unverhältnismäßigkeit* see *Palandt* § 242 para 53; *Jauernig* § 242 paras 40 sqq.

<sup>116</sup> Despite being accommodated to some extent in the code: see § 281 I 3 BGB; § 320 II BGB; § 323 V 2 BGB.

<sup>117</sup> See BGH NJW 85, 267; *Jauernig* § 242 para 40.

<sup>118</sup> *Palandt* § 242 para 53, relying on BGH NJW 03, 2448.

This prompts the question how we deal with fact patterns where German law invokes the good faith clause for this purpose. We can proceed from the specific to the general, from a particular case where our common law accepts that a court may prevent a party from enforcing a contractual right, to more general grounds for awarding such relief.<sup>119</sup>

Our specific example comes from the law of lease. Landlords generally enjoy a contractual right to approve any assignment of the lease by the tenant to a third party. When exercising this right, a landlord is obliged to take the tenant's interests into account, and he may not pursue an entirely personal or unrelated purpose, as opposed to being influenced by attributes of the tenant or by the proposed use of the premises.<sup>120</sup> It can be questioned, though, what the doctrinal basis is for denying enforcement of a right in this case.<sup>121</sup> If the lack of a sufficient interest warrants such a denial of enforcement of a right in this case, why not in others, and on what basis? Justice demands consistency. Unfortunately, the case law, which is strongly influenced by English authorities, does not reveal such a basis. German law, as we have seen, could directly have tested any rejection of the assignment with reference to the general good faith standard. But our courts cannot do the same. We therefore have to look elsewhere. In this regard some alternative routes can be considered.

(a) *The doctrine of abuse of rights*

The first, and most obvious is to resort to a legal construct that we have already come across,<sup>122</sup> namely the doctrine of abuse of rights (*misbruik van reg*). In South African law, relief could be provided in terms of this doctrine if our landlord in the case above actually exercised the right to refuse consent to sub-let with the purpose to harm the tenant, and out of “sheer bloody-

<sup>119</sup> These general grounds deal with cases when there is a defined contractual right. The following situations are not considered here. First, the right to claim specific performance is subject to a well-established judicial discretion to refuse it, for example in cases of hardship (compare *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A), where enforcement of Haynes's right to water would have had devastating consequences for a community). On the position in German law see the text to part 5 2 1 1 above. Secondly, we are also not concerned here with discretions to determine the content of contracts (also see the text to part 2 2 1 above). It is well-established that standards of reasonableness or fairness regulate the manner in which such discretions are exercised (see *NBS Boland Bank Ltd v One Berg River Drive CC* 1999 4 SA 928 (SCA) 937, where reference was also made to German law). In applying this discretion, considerations such as the interests of the party exercising it could be taken into account. However, when performing this regulating or limiting function, the courts do not resort to a general good faith principle. Hints that it may be an alternative route to achieve this outcome (see *NBS Boland Bank Ltd v One Berg River Drive CC* 1999 4 SA 928 (SCA) para 28) have not been warmly received (see *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 16; but also see *Erasmus v Senwes Ltd* 2006 3 SA 529 (T) 538-539, for a more positive view of good faith in this context).

<sup>120</sup> *Bryer and other NNO v Teabosa CC t/a Simon Chuter Properties* 1993 1 SA 128 (C) 137-138. Where the holder of a contractual right to grant permission is a public authority, exercising such a right could also be limited by principles of administrative law (see *Kouga Municipality v De Beer* 2008 5 SA 503 (E)).

<sup>121</sup> A further example derives from the law of cession, which may prevent a cessionary from exercising a right to cede a claim if it would prejudice the debtor (see *Corinth Properties (Pty) Ltd v Firststrand Bank Ltd* 2002 6 SA 540 (W) paras 7-9).

<sup>122</sup> See the text to part 2 2 2 above.

mindfulness”, as the courts have called it.<sup>123</sup> However, as in German law, it is very rare in these cases of harassment that parties succeed in relying on the doctrine of abuse of rights with its strict requirements.<sup>124</sup> Ultimately, as indicated earlier, in German law parties would rather rely on the good faith clause when a right is exercised in an abusive manner that does not quite amount to harassment or acting “bloody-mindedly”. In the South African context, we therefore also have to distinguish between situations where the “doctrine of abuse of rights” applies, and other cases where a right is exercised in an abusive manner, but without the intention to harass. It is the latter cases that are of concern here, and which will be considered further below.

### (b) Interpretation

Secondly, a party could potentially be prevented from exercising a right on the basis that a proper interpretation of the relevant contractual terms indicated that no such right exists. Such a process could, for example, reveal, that the right was only granted for a particular purpose. Prior to the *Bank of Lisbon* decision,<sup>125</sup> it was regarded as an expression of bad faith and unconscionable conduct to use a deed of suretyship for a purpose for which it was not intended, and hence enforcement could be defeated with the *exceptio doli*.<sup>126</sup> But, as we have seen, it subsequently has been suggested that the key to that case was to interpret the security properly, which may have revealed that the bank actually did not enjoy a right to enforce it for an external or unrelated purpose.<sup>127</sup> Ultimately, however, we are not really dealing with a judicial discretion to refuse enforcement of a right, but rather with a determination of what the content of the right is in the first place.

### (c) Reading in implied terms

A further possible general ground for preventing a party from enforcing a right is that an implied term qualifies the way in which it is exercised. Thus, in a *Bank of Lisbon* type of situation,<sup>128</sup> there may have been scope for finding that it was an implied term of the contract establishing the security that it may not be used for purposes unrelated to the parties. A similar restriction based on an implied term could potentially govern the manner in which a right to

<sup>123</sup> See *F W Knowles (Pty) Ltd v Cash-In (Pty) Ltd* 1986 4 SA 641 (C) 652A. Also see *Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd* 2007 6 SA 404 (D), which concerned exercising a discretion (or right) to refuse a guarantee; it was held that a party cannot refuse a guarantee “from pure caprice, but at least it must exercise an honest judgment in deciding whether the guarantee is sufficient and acceptable” (para 35). Also see *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 1 SA 700 (A).

<sup>124</sup> See *F W Knowles (Pty) Ltd v Cash-In (Pty) Ltd* 1986 4 SA 641 (C) where the minority held that the tenant did not succeed in proving “an abuse of rights, unconscionable conduct or mala fides or even a comparable situation to that in the *International Drilling* case [*International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* 1986 1 All ER 321 (CA)]” (658A). This suggests that the grounds for relief are broader than just abuse of rights in the narrow sense.

<sup>125</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).

<sup>126</sup> *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W) 215.

<sup>127</sup> See *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 35.

<sup>128</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).

terminate or cancel a contract is exercised.<sup>129</sup> Reading in such a term could thereby indirectly give effect to good faith as underlying value.<sup>130</sup> However, courts are reticent to do so, and certainly would not do it merely because enforcement would then be fair.<sup>131</sup>

(d) *Reading in tacit terms*

Depending on the circumstances, a tacit term, based on the actual or presumed intentions of the parties, could restrict the manner in which a right is exercised. Thus, where a party seeks to exercise a right to terminate a contract, such a tacit term could limit it to being done for a specific purpose. However, as in the case of implied terms, strict rules govern the determination whether such a tacit term exists. Again, fairness or reasonableness in itself is not a ground for making such a determination. The focus is on the actual or presumed shared intention of the parties determined according to the bystander test. Even though exercising a right may have very harsh consequences for one party, a tacit term qualifying the term to make it less harsh will not be found to exist if the other party would not have agreed on it according to the bystander test.<sup>132</sup> Cases like *Maphango v Aengus Lifestyle Properties (Pty) Ltd* (“*Maphango*”)<sup>133</sup> reflect a reticence to find that such a term could limit a party in terms of the motive behind or purpose for which a right is exercised.<sup>134</sup>

(e) *The rule that a term would not be enforced if it would be contrary to public policy*

Our overview of common-law instruments that could limit a party in exercising a contractual right has thus far revealed that their scope is restricted and that these instruments do not come close to fulfilling a “limiting” role comparable to the German good faith clause. But one instrument still remains to be considered. It concerns the role of public policy in the law of contract. As indicated earlier, it is a general principle of our law of contract that courts

<sup>129</sup> See *South African Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) on the possibility of implying such a term; but then obviously any relevant statutory context has to be taken into account.

<sup>130</sup> See the text to part 4 3 above; *Replication Technology Group v Gallo Africa Ltd* 2009 5 SA 531 (GSJ) 16 n 49.

<sup>131</sup> See *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 28 and compare *Harper v Morgan Guarantee Trust Co of New York, Johannesburg* 2004 3 SA 253 (W) discussed in Hawthorne (2005) 17 SA Merc LJ 214.

<sup>132</sup> See *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 6 SA 1 (SCA) paras 48, 52-53.

<sup>133</sup> 2012 3 SA 531 (CC). The minority judgment paras 92 sqq, 115 sqq and the court *a quo* (*Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) paras 13-21, especially para 20) rejected the contention that the right to terminate was qualified by a tacit term. However the majority in the Constitutional Court for judgment left it open whether the right to terminate was exercised properly in terms of the common law, since it regarded statutory remedies as applicable (see para 55).

<sup>134</sup> Also see *South African Maritime Safety Authority v McKenzie* 2010 3 SA 601 (SCA) para 12. In *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA), the aggrieved client did not even seek to rely on a tacit term qualifying the bank’s right to terminate the banker/client agreement (see para 61).

may refuse to enforce a valid right if this would violate public policy.<sup>135</sup> When our courts exercise this power, could the outcomes be similar to those that arise when a German court applies the good faith clause to fulfil its limiting function? Let us consider the record.

First, we have rather obvious cases where a right is exercised for an improper, ulterior motive. Whether such a motive is present could in turn be determined by whether certain fundamental values or rights, such as the right to equality, is affected. Thus, according to Harms DP in *Bredenkamp*, a term in a lease that allows the tenant to sub-let with the landlord's consent is valid, but would not be enforced "[s]hould the landlord attempt to use it to prevent the property being sublet in circumstances amounting to discrimination under the equality clause"; in these circumstances enforcement would be contrary to public policy.<sup>136</sup> And it may be contrary to public policy to allow a party to invoke a non-variation clause with the ulterior purpose of not pursuing *bona fide* claims.<sup>137</sup> These examples stand in contrast to the facts of *Bredenkamp*, where no improper or ulterior motive actuated the bank's decision to terminate its suspect client's account.<sup>138</sup>

Secondly, we have situations where the interests of the party seeking to enforce a right are insignificant compared to the severe detriment which would be suffered by the person against whom enforcement is sought.<sup>139</sup> A potential example concerns the way in which a creditor exercised an acceleration clause based on the debtor's breach. Acceleration clauses are not per se invalid, but in *Combined Developers v Arun Holdings* ("*Combined Developers*"),<sup>140</sup> Davis J held that it would be contrary to public policy to allow a creditor to enforce such a clause where the debtor owed a mere R86,57 *mora* interest on a R7,6 million loan, and was not given some form of notice to pay the amount before the clause was invoked.<sup>141</sup> The breach could therefore easily have been

<sup>135</sup> See the text to part 2 2 5 above. Neels would accept extending the application of the doctrine of abuse of rights in the law of contract, but only if the "doctrine of good faith" cannot fulfil the necessary "correcting" function (J Neels *Tussen Regmatigheid en Onregmatigheid. 'n Ondersoek na die Leerstuk van Oorskryding van Regte en Bevoegdhede as Uitvloeisel van die Korrigerende Werking van Redelikheid en Billikheid in die Reg met Besondere Verwysing na die Oorskryding van Eiendomsreg op Onroerende Goedere* Rijksuniversiteit Leiden Thesis (1998) 87-88). But if the public policy rule can prevent improper exercising of a right, good faith does not have to fulfil this function.

<sup>136</sup> *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 47.

<sup>137</sup> See *Nyandeni Local Municipality v Hlazo* 2010 4 SA 261 (ECM) (there, a corrupt employee invoked a non-variation clause to subvert disciplinary processes).

<sup>138</sup> In *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC), tenants argued that the landlord terminated leases solely to impose a rent increase beyond that permitted by the leases, and to frustrate the tenant's rights in terms of rent-escalation clauses and avoid compliance with tribunal clauses (para 24). In effect, the argument is that an improper motive could result in a right being exercised in a manner that violates public policy. However, as indicated above, the majority of the Constitutional Court declined to determine whether the landlord's right to terminate was improperly exercised under the common law.

<sup>139</sup> The interests of a party are of course also relevant in determining whether a term is per se contrary to public policy. Thus, according to the minority for judgment of Moseneke DCJ in *Barkhuizen v Napier* 2007 5 SA 323 (CC), the 90-day time limitation clause was per se invalid because it was not apparent what legitimate purpose (or interest) would be served by the insurer imposing such a short time period (see para 113). The majority, however, held that there was insufficient evidence to make such a finding (see paras 84 sqq). Ironically, the insurer actually argued that its discretion to rely on the clause was subject to control according to a good faith standard, but the Court left open whether such a standard indeed applied (see paras 82, 118).

<sup>140</sup> 2015 3 SA 215 (WCC) para 36.

<sup>141</sup> Para 42.

remedied to the creditor's benefit, thereby avoiding the severely detrimental effects of accelerated payment on the debtor. Crucially, in delineating the contours of public policy, Davis J clearly was influenced by what good faith and reasonableness required.<sup>142</sup> Thus, while South African law may not have a good faith clause like German law, it is through the public policy requirement that effect could be given to good faith as a value. And in this context, as German experiences also show, the discrepancy between the interests pursued by the creditor, compared to those of the debtor being harmed, could be indicative of a violation of this value.

A further set of examples deal with situations where a party seeks to enforce a right of termination of the contract; this could for instance be when a lease is terminated by giving notice (as in *Maphango*),<sup>143</sup> or when a contract is cancelled due to breach (as in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* ("Mohamed's Leisure Holdings")).<sup>144</sup> In these cases, the other party argued that the courts should nonetheless hold that the right to terminate was not validly exercised or asserted. But could courts really find that a party may not invoke the right to terminate because its interests are so insignificant that enforcing this right would be contrary to public policy? This question lies at the epicentre of debates on the future of our law of contract.<sup>145</sup>

In *Maphango* the landlord argued that the purpose of terminating the leases was to enable it to renovate inner city property to make leasing economically more viable; the tenant in turn argued that termination of the leases was contrary to public policy because it was unfair, and would affect their constitutional right to housing. The SCA decisively rejected the tenant's argument, especially inasmuch as it suggested that (mere) unfairness could indicate a violation of public policy; and neither could good faith be relied on as a self-standing rule whereby the landlord's conduct could be evaluated.<sup>146</sup> Theoretically, this case had the potential to set the table for the Constitutional Court to engage in-depth with determining how the parties' respective interests influence whether a right of termination is exercised contrary to public policy.

<sup>142</sup> Para 41.

<sup>143</sup> 2012 3 SA 531 (CC).

<sup>144</sup> 2018 2 SA 314 (SCA), overruling *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 4 SA 243 (GJ). Also see *AJP Properties CC v Sello* 2018 1 SA 535 (GJ) paras 28 sqq, but the question there was whether eviction was warranted. *Beadica 231 CC v Trustees, Oregon Unit Trust* is dealt with above in the context of protecting weak parties, but it could be explained as a case where a court prevented a party from asserting that a contract had validly terminated by weighing up the parties' respective interests, and concluding that the economic empowerment interests of the tenants outweighed those of the landlord. *Botha v Rich NO* 2014 4 SA 124 (CC) paras 50-51 considered the validity of exercising a right of cancellation, but did not consider public policy per se. The case was decided in the context of a statutory regime aimed at protecting purchasers of land on instalment by allowing them to claim transfer after half the price was paid. The purchaser was in arrears, but it was held that this did not entitle the seller to refuse transfer, which would be contrary to good faith (see paras 46-49). The past breach triggering the right to cancel could in effect be disregarded, since the seller was protected by a mortgage bond securing the purchaser's remaining liability.

<sup>145</sup> And indeed, global debates on the future of the law of contract – for a highly critical analysis of recent developments in common-law jurisdictions see N Andrews "Breach of Contract: A Plea for Clarity and Discipline" (2018) 134 *LQR* 117.

<sup>146</sup> 2012 3 SA 531 (CC) paras 23-24 (see *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA)).

Such an enquiry could also have considered what role good faith could play in this enquiry. But this was not to be. Ultimately, as the majority indicated, the question whether the landlord validly terminated the lease under the common law had to be left open,<sup>147</sup> since the dispute was governed by statutory rental legislation, which allows for a statutory tribunal to determine whether the landlord engaged in an unfair practice by terminating the lease. It is not without significance, however, that the majority indicated that in making such a determination, the tribunal would consider the parties' respective interests, thereby underlining how important this consideration is in exercising these discretions.<sup>148</sup>

A similar approach was adopted in the *Mohamed's Leisure Holdings* case; here a tenant failed to pay rental on time due to its bank not properly processing a valid instruction to pay the landlord. The tenant remedied the breach shortly thereafter, but the landlord nonetheless elected to cancel the lease, which the tenant challenged on various grounds, including that the termination clause required parties to act in good faith, and could not be relied on when non-payment was beyond the tenant's control.<sup>149</sup> In the court *a quo*, Van Oosten J, in a judgment influenced by that of Davis J in *Combined Developers*,<sup>150</sup> held that the landlord did not validly exercise a right to terminate. The SCA in turn disagreed. Let us consider the reasoning more closely.

In denying enforcement, the court *a quo* placed especially strong emphasis on the relevance of constitutional values such as *ubuntu*, which carries in it "ideas of humaneness, social justice and fairness".<sup>151</sup> But this is precisely the type of language that does not carry the day in the SCA. It would perhaps have been beneficial had the court *a quo* more specifically and expressly based its finding on the specific rules that express these values, which must include good faith, apart from *ubuntu*. More specifically, it would have been valuable had the court *a quo* enquired into how to apply the rule that enforcement may be refused on grounds of public policy, and what role the relative interests of the parties could play in making such a determination.<sup>152</sup>

In this regard the following considerations may be relevant. In contrast to cases like *Brisley v Drotzky*, where the tenant was a serial defaulter, or *Maphango*, where the landlord needed to keep the property viable, it is not at all apparent what Mohamed's Leisure Holdings' interests in termination were; there was one prior late payment (ascribed to the tenant's bank) and both late payments were soon remedied. To the tenant, in turn, termination meant the "death-knell" of its hotel business.<sup>153</sup> This is not to say that weighing up interests is decisive; other factors may also be taken into account, and it is

<sup>147</sup> 2012 3 SA 531 (CC) para 55.

<sup>148</sup> Para 52.

<sup>149</sup> Para 12.

<sup>150</sup> *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 4 SA 243 (GJ) para 23.

<sup>151</sup> 2017 4 SA 243 (GJ) para 26.

<sup>152</sup> Para 31. Cf *Louw v Davids* [2018] ZASCA 70 (29 May 2018) para 24 on the court exercising value judgement, which requires taking into account the parties' interests in deciding whether breach warrants cancellation.

<sup>153</sup> 2017 4 SA 243 (GJ) para 31.

legitimate to enquire what reasonable steps could be expected from a party to meet its obligations. Thus, in *Barkhuizen*,<sup>154</sup> it rightly can be questioned whether it was practical to expect of the insured to institute action in 90 days. And in the *Mohamed's Leisure* case it may in turn be questioned what more could reasonably have been expected from a debtor who had instructed its bank to pay, and was assured by a statement from the bank that payment was effected.<sup>155</sup>

## 5 2 2 Exercising a right when there is a duty of immediate restitution<sup>156</sup>

### 5 2 2 1 German law

The next example is self-evidently a case of conduct that could be regarded as abusively exercising a right through failing to serve a proper purpose or protectable interest.<sup>157</sup> It is impermissible to claim something for one reason, if that same thing in any event has to be returned for another reason. The idea has an ancient lineage and is expressed in the civil-law maxim *dolo agit, qui petit, quod statim redditurus est*.<sup>158</sup> In essence, the interests of the defendant weigh stronger than those of the plaintiff. It is not apparent why the claim should be enforced, resulting in the risk of loss or disposal of the object or insolvency of the plaintiff, if the very thing has to be returned. The argument to some extent resembles the justifications for allowing set-off.<sup>159</sup> Thus, a tenant who has a statutory claim for reduced rental cannot enforce it to the extent that the landlord in turn enjoys a claim for damages.<sup>160</sup>

### 5 2 2 2 South African perspective

The *dolo agit* rule is also recognised in South African law. Thus, in *Gerber v Wolson*,<sup>161</sup> (decided before *Bank of Lisbon* confirmed the demise of the *exceptio doli*),<sup>162</sup> Van den Heever JA stated that the *dolo agit* rule would have thwarted claims by co-sureties who sought recourse of amounts which they would in turn be obliged to repay. In this regard he expressly referred to the *exceptio doli* being available, a clear indication that this instrument served to give effect to a rule which was rooted in *bona fides* or good faith.

<sup>154</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC).

<sup>155</sup> See 2017 4 SA 243 (GJ) para 12 and the submissions relating to possibility of performance by the tenant in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) paras 13-15. The stance of the SCA that "... the respondent could have diarised well ahead of time to monitor this important monthly payment and it could have effected other means of payment such as an electronic funds transfer" (para 28), with respect, is not particularly convincing. Ultimately, the question whether absence of fault excuses breach of contract is a matter for the development of the substantive law of breach of contract. The public policy rule (like the good faith clause of § 242 BGB), may be only a temporary means to ensure that the demands of good faith are met.

<sup>156</sup> *Pflicht zur alsbaldigen Rückgewähr* - see *Jauernig* § 242 para 39; *Palandt* § 242 para 52; *Münchener Kommentar* § 242 paras 440-445; *Staudinger* § 242 paras 279-283.

<sup>157</sup> Some commentaries bring this example home under the category of enforcing a right without any protectable interest (see 5 2 1 above, *Palandt* § 242 paras 50-52).

<sup>158</sup> See D 50 17 173 3; D 44 4 8 pr.

<sup>159</sup> *Staudinger* § 242 para 281; *Münchener Kommentar* § 242 para 440.

<sup>160</sup> See BGH 66, 302 305.

<sup>161</sup> 1955 1 SA 158 (A) 171. Also see *Ntai v Vereeniging Town Council* 1953 4 SA 579 (A) 588H.

<sup>162</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).

### 5 3 Engaging in prior objectionable conduct

#### 5 3 1 Introduction

The focus thus far was on how parties may not exercise existing rights in an abusive manner, and thereby violate good faith – whether directly, as in German law, through contravening the good faith clause, or indirectly, as in South African law, when falling foul of various common-law instruments that serve good faith as underlying value. Historically, these cases, as we have seen, are the domain of the *exceptio doli praesentis* or *exceptio doli generalis* – what South African law usually simply refers to as the *exceptio doli*.

However, a party would also act improperly when seeking to exercise a right that arises from that person’s own prior objectionable or improper conduct (as opposed to having the present ulterior purpose or insufficient interests in seeking enforcement discussed above).<sup>163</sup> In the earlier civil law, the mechanism that gave effect to this principle was the *exceptio doli praeteriti* or *exceptio doli specialis*, that is, the defence based on ‘initial’ or preceding dishonesty (*dolus*).<sup>164</sup>

German law nowadays also applies the good faith clause to these cases, albeit that it does not actually require dishonest or deceitful behaviour; it suffices if a person acted objectionably by violating some or other duty.<sup>165</sup> The good faith clause also need not be applied where objectionable conduct rendered a contract illegal,<sup>166</sup> or amounted to an improper form of obtaining consent, such as fraud or duress, inasmuch as these situations are already covered elsewhere in the code.<sup>167</sup>

The same would be true for South African law; it could be regarded as contrary to good faith to obtain a contractual right through improper conduct, such as concluding a contract with an illegal purpose or engaging in fraud, duress or undue influence, which are established grounds for relief.<sup>168</sup> So what constitutes the type of “objectionable” prior conduct that German law uses the good faith clause for to disqualify a party from exercising a right? From an outsider’s perspective, it is rather challenging to engage with this category. What, after all, could “objectionable” mean? But again, the devil is in the detail. The following are (admittedly rather abstract and fluid) sub-categories of such objectionable conduct. The first focuses on dishonourably benefitting one’s own position, and the second on subverting the other party’s position.

<sup>163</sup> See generally *Jauernig* § 242 para 44; *Staudinger* § 242 paras 234-254; *Münchener Kommentar* § 242 paras 250-255.

<sup>164</sup> See *Bank of Lisbon and South Africa v De Ornelas* 1988 3 SA 580 (A) 594 E-F.

<sup>165</sup> In line with the terminology of earlier civil law, the subject matter is sometimes dealt with under the heading *Unredliches früheres Verhalten*, which means dishonest prior conduct (see *Jauernig* § 242 paras 44-47). But, in line with the notion that fraud or dishonesty is not actually required, some commentaries merely refer to objectionable prior conduct or *missbilligtes früheres Verhalten* (see *Münchener Kommentar* § 242 paras 250 *sqq.*).

<sup>166</sup> See the text to part 2 2 5 above on § 134 and § 138 I BGB.

<sup>167</sup> See the text to part 2 2 3 above on § 123 BGB; *Münchener Kommentar* § 242 para 253.

<sup>168</sup> See the text to parts 2 2 5, 5 2 1 2 (e) above on the rule that the terms must not per se be contrary to public policy; if this is the case, there can be no further enquiry into whether enforcement is contrary to public policy (see *Barkhuizen v Napier* 2007 5 SA 323 (CC)). Further see the text to part 2 2 3 above on defects of consent, such as undue influence.

### 5 3 2 *Dishonourably acquiring rights or improving one's own legal position*<sup>169</sup>

#### 5 3 2 1 German law

This category covers a variety of cases where the good faith clause is invoked to prevent a party from exercising a contractual right due to prior dishonourable conduct. Sometimes the boundaries with the provisions of the code dealing with illegal and fraudulent conduct are rather indistinct, which makes it difficult to delineate its field of application. Possible examples include concluding and seeking to enforce agreements that would cause the party who has to perform to commit breach of a contract, or inducing a party to conclude an agreement that imposed obligations that such a party would clearly be unable to fulfil.<sup>170</sup> It may also be contrary to good faith to enforce a clause after knowing full well that the other party made a calculation error when assenting to it,<sup>171</sup> the dishonourable way in which the party seeking enforcement acted is regarded as a violation of good faith and justification for depriving him of a claim.

#### 5 3 2 2 South African perspective

In South African law, some support exists for the notion that a court should not provide relief to a person with “unclean hands”. However, it is applied rather strictly in certain areas of law,<sup>172</sup> and there is no indication that it functions to prevent a party from enforcing a contractual right that arises from such a party's prior dishonourable conduct. In the contractual context, the defendant would have to rely on specific rules of the law of contract, for example that the courts will not enforce a contract which is concluded with an illegal or immoral purpose,<sup>173</sup> or due to fraud or other recognised defects of consent.<sup>174</sup> Some of the examples from German law referred to above could perhaps fall under these rules. For example, deliberately refraining from pointing out another party's calculation mistake could, on a very generous interpretation of the duty to speak, amount to an actionable misrepresentation. But it is less apparent to what extent the other examples would qualify as actionable prior conduct under our law.

<sup>169</sup> *Unredlicher Erwerb der eigenen Rechtsposition* - see *Staudinger* § 242 para 237-244; *Unredlicher Erwerb von Rechten und unredliche Schaffung von Rechtsstellungen* - see *Jauernig* § 242 para 45; further see *Palandt* § 242 para 43-45; *Münchener Kommentar* § 242 paras 253-289.

<sup>170</sup> See *Münchener Kommentar* § 242 paras 254-257. See 2 2 3 above on the closely related cases where advantage is taken of weakness (eg of poverty), but § 138 I BGB is applied.

<sup>171</sup> *Palandt* § 242 para 44.

<sup>172</sup> See eg *Mgoqi v City of Cape Town* 2006 4 SA 355 (C) para 140, indicating the relevance of “unclean hands” in the context of unlawful competition, and *Cambridge Plan AG v Moore* 1987 4 SA 821 (D) 842 in the context of trade mark law. Also see *Mostert v Nash* [2018] ZASCA 62 paras 24 sqq. Reference to the related civil law maxims that “no action can rise from bad faith” (*ex dolo malo non oritur actio*) and that “no one is heeded who adduces his own infamy” (*turpitudinem suam allegans non auditur*) are rare – see eg *Phillips v Botha* 1999 2 SA 555 (SCA) 567A.

<sup>173</sup> See eg *S v Marais* 1982 3 SA 988 (A) 102-1003; the “unclean hands” argument could also justify barring restitution by way of the *par delictum* rule.

<sup>174</sup> See the text to part 2 2 3 above.

### 5 3 3 Subverting the other party's rights or legal position<sup>175</sup>

#### 5 3 3 1 German law

A further form of engaging in prior objectionable conduct consists in undermining or subverting another party's rights or favourable legal position, or preventing such a legal position from arising in future. The relief consists of deeming the conduct not to have taken place and letting the favourable legal position prevail. A simple example illustrating the operation of good faith in this context is that of a person preventing notification. Depending on the circumstances, the notice may be deemed to have reached him, due to the objectionable manner in which it was sought to prevent the other party from exercising the right to give notice.<sup>176</sup> A party who prevented compliance with formalities could also be prevented from subsequently relying on the formal defect.<sup>177</sup> Although the issue is disputed, since formal requirements deserve to be taken seriously, there is some support for regarding it as contrary to good faith for a party to complain about the other party's failure to notify or meet formal requirements when the complaining party was actually responsible for it.

#### 5 3 3 2 South African perspective

The fact pattern of what steps amount to proper notice, and what can be expected of the addressee has enjoyed considerable attention in South African courts.<sup>178</sup> In *Kubyana v Standard Bank of SA Ltd*<sup>179</sup> the Constitutional Court held that a duty exists on an addressee of a notice to act reasonably, and that this duty is violated when he deliberately prevents delivery; notification can then be deemed to have been effected. However, the court did not expressly indicate that the party preventing notice acted contrary to good faith.<sup>180</sup>

As far as the example of failure to comply with formalities is concerned, South African law would not expect a party to co-operate to put a contract in writing merely because this was a self-imposed requirement, whether for the initial validity or variation of a written contract. But *First National Bank Ltd v Avtjoglou* provides some support for the notion that a party who prevents compliance by deliberately retaining a copy signed by himself, in order to prevent the other party from signing the copy as well, would not be able to rely on non-compliance with formalities. In this regard the court expressly

<sup>175</sup> *Vereitelung von Rechten der Gegenpartei und ihr günstigen Rechtslagen* - see *Jauernig* § 242 para 46; *Unredliche Vereitelung der gegnerischen Rechtsposition* (*Staudinger* § 242 para 245-249; *Münchener Kommentar* § 242 paras 302-308).

<sup>176</sup> BGH 137, 209 sqq; *Jauernig* § 242 para 46; *Münchener Kommentar* § 242 para 303.

<sup>177</sup> RG 96, 315; *Jauernig* § 242 para 46. Further see *Staudinger* § 242 para 246 on *Rechtsformmissbrauch* and § 242 para 445-452 on the role of good faith in the context of compliance with formal requirements in the context of § 125 BGB.

<sup>178</sup> See J du Plessis "Rethinking Notification in the Law of Contract" (2017) 80 *THRHR* 113.

<sup>179</sup> 2014 3 SA 56 (CC).

<sup>180</sup> German experiences suggest that the court could have justified its position by arguing that good faith is violated when another's favourable legal position is subverted or prevented. This sounds somewhat more plausible than arguing that a debtor preventing notice violates good faith by engaging in contradictory behaviour (see Du Plessis (2017) *THRHR* 113 for criticism of this explanation; further see 5 4 below).

referred to “the equitable rule that a party cannot take advantage of his own default to the loss or injury of another”.<sup>181</sup>

### 5 3 4 Failure as creditor to be true to the contract: the “you too” defence and reciprocity<sup>182</sup>

#### 5 3 4 1 German law

One of the oldest defences against being criticised for acting in a certain way is to accuse the accuser of engaging in similar conduct. This is called the “you too” (*tu quoque*) defence. It is doubtful whether German law recognises a general principle to the effect that only a party who is “true” or “faithful” to the contract may exercise rights under it. However, expression could be given to the underlying sentiment in a variety of ways. Sometimes specific clauses of the German Civil Code are invoked, for example those on when one party may refuse to perform until the other party renders counter-performance (the *exceptio non adimpleti contractus*).<sup>183</sup> But sometimes good faith can be the basis for barring the “untrue” party from exercising a right. Thus a landlord who is contractually obliged to agree to a request by the tenant to sublet, but fails to do so, may not subsequently terminate the lease if the tenant sublets without the landlord’s permission.<sup>184</sup> And a creditor seeking recourse from a surety may be deprived of a claim if the surety’s interests were grossly violated by, for example, causing the main debtor to commit breach or prejudicing the surety’s right of recourse.<sup>185</sup>

#### 5 3 3 2 South African perspective

South African law also knows no general rule that a party may only exercise rights under a contract if he is true or faithful to it. But, as in German law, it has certain rules that give effect to this basic notion. Parties to reciprocal contracts must respect each other’s right to performance, which means that a party who claims performance may be defeated by the *exceptio non adimpleti contractus* if he in turn does not perform or tender performance. In *Botha v Rich NO*,<sup>186</sup> the Constitutional Court expressly recognised that the principle of reciprocity and the *exceptio* give expression to good faith, thus indicating how this underlying value is served by specific rules.<sup>187</sup>

<sup>181</sup> 2000 1 SA 989 (C) 996. The court regarded the contract as “conditional” on being signed, and held that the doctrine of fictional fulfilment consequently applied, which resulted in the “condition” being deemed to have been fulfilled – for comment see Van Huyssteen et al *Contract* 147 fn 9. Further see *Du Plessis NO v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 6 SA 617 (SCA). See Van Huyssteen et al *Contract* 283 on the doctrine of fictional fulfilment of a condition when a party was under a duty not to interfere with fulfilment as an emanation of good faith. On the equivalent doctrine in German law (§ 162 BGB) and its link to the notion that a party should not reap benefits obtained contrary to a duty to act in accordance with good faith, see Palandt § 162 para 4, read with § 242 para 42, 46; *Jauernig* § 162 para 2.

<sup>182</sup> *Eigene Vertragsuntreue des Gläubigers* – see *Jauernig* § 242 para 47.

<sup>183</sup> The right of withholding performance is contained in § 273 BGB and the *exceptio* in § 320 BGB.

<sup>184</sup> *Jauernig* § 242 para 47.

<sup>185</sup> See *Jauernig* § 242 para 47cc; *Münchener Kommentar* § 242 para 298 on *Verwirkung* (on *Verwirkung* by time see the text to part 5 4 2 below).

<sup>186</sup> 2014 4 SA 124 (CC).

<sup>187</sup> Para 45.

As far as the example of prior conduct of the creditor to the prejudice of the surety is concerned, South African law would only release the surety if the creditor is in breach of a specific duty;<sup>188</sup> the courts have emphatically rejected the notion that there is some general “prejudice principle” whereby a surety could be released when suffering a “real and substantial prejudice which has the effect of unduly increasing the contractual burden of the surety with reference to all the relevant facts and circumstances, and with due regard to considerations of justice, fairness, reasonableness, good faith and public policy”.<sup>189</sup> If this example is anything to go by, the courts will not easily be swayed by a “you too” argument that is not strongly rooted in the existing rules.

#### 5 4 Engaging in contradictory conduct<sup>190</sup>

##### 5 4 1 Introduction

Our final main example of behaviour that is so improper that it violates the good faith clause involves engaging in contradictory conduct, or “going against what one has done earlier” (*venire contra factum proprium*) according to the civilian tradition. Generally, the party engaging in the contradictory behaviour is prevented from getting away with it, since he created a protectable reliance on the side of the other party.<sup>191</sup>

##### 5 4 2 German law

Commentaries on the German Civil Code sub-divide cases of contradictory conduct in a number of categories, but at times it does seem as if classificatory order is pursued at the expense of utility. The focus will accordingly only be on some general examples that convey the essence of this form of improper behaviour that violates good faith and will thereafter shift to the prominent case of forfeiture of a right (*Verwirkung*).

As far as the general examples are concerned, the good faith clause could be applied against a party who created a reliance that he would exercise a right in a certain way or not exercise it at all, only to turn around and do the opposite.<sup>192</sup> A party might, for example, create the impression that he is interested in obtaining performance of a contract, only to cancel it due to breach,<sup>193</sup> or create the impression that he acts as independent contractor,

<sup>188</sup> See *ABSA Bank Ltd v Davidson* 2000 1 SA 1117 (SCA); *Bock v Duburoro Investments (Pty) Ltd* 2004 2 SA 242 (SCA); *Fedbond Nominees (Pty) Ltd v Meier* 2008 1 SA 458 (C) 466. Also see *Nedbank Ltd v Zevoli 2008 (Pty) Ltd* 2017 6 SA 318 (KZP) paras 32, 41.

<sup>189</sup> *Di Giulio v First National Bank of South Africa Ltd* 2002 6 SA 281 (C) para 41.

<sup>190</sup> *Widersprüchliches Verhalten* - see *Jauernig* § 242 paras 48-52; *Staudinger* § 242 para 284-318; *Palandt* § 242 paras 55-59; *Münchener Kommentar* § 242 paras 344-355.

<sup>191</sup> See *Münchener Kommentar* § 242 paras 344-355; *Palandt* § 242 para 59 on the (relatively) rare instances where a party is held liable for contradictory behaviour even though such a reliance is absent, or not particularly prominent.

<sup>192</sup> *Widerspruch zu begründetem Vertrauenstatbestand* - see *Jauernig* § 242 para 50; *Münchener Kommentar* § 242 paras 341-343.

<sup>193</sup> See BGH WM 06, 1534; *Jauernig* § 242 para 50.

only to maintain subsequently that he was appointed as employee.<sup>194</sup> A party may further also not raise the defence of prescription or failure to adhere to a time limit in an improper manner; this does not only include the more serious case of intentionally deterring the creditor from taking legal action, but also unintentional behaviour that causes the claim not to be pursued timeously.<sup>195</sup>

One example of contradictory behaviour is regarded as such a prominent application of the good faith clause that some commentaries deal with it separately from the more general cases considered above.<sup>196</sup> It concerns the situation where a party has not exercised a right for an extended period of time, and then unexpectedly does so, thereby acting contrary to a reliance created on the side of the other party that the right will not be exercised. To protect the latter party's reliance, the law may respond by declaring forfeiture (*Verwirkung*) of the right. For example, a landlord could acquire the right to terminate a lease when a tenant commits breach by being a drunken nuisance, but if the landlord only exercises this right a year later, after creating the impression that he has abandoned the right, it may be forfeited.<sup>197</sup> The situations of forfeiture under consideration here differ from those where a right is waived by express or tacit agreement.<sup>198</sup> Waiver could for example be inferred if a landlord unreservedly accepts and provides a receipt for a lesser amount than the actual amount of rental due.<sup>199</sup>

### 5 4 3 South African perspective

A number of constructs in South African law could serve the purpose of protecting a party against contradictory behaviour. The most prominent of these is undoubtedly estoppel, which serves the general function of preventing persons from acting contrary to their representations.<sup>200</sup> It is well-established that estoppel gives expression to the demands of good faith, and could be linked to the *exceptio doli*,<sup>201</sup> albeit that estoppel's specific requirements narrowly delineate its contours. For example, to take the lead from the termination example above, a landlord could in principle be estopped from exercising a cancellation clause if he created an impression that contributed to a tenant committing breach. But in applying this principle the courts have

<sup>194</sup> *Unlösbarer Selbstwiderspruch* - see Jauerning para 49.

<sup>195</sup> *Missbräuchliche Geltendmachung der Verjährungseinrede* - see Jauerning § 242 para 51. This category also includes the related situation where one party deters another from adhering to a time limit within which to exercise a right (for example to pursue a claim for compensation), and then subsequently relies on the time limit having expired (*missbräuchliche Berufung auf den Ablauf von Ausschlussfristen*; see BGH NJW-RR 87, 157; Jauerning § 242 para 52).

<sup>196</sup> See Palandt § 242 paras 87-107; Jauerning § 242 paras 53-63; Staudinger § 242 para 300-316; Münchener Kommentar § 242 paras 290-301, 356-421.

<sup>197</sup> H Brox & W Walker *Allgemeiner Teil des BGB* 41 ed (2017) para 691; further see Staudinger § 242 para 784-785 on claims for payment by landlords and claims for repayment by tenants.

<sup>198</sup> *Verzicht*, which is linked to *Erläss* (see § 397 BGB); Palandt § 242 para 91.

<sup>199</sup> Palandt § 242 para 91.

<sup>200</sup> See J Sonnekus *The Law of Estoppel in South Africa* 3 ed (2012).

<sup>201</sup> See Zimmermann "Good Faith and Equity" in *Southern Cross* 221-227 on the reception of estoppel by linking it to the *exceptio doli* and hence to good faith; Sonnekus *The Law of Estoppel* 3-4.

strictly interpreted the requirements of estoppel.<sup>202</sup> This approach also renders it uncertain whether estoppel could be relied on to reach similar outcomes as in earlier cases that used the *exceptio doli* to protect a purchaser who was “lulled into a false sense of security” that payment could be made after the due date.<sup>203</sup>

Further constructs that could protect reliance include ostensible authority, which is applied in the law of representation or agency,<sup>204</sup> while the quasi mutual assent and *iustus error* doctrines could protect the reliance of one party on the existence of the contract which the other now seeks to deny.<sup>205</sup>

However, there will be cases where a party relies on behaviour which is contradicted, but none of these instruments provide relief; here the parties would not be able to resort directly to good faith. A particularly prominent example concerns non-variation clauses: a party cannot escape from such a clause by arguing that the other party agreed to an oral variation and is now acting in a contradictory manner (and contrary to good faith) by requiring compliance with the writing requirement.<sup>206</sup> To escape, a party would have to rely on recognised exceptions. These include the prohibition against approbating and reprobating by first relying on a variation that does not comply (for example, by pleading it), only subsequently to allege non-compliance.<sup>207</sup>

As far as the fact pattern of seeking to exercise a right after an extended period of time is concerned, a right does not automatically terminate merely because an “unreasonable” period has passed.<sup>208</sup> To defeat an attempt at enforcement a party would have to rely on specific mechanisms. He could argue that the right has been waived,<sup>209</sup> but this can only be inferred from unequivocal conduct creating the impression of an intention to waive.<sup>210</sup> But again estoppel can be an avenue of relief,<sup>211</sup> the argument being that a party

<sup>202</sup> See *Die Afrikaanse Pers Bpk v Perestrello* 1949 2 SA 346 (W) 348 (a tenant argued that the landlord should have informed him that a cheque delivered in payment of rental was dishonoured, but it was held that the landlord did not directly contribute to the tenant’s mistaken impression; further see *Lovemore v White* 1978 3 SA 254 (E) 259-260; *Palace Shareblock Ltd v Lavender Moon Trading 157 CC t/a the Copper Chimney* [2009] ZAKZDHC 41 paras 17-20 and *Venter v Venter* 1948 1 SA 1291 (C), where the landlord was also not found to have made a representation by failing to inform the tenant of the default. On the alternative argument that a right is exercised improperly and contrary to good faith due to insufficient interest see 5 2 1 above).

<sup>203</sup> See *Edwards v Tuckers Land and Development Corporation (Pty) Ltd* 1983 1 SA 617 (W) 627-628. Also see *Senekal v Home Sites (Pty) Ltd* 1950 1 SA 139 (W) (a purchaser knew that a third party had prior rights to a property, yet demanded transfer of a clean title; this claim was defeated by the *exceptio doli*).

<sup>204</sup> On the contested relationship between estoppel and ostensible authority see *Makate v Vodacom* 2016 4 SA 121 (CC).

<sup>205</sup> See the text to part 2 2 3 above.

<sup>206</sup> See *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 11-34, overruling *Miller NNO v Dannecker* 2001 1 SA 928 (C).

<sup>207</sup> See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) para 12; *Klub Lekkerus/Libertas v Troye Villa (Pty) Ltd* [2011] 3 All SA 597 (SCA) para 26; *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 2 SA 570 (SCA) paras 26-28.

<sup>208</sup> *Mahabeer v Sharma NNO* 1985 3 SA 729 (A) 736-737.

<sup>209</sup> 736G, where waiver was regarded as synonymous with electing not to exercise a right.

<sup>210</sup> See *Road Accident Fund v Mothupi* 2000 4 SA 38 (A) para 19; *Mahabeer v Sharma NNO* 1985 3 SA 729 (A) 736J-737D.

<sup>211</sup> *Mahabeer v Sharma NNO* 1985 3 SA 729 (A) 737H-738C.

who does not exercise a right over an extended period of time could (culpably) create the impression that it would no longer be pursued. Again, as with *Verwirkung*, one is dealing with an instrument that promotes good faith by counteracting contradictory behaviour.

Finally, some support further exists for recognising the defence of “acquiescence”.<sup>212</sup> In this regard early case law supports “the equitable principle that if a person lies by with a full knowledge of his rights and of the infringement of those rights, he is precluded from asserting them”. This is said to “form a branch of the law of *dolus malus*”.<sup>213</sup> It remains to be seen, however, whether this approach is good law.<sup>214</sup> The use of the expression “lies by” in early case law clearly relates to the English doctrine of laches, which has been decisively rejected in South African law in *Zuurbekom Ltd v Union Corporation Ltd* (“*Zuurbekom*”),<sup>215</sup> and some English authority apparently regard this doctrine as in any event overlapping with estoppel.<sup>216</sup> Nonetheless, it is possible that acquiescence could cover a niche of cases of contradictory behaviour that do not fall within the ambit of estoppel and waiver (and perhaps would cover some of those covered by *Verwirkung*). In the *Zuurbekom* case, the court left the door open for recognition of these cases by stating that they could be covered by the *exceptio doli*. However, this door was of course closed when the *exceptio doli* was later regarded as not being part of our law.<sup>217</sup> Nonetheless, if our courts regard these cases as deserving of protection, good faith could still fulfil the function of an underlying value that supports recognising acquiescence as a part of our law. It would certainly not be the first time that English imports have been baptised in the water of good faith; in fact, this is exactly what happened with estoppel.<sup>218</sup>

## 6 The correcting or controlling function of good faith

### 6 1 Introduction

We now turn to the third and final function of the good faith clause. It used to be one of its most dramatic and far-reaching applications and may explain why South African courts have been so wary to accord good faith any greater status than that of underlying value. We are dealing here with its function of

<sup>212</sup> See eg *Botha v White* 2004 3 SA 184 (T) para 31. Reference is made to the judgment of Jansen J in *North Vaal Mineral Co Ltd v Lovasz* 1961 3 604 (T) 608B-H, which contains only general comments on the application of the *exceptio doli* in cases not amounting to estoppel.

<sup>213</sup> *Policansky Bros v Hermann & Canard* 1910 TPD 1265 1278.

<sup>214</sup> It was doubted but left open in *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 5 SA 388 (C) 406-408.

<sup>215</sup> *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A) 534-535.

<sup>216</sup> See the reference to English authority in *Resisto Dairy (Pty) Ltd v Auto Protection Insurances Co Ltd* 1963 1 SA 632 (A) 643A-B. In the South African context further see *Garlick Ltd v Phillips* 1949 1 SA 121 (A) 129; Zimmermann “Good Faith and Equity” in *Southern Cross* 242.

<sup>217</sup> See *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A) 537; Zimmermann “Good Faith and Equity” in *Southern Cross* 233.

<sup>218</sup> See Zimmermann “Good Faith and Equity” in *Southern Cross* 221-227 on resorting to the *exceptio doli* to legitimise the reception of estoppel.

“correcting” or “controlling” the substance of a contract.<sup>219</sup> This function has been especially relevant in two contexts, namely when there was a drastic change of circumstances, or serious unfairness of the terms. Nowadays the German Civil Code contains specific provisions to deal with these situations, but some commentaries still find it useful to refer to residual cases where the good faith clause in some way could play the role of “correcting” the contract.

## 6 2 Change of circumstances and hardship

### 6 2 1 *German law*

Parties to a contract may have various expectations, of which some may be achieved and others not. A basic point of departure in German law, as indeed in South African law, is that these are the risks that the parties must bear. Nonetheless, sometimes the circumstances that prevail when the contract ultimately has to be performed could differ so radically and unexpectedly from those that existed at its conclusion that this general approach requires reconsideration.

This was for example the case when hyperinflation struck in Germany in the 1920s. Judges rather boldly, given the resolve of the legislature not to intervene, relied on the good faith clause to prevent debtors from effectively escaping liability by paying the nominal value of debts that had become worthless due to hyperinflation.<sup>220</sup> In due course, however, the rules relating to these cases evolved and assumed such an independent character that they came to be located in their own special provision in the civil code, § 313 BGB, albeit that some overlap with § 242 BGB is still possible.<sup>221</sup> In essence, § 313 BGB enables adapting, and, if this is not feasible, even terminating a contract if the circumstances that became the “basis” of the contract changed significantly since the contract was entered into, and if the parties would not have entered into the contract, or they would have entered into it with different contents if they had foreseen this change. These experiences illustrate how general clauses can be victims of their own success; or, to put it more positively, how they can give birth to new sets of rules.

### 6 2 2 *South African perspective*

South African law is traditionally not favourably disposed to releasing a party from liability due to change of circumstances.<sup>222</sup> The common law of supervening impossibility of performance only releases a party if no-one could render the desired performance any more (that is, if there is objective

<sup>219</sup> See *Jauernig* § 242 para 8. But see the general remark at the beginning of 3 above that these broad headings are somewhat imprecise, inasmuch as it can be argued that a “correcting” function is (also) exercised by imposing supplementary duties, or by limiting parties’ rights.

<sup>220</sup> See generally Ebke & Steinhauer “The Doctrine of Good Faith in German Contract Law” in *Good Faith and Fault in Contract Law* 171 180-189.

<sup>221</sup> See *Staudinger* § 242 paras 385-386. The good faith clause might still be relevant if a party does not want terms to be adapted, and only seeks to prevent the improper application of a term.

<sup>222</sup> See Van Huyssteen et al *Contract* 517-524. The courts may, however, take into account problems of hardship to the debtor when exercising the discretion to award specific performance (see the text to part 5 2 1 2 above; Van Huyssteen et al *Contract* 523).

impossibility), as opposed to cases, such as the hyperinflation example above, where the particular debtor cannot perform, or would find it hard or difficult to do so (that is, cases of subjective impossibility).<sup>223</sup>

It has been argued, though, that in this regard South African law is out of touch with international developments and that it needs to be more accommodating to hardship cases, and distribute risks more equitably between the parties, who cannot always be expected to do so contractually in advance.<sup>224</sup> Whether such a change in our common law of contract, and more specifically the rules on supervening impossibility,<sup>225</sup> ultimately is desirable of course requires weighing up various values, but the German experience clearly shows that the requirements of good faith could play a central role in this context, given their emphasis on concern for the contracting party. In this regard our courts have at times at least indicated that *pacta servanda* cannot be a trump card that defeats any attempt to deal with changed circumstances.<sup>226</sup>

### 6 3 Unfair contract terms

#### 6 3 1 German law

To a limited extent, German law allows courts to provide relief where the substance or content of contractual terms is unfair. Earlier on, this was done (admittedly in more extreme cases) by relying on the good faith clause<sup>227</sup> or by applying § 138 BGB. However, in due course legislation was introduced specifically to combat unfair standard terms, and finally this type of protection was incorporated into separate provisions of the German Civil Code.<sup>228</sup> The adoption of the latter provisions has diminished the relevance of the good faith clause in the context of combatting unfair terms, but it still fulfils a residual controlling function, for example when some agreements are individually negotiated.<sup>229</sup>

#### 6 3 2 South African perspective

South African law has no tradition of directly relying on good faith to exercise control over the content of contractual terms. Even when good faith

<sup>223</sup> There is support for the notion that objective impossibility cannot be equated to actual factual impossibility, and could cover cases where performance is physically possible, but prohibitively expensive (see Van Huyssteen et al *Contract* 518). But this is not subjective hardship.

<sup>224</sup> See eg Hutchison (2010) *Stell LR* 414.

<sup>225</sup> Theoretically, there may also be other avenues of common-law relief. This includes reading in an implied term that a contract needs to be adjusted if circumstances change (*a clausula rebus sic stantibus*). See eg *Van Schalkwyk v Van Schalkwyk* 1947 4 SA 86 (O) for a rare and unsuccessful invocation of a “tacit condition rebus sic stantibus”. Neels has argued that the law should not hide behind such a fiction, albeit that he accepts that implied terms could be read into contracts to give effect to the supplementary operation of fairness and reasonableness (*Thesis* 81-83).

<sup>226</sup> See *Investment CC v Hammersley* 2008 3 SA 283 (SCA) paras 31-32, which dealt with the effect of changed circumstances on servitudes.

<sup>227</sup> *Münchener Kommentar* § 242 para 139.

<sup>228</sup> §§ 307 sqq BGB. See T Naude “Factors Relevant to the Assessment of the Unfairness or Unreasonableness of Contract Terms: Some Guidance from the German Law on Standard Contract Terms” (2015) *Stell LR* 85-90.

<sup>229</sup> *Münchener Kommentar* § 242 para 139; *Jauernig* § 242 para 15; BGH 101, 353 sqq; Whittaker & Zimmermann “Good faith in European Contract Law” in *Good Faith* 28.

was still given effect through the *exceptio doli* before the *Bank of Lisbon* decision of 1988, the courts did not use it to strike down terms merely because they were substantively unfair.<sup>230</sup> It would indeed have been unusual, if not incongruous, to do so, while, for example, simultaneously rejecting the doctrine of *laesio enormis*, which was aimed at combatting substantive unfairness, and also could be regarded as giving expression to good faith.<sup>231</sup>

However, our legal system at present is clearly not unconcerned with substantive unfairness. First, without having gone the German route of initially resorting to a statutory good faith clause, we have adopted consumer legislation which generally requires that the price and terms of a consumer contract must be fair,<sup>232</sup> and specifically invalidates or presumes terms to be unfair.<sup>233</sup> Secondly, in 1990, barely two years after the *Bank of Lisbon* decision, it was recognised in *Sasfin (Pty) Ltd v Beukes*<sup>234</sup> that a term could be so substantively unfair as to be contrary to public policy. Since our system also accepts that good faith as constitutional value could be taken into account when determining whether public policy should invalidate a term, good faith may indirectly assist in deciding whether contractual terms should be “corrected”.<sup>235</sup> And, to complete the picture, we have seen that if this correction does not take place, and a term is per se valid, courts may still on grounds of public policy “limit” or refuse to enforce it; here good faith can as underlying value indirectly assist in this “limiting” function being fulfilled.<sup>236</sup>

Ultimately, there can be considerable disagreement about where courts should draw the line in applying the public policy rule.<sup>237</sup> But then the debate is not about whether we have a rule that can be used to combat and control substantively unfair terms. We have such a rule, namely the public policy rule; the question is how it should be applied.<sup>238</sup>

## 7 Conclusions

South African law has been struggling for some time to determine what place to accord good faith in the law of contract. The meaning of the concept is not self-evident, and the potential roles it could play vary considerably. But we are not unique in facing these challenges. We can obtain a better understanding of them by learning from systems that have grappled with them in the past. We are also in the fortunate position of being able to implement

<sup>230</sup> See *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Dithaba Platinum (Pty) Ltd v Erconovaal* 1985 4 SA 615 (T) 629.

<sup>231</sup> See J Gordley “Good Faith in the Medieval *Ius Commune*” in *Good Faith in European Contract Law* 93, 100-102 on how good faith (through the law of *dolus*) could be the basis for substantive control in earlier civil law; *Voet* 18 5 14.

<sup>232</sup> S 48 of the CPA.

<sup>233</sup> See s 51 of the Consumer Protection Act, which “blacklists” certain terms, reg 44(3) (GN 293 in GG 34180 of 1-4-2011), which “greylists” certain terms by presuming unfairness.

<sup>234</sup> 1989 1 SA 1 (A).

<sup>235</sup> See the text to part 2 2 5 above.

<sup>236</sup> See the text to part 5 2 1 2 (e) above.

<sup>237</sup> Especially whether the interpretation in *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) that a constitutional value must be “implicated” before public policy requires denying enforcement, is too strict.

<sup>238</sup> See the minority judgment of Moseneke DCJ in *Barkhuizen v Napier* 2007 5 SA 323 (CC).

these lessons due to our uncodified system of private law which has never been afraid to seek inspiration from foreign law, and which is located in a constitutional dispensation that allows courts to transform the law to give effect to fundamental rights and values.

Taking the lead from some local commentators, it was enquired here whether South African law can benefit from the experiences of modern civilian systems in giving practical effect to the requirements of good faith. And in this regard it is quite clear that when facing this challenge, German law has regarded it as essential to adhere to a quite specific interpretation of the concept. Good faith is not equated with vague notions of fairness or reasonableness;<sup>239</sup> it is an objective standard,<sup>240</sup> requiring of the parties not to pursue self-interest boundlessly, but to respect and consider each other's interests. This focussed meaning has also been advocated by local commentators,<sup>241</sup> and can be linked to indigenous values that serve related purposes.<sup>242</sup>

However, the value of a comparative perspective is not limited to assisting in defining the concept of good faith. As Ngcobo J pointed out in *Barkhuizen*, in South African law “[n]o comprehensive analysis has yet appeared of how the principle of good faith operates and what its various functions are ...”.<sup>243</sup> Such an analysis remains to be done, but it has been attempted here to at least contribute to this end by drawing on the experiences of a legal system with a shared heritage, and to relate these experiences to those of South African law.

As we have seen, German law differentiates between three broad practical fields of application of the good faith clause. These are (i) its “supplementing” function of filling gaps in the contractual relationship by refining and adding to existing duties; (ii) its “limiting” function, which constrains a party seeking to enforce a contractual right, for example due to pursuit of interests not worthy of protection, or due to engaging in contradictory conduct; and, finally, (iii) its “correcting” function of changing contractual terms, for example due to changed circumstances or extreme unfairness.<sup>244</sup>

A comparison of these experiences with those of South African law has revealed that our system recognises a variety of rules that fulfil functions comparable to those of the German good faith clause. These include rules on reading implied terms to “supplement” existing terms, on resorting to public policy or estoppel to “limit” the enforcement of valid terms, and on using

<sup>239</sup> The vehement reaction to the views of Olivier JA on the role of good faith could at least partly be ascribed to him not giving a more specific meaning to good faith (see the text to part 2 2 6 above).

<sup>240</sup> See the text to part 2 1 1 above on the fundamental distinction between the subjective meaning of good faith, which entails having a state of mind (as when a party acts “in good faith”) and its objective meaning of a value or standard.

<sup>241</sup> See Lubbe (1990) *Stell LR* 7, 20, and reference there to *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd* 1989 4 SA 31 (T) 54-55, 58-59.

<sup>242</sup> On the relevance of the customary notion of *ubuntu* and its relationship to good faith in the law of contract, see J du Plessis “Fairness and diversity in the South African law of contract” to appear in a forthcoming *Festschrift* for Esin Örtücü; Neels *Tussen Regmatigheid en Onregmatigheid* 141.

<sup>243</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 80. Also see *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 71 (per Olivier JA) (“The operation of good faith in our law of contract is still far from being explored and given content. This will have to happen over the years and on the basis of many judgments. Ultimately, a new framework and mindset will hopefully arise ...”).

<sup>244</sup> For early recognition of these categories in South African context see the pioneering comments by Carey Miller (1980) 87 *SALJ* 531 535-537.

public policy to “correct” a contract that is substantively unfair. It was further shown that the German code contains other provisions, apart from the good faith clause, that could be regarded as promoting good faith as value; again, it was apparent that certain rules of South African law fulfil similar functions.

Against the backdrop of these comparative observations, let us finally return to the question posed in the introduction. Assuming that there is a need to promote greater fairness in the South African law of contract, do the experiences of systems like German law show that we could benefit from elevating good faith from an underlying, constitutionally-recognised value to a rule, comparable to the good faith clause? It is readily admitted that only a limited number of examples were considered here, so any conclusion can only be provisional, but it is difficult to avoid the strong impression that many functions of the German good faith clause are already fulfilled, or could be fulfilled by existing rules of South African law. This suggests that adopting a good faith rule would be a conquest of much less territory than its protagonists may expect. Furthermore, it also seems inevitable that such a step could give rise to new conflicts, arising from uncertainty about overlaps between such a good faith rule and other rules, most notably the rule that neither the content nor the enforcement of contracts should be contrary to public policy.

It may therefore well be that our attention should rather be focussed on how good faith could best be given effect to as fundamental value, which is the role our courts have thus far assigned it. Here the functions-based classification of German law could sharpen our focus and aid our courts to consider more precisely how specific rules could give expression to this value, and thereby contribute to a fairer and more just law of contract.

## SUMMARY

South African courts generally support the notion that good faith is an underlying value of the law of contract, as opposed to a rule or standard that could be relied on directly to promote fairness. However, some commentators have criticised this approach and pointed out that the private law codes of modern civil-law systems contain general clauses or rules to the effect that parties must act according to good faith. The contribution focuses on arguably the most prominent of these codified systems, namely German law, and seeks to determine whether its experiences with the practical application of a good faith clause do indeed suggest that South African law will benefit from according a more prominent status to good faith. After examining how German law narrowly defines good faith, and how the good faith clause fits in the broader context of the Constitution and the German Civil Code, it is shown how the clause fulfils three main functions. These are to “supplement” contractual duties, to “limit” parties in the way they exercise contractual rights, and to “correct” or modify contractual terms. This threefold division of basic functions is adopted as a structure within which a broad range of rules of South African law can be located. This comparative analysis enables a clearer understanding of how these rules of South African law currently give practical effect to good faith as value, or have the potential to do so in future. The conclusion is reached that it is not self-evident that our courts must elevate good faith to a general standard or rule in order to promote greater contractual fairness.