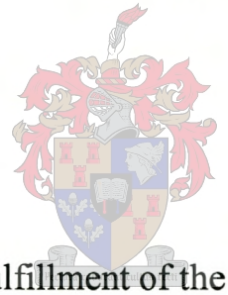
THE ROLE OF IMPLICIT CONTRACT TERMS AS A DETERMINANT OF CONTRACTUAL CONSEQUENCES

Chantal Bailly



A Thesis represented in partial fulfillment of the requirements for the degree of Masters in Law at the University of Stellenbosch.

Supervisor: Prof G.F. Lubbe

December 2005

DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part, submitted it at any university for a degree.

SUMMARY

It is clear that the classical concept of contract suffers from weaknesses because it takes too little account of social and economic changes that have occurred in our highly competitive global climate. More particularly, it fails to acknowledge implicit dimensions of contract.

The classical contract theory was designed for transactions rather than to regulate relations. In view of the relational contract theory, contracts are agreements, often developed gradually, over a period of time and last over a period of time, perhaps indefinitely.

As illustrated, with a discussion of the various theories attempting to qualify the classical law, the development of the relational contract theory and the need for implicit dimensions is in line with changes in business, market transactions and the economic and social environment of today.

The relational contract is gradual and emphasises the relationship between the parties. Focus is placed on their understandings, party practices, customs and expectations as opposed to formal doctrines and principles.

Characteristically, relational contracts are often incomplete in their specifications, thus leaving room for the creation of expectations and understandings *inter partes*. These expectations and understandings along with co-operation, rationality and trust are the implicit dimensions, which reflect the shared interest the parties have in their transaction.

The ways in which these implicit dimensions can be recognised, developed and applied to contracts, particularly in the South African context is considered in light of our law's treatment of the implication of terms into contracts. It was found that considerations of reasonable expectations and policy do play a role in our law, albeit not to such an extent as to meet the demands of the relational contract theory and the recognition of implicit dimensions.

Existing contract principles are also evaluated in the light of the relational contract and implicit dimensions.

It is not suggested that classical contract law doctrines are to be dispensed with but that a shift of focus should occur, from the traditional focus on the "paper" deal to focusing on the "real" deal, between the parties.

It is concluded that a principle of good faith would be a suitable starting point to give cognisance to implicit dimensions and to regulate relational contracts. In recognising a principle of good faith, the courts will be able to better respond to the expectations of the parties. A principle of good faith is recommended as being advantageous towards developing a pre-contractual duty of disclosure and encouraging more co-operative thinking and dealing in both legal doctrine and contracting practice.

OPSOMMING

Dit is vandag duidelik dat die klassieke kontraksmodel aan swakhede ly omrede dié model nie genoegsaam rekening hou met sosiale en ekonomiese veranderinge in ons hoogskompeterende wêreldklimaat nie. Meer bepaald, neem die model nie die implisiete aspekte van kontrakte in ag nie.

Die klassieke teorie is meer gepas vir eenmalige transakies tussen kontraktante en nie soseer gebruik vir die regulering van deurlopende kontraksverhoudinge nie. In terme van die verhoudingskontrakteorie ("relational contract theory") word kontrakte beskou as ooreenkomstes wat geleidelik, oor 'n lang tydperk kan duur, miskien selfs vir 'n onbepaalde tydperk.

Soos geïllustreer, is daar verskeie teoriëe wat poog om die bestaande klassieke benadering aan te pas. Die ontwikkeling van die verhoudingskontrakteorie en die implisiete aspekte van kontrakte korreleer met veranderinge in internasionale handel en die ekonomiese en sosiale omgewing van vandag.

Die verhoudingskontrakteorie beklemtoon die verhouding tussen die partye, hul praktyke en gewoontes en verwagtinge en is nie net slegs op formele beginsels gebaseer nie.

'n Eienskap van hierdie kontraktstipe is dat hulle dikwels nie poog om die verhouding van die partye volledig te reguleer nie. Sodoende word ruimte gelaat vir die ontwikkeling van verwagtinge en implisiete verwagtinge tussen die partye.

Hierdie verwagtinge en verstandhoudings te same met die beginsels van samewerking, redelikheid en onderlinge vertroue, is die implisiete aspekte wat die gemeenskaplike belang wat partye in hul verhouding het, weerspieël.

Maniere om hierdie implisiete aspekte te herken, te ontwikkel en toe te pas, veral in die Suid-Afrikaanse konteks, is oorweeg in die lig van ons reg se benadering tot die inlees van onuitgesproke bedinge in kontrakte. Alhoewel daar bevind is dat redelike verwagtinge en beleid wel 'n rol speel, is dit onvoldoende in die lig van die eise van die verhoudingskontrakteorie en die behoefte aan implisiete aspekte.

Bestaande kontraksbeginsels is ook geëvalueer in die lig van die verhoudingsgebaseerde kontrak en implisiete aspekte.

Daar word nie gesuggereer dat klassieke beginsels van die hand gewys moet word nie. Eerder dan die tradisionele fokus op die "paper deal" moet die fokus op die"real deal" wees.

Ten slotte word die behoefte aan die erkenning van 'n beginsel van goeie trou uitgelig. Breedweg sal howe beter kan reaggeer op partye se verwagtinge en verstandhoudinge en dié beginsel word ook aanbeveel met die oog op die behoefte aan samwerking tussen partye en die ontwikkeling van 'n voor-openbaarmakingsplig.

ACKNOWLEDGEMENTS

The most important person in this study is, without a doubt, my supervisor Professor Lubbe. Thank you very much for your guidance and the many hours spent reading my thesis. Your knowledge and insight are truly inspirational. To my parents and siblings, Nathalie and Claude, thank you for your support and encouraging words in distressed times. Last but not least, Sotirios, for your love and always being here for me.

TABLE OF CONTENTS

CHAPTER 3: The Implication of Terms in South African law

CHAPTER 4: Development in the law of Contract

CHAPTER 5: Implicit Dimensions of Contract and their Implication for South African law

CHAPTER 1

Introduction

1 Aim of this study

The aim of this study is to examine the role or significance of what has been called the implicit expectations and understandings of the contracting parties in the determination of the consequences of contracts. To what extent, and how, must the law take cognisance of these implicit dimensions of the contracting relationship in order to make sense of a contractual agreement and fully determine the legal consequences of a transaction?

1 1 Definition and basis of contract

It is trite law that contracts are a source of obligation. An obligation is a legal relationship comprising rights and duties between legal subjects.[1] Contractual obligations are created through agreement.[2] More specifically, a contract is a particular kind of agreement. It is an agreement by which a party or the parties promise and engage to the other to give some particular thing, or to do or abstain from doing a particular act.[3] An agreement is concluded voluntarily, and consensus is thus the basis of a contract.[4] Theoretically, there can be no agreement unless the minds of the parties have met, *consensus ad idem* is insisted upon.[5] This notion that contracts are based on actual agreement is known as the will theory and is well established in

---

[1] Lubbe & Murray *Farlam & Hathaway: Contract: Cases, Materials, Commentary* (1988) 3; *Digest 44.7.3* translated by Watson.

[2] Christie *The law of contract* (2001) 23; Joubert *General Principles of The Law of Contract* (1987) 21; Kerr *The Principles of The Law of Contract* (2002) 4.

[3] Pothier *A treatise on the Law of Obligations* translated by Evans (1806) s 3.

[4] Lubbe & Murray 1. Be it an actual meeting of the minds of the contracting parties or the reasonable belief by one of the contracting parties that there is consensus. A reliance on consensus as formulated by Blackburne J in *Smith v Hughes* (1871) LR 6 QB 597. This reliance on consensus is referred to as a deemed or apparent agreement by the writers Kerr 9 and Christie 2 respectively. Reasonable reliance on agreement is discussed at a later stage *infra*.

[5] As stressed by Lord De Villiers CJ in *Joubert v Enslin* 1910 AD 6 23; Christie 12; Joubert 21.

South African law.[6] The will theory emphasises the subjective, psychological intentions of the parties.[7] *Consensus ad idem* is best established by means of inferences from the statements and acts of the parties and evidence concerning their negotiations and surrounding circumstances.[8] This accentuates the role of the declaration as an outward manifestation of intention.[9] Essentially, the contractual agreement is embodied in the parties' declarations of will, which evidences the intention of the parties. The agreement is usually articulated or expressed by means of terms embodying an obligation or further delineating, qualifying or sanctioning its operation.[10]

1 2 The concept 'term'

Terms thus express the contents of a contract.[11] Usually the terms reflect the actual agreement of the parties or the reasonable reliance on the presence of actual agreement of one of them.[12] Often, however, the law also implies certain terms without reference to the actual intentions or conduct of the parties.[13] This distinction is reflected in the traditional classification of contract terms into *essentialia, naturalia*

---

[6] *Maritz v Pratley* (1894) 11 SC 345. Our modern courts emphasise the importance of intention as illustrated in *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) at 435; *Jonnes v Anglo African Shipping Co (1936) Ltd* 1972 2 SA 827 (A) at 834 D.

[7] Despite this theory giving utmost respect for the freedom of will and for the belief in the inequity of holding a person to an unintended transaction, the theory in its complete subjective form cannot be supported, see Kahn *Contract and Mercantile Law* (1988) 12-13.

[8] Lubbe & Murray 108.

[9] Watermeyer ACJ in *Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241 said: "[A] binding contract is as a rule constituted by the acceptance of an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance. Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn..."

[10] Van der Merwe, Van Huyssteen, Reinecke & Lubbe *Contract General Principles* 2ed (2003) 256; Kerr 41.

[11] Van der Merwe et al 256

[12] Van der Merwe et al 256

[13] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531 E. According to Joubert, terms implied by law are legal rules stating or defining the rights and duties of the parties in various circumstances and applicable to a particular contract. Joubert 65.

and *accidentalia* (*incidentalia*).[14] *Essentialia* are the characteristic rights and duties of a specific contract that distinguish various specific contracts from one another. The contract cannot exist without agreement on those terms.[15] The *accidentalia* are not of the nature of a contract but rather terms included by express agreement, to regulate incidental aspects of importance to a particular transaction.[16] Implied terms are those implied by law (*ex lege* legal consequences), the so called *naturalia*, which can supplement the parties' agreement.[17] The *naturalia* serve as a set standard of terms which apply to contracts falling into a specific category.[18] According to Pothier, the *naturalia* are terms, which are of the nature of the contract though not expressly mentioned. Such terms may be expressly excluded, as the contract is able to subsist without them.[19] Vorster firmly maintains that the courts do have the power to adopt novel *naturalia* in accordance with the dictates of *bona fides* and public policy considerations relevant to a particular kind of contractual relationship.[20]

The law of contract also draws a distinction between express terms on the one hand and implied terms on the other. Express terms are those contained in writing, in the

---

[14] In accordance with Pothier *Traité des obligations* translated by Evans (1802), Joubert *Die Finansiële Huurkontrak* (1991) 67, Gordley *The Philosophical Origins of Modern Contract Doctrine* (1991) 61, *LAWSA V Contract* par 183.

[15] The *essentialia* generally make up the purpose of the contract, the most important result or economic end intended by the parties as well as the most important terms on which there must be consensus, for a contract of a particular kind to exist. Joubert 23. *Essentialia* are terms essential for the existence of a particular type of contract. If a specific contract displays the *essentialia* of a particular contract type it will be classified as such even though the parties have called it by a different name. Decisive for classification is not outward appearances but the actual terms a contract contains. See *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) on the rule *plus valet quod agitur quam quod simulate concipitur*.

[16] Kahn 485; *LAWSA V* par 186; Jobert 23 Kerr 338-339; Christie 181.

[17] *McAlpine supra.*

[18] *LAWSA V* par 185. The rules as to the *naturalia* of a contract are generally only directory, meaning that the *naturalia* apply only in so far as the parties have not agreed otherwise. Certain *naturalia* are peremptory, these arise by operation of law and are read into a contract even though they may have never been in the contemplation of the parties.

[19] Pothier *Traité des obligations* translated by Evans (1802).

[20] Vorster "The resolution of contractual disputes: Interpretation *versus* The Recognition of Novel *Naturalia.*"1987 *THRHR* 450.

contract[21] or stated verbally. The umbrella term "implied term" in this thesis is used in the wide sense referring to any supplementation of the express terms of the contract.[22]

1 3 Implied and tacit terms

Ideally, there should exist a distinct difference between the synonymous words "implied" and "tacit" to avoid misunderstanding and confusion.[23] The distinction between terms implied by law and unexpressed terms based upon the actual or imputed intention of the parties to the contract was emphasised in *Minister van Landbou-Tegniese Dienste v Scholtz*.[24]

> "The implied term is essentially a standardised one, amounting to a rule of law, which the court will apply unless validly excluded by the contract itself, while the tacit term is a provision, which is found in the unexpressed intention of the parties."[25]

The word "implied" in this discussion refers to a term, which the law provides and imposes in the absence of a contrary agreement by the parties[26] as well as terms implied by the law based on custom and trade usage.[27] The word "tacit" by contrast is used to describe a term, which the parties had in, mind but did not express.[28] Tacit

---

[21] *Schmidt v Dwyer* 1959 3 SA 896 (C) 899 A: "... any statement in such a document *prima facie* constitutes a term of the contract unless it appears from the contract itself or other admissible evidence that the parties did not so intend."

[22] In the narrower sense, used *infra*, implied terms are divided into tacit terms, terms implied by law and *naturalia*. Vorster *Implied Terms In The Law Of England And South Africa* (PhD thesis Cambridge, 1987) 123 uses "implied term" to embrace all non-express contractual provisions.

[23] AJ Kerr is definitely the most well known critic regarding this confusion in semantics. He warns against this misunderstanding in his article "Dangers in the use of synonyms to describe different categories of contractual provisions: 'implied' and 'tacit'." 1994 *THRHR* 281.

[24] 1971 3 SA 188 (A).

[25] The court in *McAlpine* at 532 D referred to Salmond & Williams *Principles of the Law of Contract* 2ed (1945) 36 and their clear distinction between these terms; see chapter 2 28 *infra*.

[26] Christie 182; Joubert 67.

[27] Christie 184.

[28] A tacit term can be actual or imputed. It is actual if both parties thought about the relevant matter but did not bother to express their assent; it is imputed if the parties would have agreed on the relevant matter had they thought about it , but did not do so because they overlooked it or failed to anticipate the situation in which the term would be required, *Wilkins v Voges* 1994 3 SA 130 (A); *Techni-Pak Sales*

terms are not added to the contract by law but form part of the agreement between the parties.[29] However, a tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract.[30] The focus placed on the express agreement constitutes the primary determinant of the contractual consequences.

1 4 The Traditional Approach

1 4 1 The Discrete contract and the classical model of the law of contract

The above approach reflects the paradigm of the so-called discrete contract.[31] This entails an image of contracts as transactions involving discrete, restrictive and voluntary relationships, containing relatively bounded obligations performed more or less instantaneously on a once off basis.[32] This view is also associated with the classical approach to contracts. The classical approach realises the importance of individual autonomy and the notion of consensuality.[33] These ideals enjoin a restrictive view of the function of the law of contract; envisaging contracts as an individual or private transaction, between equal parties, which will for that reason be strictly enforced.[34]

(Pty) Ltd v Hall 1968 3 SA 231 (W) 236-237; *Van den Berg v Tenner* 1975 2 SA 268 (A) 277; *Greenfield Engineering Works (Pty) Ltd* 1978 4 SA 901 (N) 909.

[29] Christie 191; *LAWSA V* par 189.

[30] The rule as stated by Trengrove JA in *Robin v Guarantee Life Assurance Co Ltd* 1884 4 SA 558 (A) 567C-D. The tests used by the courts are discussed *infra*.

[31] The Oxford Dictionary defines "discrete" as individually distinct, separate and discontinuous. This term is criticised by Macneil *infra* to define contracts as instantaneous and merely bounded obligations. He feels that obligations cannot be confined to the express terms of the contract but rather that transactions occur within a relational context. Collins "Introduction: The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins and Wightman (eds) *Implicit Dimensions of Contract* (2003) 19.

[32] Campbell & Collins "Discovering the Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 18.

[33] Individual autonomy entails the notion that the decision whether and with whom to contract and on what terms, should be left to the discretion of the individuals involved. The notion of consensuality means that the formation of and liability to the contract is based on the concurrence of the intentions of the parties; Lubbe & Murray 21.

[34] Lubbe & Murray 21.

Although social conditions and values have changed, the South African law of contract still conforms to the pattern of classical law.[35] Despite the movement in other legal systems towards socialising the law of contract,[36] our courts have lagged behind due to our continuous acceptance of the will theory as a basis for our law of contract.[37]

The classical theory of contract was designed to provide for the enforcement of the private arrangements, which the contracting parties had agreed upon.[38] The individualistic values of the classical approach emphasize freedom and equality in which the ideal of individual autonomy is paramount.[39] This results in the law not being directly concerned with fairness, justice or public policy regarding the outcome of the contract.[40] This does not mean that the judges were ignorant of the developing and changing *mores* but rather that they thought it to be in public interest to strictly enforce private contracts.[41] This result created the foundation upon which the classical contract model is built, "freedom of contract" and "sanctity of contract."[42] The classical law of contract expressed a great bulk of the rules of contract to be

---

[35] Lubbe & Murray 26.

[36] Hefer "Billikheid in die kontraktereg volgens die Suid-Afrikaanse regskommisie" 2000 *TSAR* 142 refers to Kötz "Controlling unfair contract terms: Options for legislative reform" 1986 *SALJ* 405 on this matter "Contract involves free choice of the individuals concerned, and is therefore based on the idea of private autonomy. On the other hand, contract has also been justified in terms of economic purpose and social function. It has been explained as a mechanism by which scarce resources can be moved to what are considered the most valuable uses. Thus, contract enhances the mobility of the factors of production. It helps maximise the net satisfaction realised in a given society. As a result, individuals by entering into contracts that serve their own interests are also serving the interests of society…." and "There is little doubt that in the evolution of modern contract law the principle of social control has steadily been on the increase."

[37] *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A).

[38] Based on the guiding principle *pacta servanda sunt*, i.e. that it is imperative to honour agreements. Atiyah *An Introduction To The Law Of Contract* 5ed (1995) 8.

[39] Lubbe & Murray 21.

[40] Atiyah 8.

[41] One of the greatest English judges of the nineteenth century, Sir George Jessel, declared that "if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice" Atiyah 8.

[42] Atiyah 8 10; Van der Merwe et al 10.

dependent on the intention of the parties.[43] This emphasis on intention, misled judges who failed to see that a good deal of the law of contract was concerned with obligations arising from conduct of the parties as opposed to what they agreed or promised.[44] Gordley points out that the early adversaries of the will theory realised that the concept of will could not resolve certain problems in contract law relating to areas such as offer and acceptance, fraud, duress and more importantly, for this essay, the issue of implied terms, in the wide sense.[45]

Today it is clear that the classical concept of contract suffers weaknesses because it takes too little account of social and economic changes in our highly competitive and global climate. This model has been criticised by legal scholars as denying contracts of their social character and more particularly for failing to acknowledge implicit dimensions of contract.[46]

According to Ataiyah[47] the classical contract law was designed for transactions rather than relations.[48] Furthermore, in classical law there is an assumption that all contracts are transactions and this is not suited to long-term relations.[49] In relations, the agreement is often reached gradually, over a period of time as opposed to instantaneously. In this respect, the concepts of good faith and fidelity are important, which the classical law does not cater for.[50]

---

[43] Atiyah 10; Lubbe & Murray 20 21 25.

[44] Atiyah 11.

[45] Gordley 230.

[46] Campbell & Collins "Discovering the Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 26.

[47] Atiyah 50.

[48] The author further writes that a typical transaction is a discrete event. For example a one-off sale between a buyer and seller. He states that a typical transaction is a "once-and-for all transaction" over and done with on the spot. However, he highlights the fact that many contracts are not like this at all. They instead embody long-term relationships such as contracts of employment or business relationships between long-standing suppliers and customers.

[49] Atiyah 51.

1 5 New approach: Recognition of implicit dimensions

Recently, Hugh Collins[51] has argued that any system of contract enforcement must develop techniques and processes to determine the legal significance of the contexts and conventions surrounding the social practice of entering into contracts. The image of contracts as only a discrete, voluntary form of human association presents a distorted picture. Collins emphasises that contracts are embedded in conventions, norms, mutual assumptions and unarticulated expectations.[52] The recognition of such implicit dimensions is necessary and inevitable in law. This is particularly so, in light of the relational contract as postulated by Macneil,[53] who reveals that all transactions take place in a relational atmosphere. In terms of Macneil's relational contract theory, the analysis of any transaction requires the recognition and consideration of all significant relational elements surrounding the transaction.[54] Accordingly, it is essential that matters such as power, reciprocity and solidarity in contractual relations be considered. Obligations cannot be confined to those expressed. Macneil explains that the process of a relational contract is not sudden but gradual. The relationship between the parties is the focus, with emphasis placed on their understandings, party practices, customs and expectations as their relationship evolves. According to Macneil, the main intended thrust of his work is to expose the relational constitution of all contracts.[55]

It is also important to differentiate between the real and the paper deal as explained by Macaulay.[56] The real deal refers to the parties' own understandings that are shaped by customs and practices, whilst the paper deal refers to the express contract, the formal

---

[50] Atiyah 51.

[51] Collins "Introduction: The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 1.

[52] Collins "Introduction: The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins and Wightman (eds) *Implicit Dimensions of Contract* 2.

[53] Macneil's relational contract as expounded in Collins "Introduction: The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins and Wightman (eds) *Implicit Dimensions of Contract* 18-19 143.

[54] Collins, "Introduction: The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins and Wightman (eds) *Implicit Dimensions of Contract* 18-19.

[55] Macneil *The relational theory of contract: Selected works of Ian Macneil* (2001) 5.

[56] Collins, "Introduction: The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins and Wightman (eds) *Implicit Dimensions of Contract* 143-144

expressions of the parties. Often, however, the paper deal will not reflect the real deal, as a written document can be inconsistent with the actual expectations of the parties. Macaulay recognises that these understandings may clash with the contract terms to which the parties have consented and must therefore be considered. He states that

> "Contracts are always more than the contract document."[57]

The claim therefore is that the classical model is restrictive and cannot sufficiently acknowledge the implicit dimensions of contracts.[58] The classical model does not recognise that contracts are actually embedded in conventions, norms, mutual assistance and unarticulated expectations.[59]

Therefore, a modern law of contract should have regard also to other dimensions in transactions such as fairness, good faith, co operation, understandings, expectations and trade practice and customs must be recognised.

1 6 Scheme of analysis

This study examines the extent to which South African law recognises the relevance of implicit understandings and expectations as a determinant of contractual consequences. The controversial issue at hand is to what extent the parties determine the consequences of their contract and to what extent the law implies certain consequences in the light of implicit dimensions. To this end it will be necessary to determine on what basis the law could insert terms by considering the tentative weight to be accorded to considerations based on the understandings or expectations *inter partes*.

In light of the above, I intend to examine the meaning, understanding, function and role of implied and tacit terms in South African contract law. In what manner and to what extent meaning and weight is given to the implicit understandings and

---

[57] Macaulay "The Real And The Paper Deal: Empirical Pictures Of Relationships, Complexity and the Urge for Transparent Simple Rules" in: Campbell, Collins and Wightman (eds) *Implicit Dimensions of Contract* 52-53.

[58] Campbell & Collins "Discovering the Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 26.

[59] Campbell & Collins "Discovering the Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 2.

expectations of the parties in light of the recent theories regarding the implicit dimensions of contracts and what it could become.

In view of the fact that South African law partly adopted English law regarding the implication of contract terms; an overview in the first instance is given of the development and growth in English law regarding implied terms.

The emphasis of this study is, however, on South African law. As a point of departure, a summary is given of our adoption of the English law and the terminological issues and problems that arose as a result. An examination is made of our legal system's use and application of implied terms. A discussion is dedicated to customs and trade usages as a means of modifying the *naturalia* of the various contract types or broadening our restrictive approach when dealing with the implication of contract terms. This is necessary in the view of Vorster's contention that our courts have failed to introduce desirable *naturalia* adapted to the changing *mores* and socio-economic developments.[60]

Special attention is given to the current developments regarding the new theories, their application, if at all, and their position in the law of contract. It is necessary to balance the need to give appropriate weight to reasonable expectations to achieve contractual justice and the need to uphold the classical model to ensure contractual justice and not neglect legitimacy and certainty.

[60] Lewis "General principles of contract" 1990 *Annual Survey of South African Law* 54. *Naturalia*, customs and trade usages will be used as motivation for the development of implicit dimensions in South African law *infra*.

CHAPTER 2

Origins and background

2 1 Introductory remarks

The South African law regarding the implication of terms reflects influences from both Roman-Dutch[61] and English law.[62] After a discussion of the notion of contractual *naturalia* as received from Roman-Dutch law, there follows a brief overview of the English law as the foundation upon which much of South African law is based.

2 2 *Naturalia*

Naturalia are *ex lege* terms, which are attached by law to every contract of a particular class unless excluded.[63] The notion that such *ex lege* terms or *naturalia* flow naturally from a contract stems from the Aristotelian metaphysical concept of the essence.[64] This entails that the identity of each thing is determined by certain essential features, which are distinguished from the mere accidental attributes of a particular thing.[65] Baldus, followed this concept and concluded that each type of contract had a nature or essence from which certain obligations flowed naturally.[66] This justified reading terms into the contract, even in the absence of express provision by the parties. The nature or essence of an agreement depended on its end, and its natural terms were means to that end. These ideas were applied by the Spanish scholastics, and through their influence, accepted by Roman-Dutch writers such as Grotius.[67]

---

[61] Vorster "The basis for the implication of contractual terms" 1988 *TSAR* 161 178.

[62] See Vorster "The Influence of English Law on the implication of terms in the South African Law of contract" 1987 104 *SALJ* 588; Vorster 1988 *TSAR* 178.

[63] Van der Merwe et al 261; 147; Joubert 65. See *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 3 SA 754 (A) for an example of variation of liability under the *naturalia* of the various classes of bailees.

[64] Gordley 61 208.

[65] Gordley 61 67.

[66] Gordley 61.

[67] Gordley 102 105. Examples of South African case law in which the notion of *naturalia* is recognised, will be discussed *infra*.

Naturalia assist in determining the rights and duties of contracting parties as well as other effects and consequences of their contracts.[68] They are usual terms, which the contractants do not have to negotiate themselves. From an economic perspective, this helps to reduce the costs of transactions.[69] *Naturalia* are based on notions of fairness and reasonableness. This concept is not a static one as the *naturalia* of contract types may be extended or curtailed and new ones developed. The development of novel *naturalia* occurs through judicial adaptation in response to changing circumstances, through legislation and through custom or trade usage.[70] Vorster is of the opinion that the courts do have the power to adopt novel *naturalia* in accordance with the dictates of *bona fides* or policy considerations relevant to particular contractual relationships.[71]

Corbett AJA, in his dissenting judgement in the *McAlpine*[72] case, indicates that implied terms might be derived from common law, statute and trade usage or custom.[73] Vorster contends that the courts have the power to recognise on the basis of policy considerations *naturalia* not found in statute, precedent, custom and usage or old authorities.[74] Kerr[75] says that the state of the law and requirements of justice are major factors which courts consider when they are called upon to define or apply *naturalia* but the author does not go as far as to say that policy may be the sole source of *naturalia*.

---

[68] Van der Merwe et al 260.

[69] Lubbe & Murray 422 n 1; Posner *The Economic Analysis of Law* (1977) 69; Van der Merwe et al 260; Collins *The Law of Contract* (2003) 245.

[70] Van der Merwe et al 261.

[71] Vorster 1987 *THRHR* 450 451.

[72] *Supra* at 531 E-H.

[73] Vorster 1987 *SALJ* 588 criticises this statement by Corbett AJA and other cases that assume that terms implied by law are to be sought only in precedent, statute, custom and old authorities. According to Vorster, this has retarded the development of new legal incidents. Vorster also adds that legal policy may require the recognition of a new legal incident where the above-mentioned are of no assistance.

[74] Vorster 1988 *TSAR* 167. As is done in English law and illustrated by the case of *Liverpool City Council v Irwin* 1977 AC 239. Vorster contends that statute and precedent, determined by the *stare decisis* doctrine, are binding sources while custom or trade usage and old authorities are merely of persuasive value. According to Vorster, this is so because "any court may refuse to recognise a proposed legal incident which reflects a custom or trade usage, or which is found in the old authorities, if the court deems it unreasonable or in conflict with the dictates of policy." Vorster *Implied Terms* 147.

There are cases that have overlooked policy considerations as a potential source of *naturalia*.[76] Fortunately, there are cases that have given judicial recognition to this source.[77] In general, our courts have been very cautious in developing novel *naturalia*.[78]

The parties may exclude the operation of *naturalia* by means of exemption clauses.[79] However, it is well established that the capacity of parties to contract out of the *naturalia* of a contract is restricted by considerations of public policy.[80] A well-known case in which the court declared an exemption clause contrary to public policy and subsequently unenforceable is *Wells v South African Alumenite Company*.[81]

2 3 A brief overview of English law

---

[75] Kerr 374.

[76] *Agricola v Osiowitz* 1947 1 SA 282 (T); *Union National South British Insurance Co v Padayachee* 1985 1 SA 551 (A). Vorster maintains that the court's apparent unawareness of policy considerations as a potential source of *naturalia* may be ascribed to the negative influence of the Privy Council decision in *Douglas v Baynes* 1908 AC 477 where the actual or presumed intention of the parties was enshrined as the only possible basis for the implication of terms. It is submitted that these cases might have been decided differently if it had been argued that *bona fides* or commercial convenience required the recognition of novel *naturalia*.

[77] *Falch v Wessels* 1983 4 SA 172 (T); *A Becker & Co (Pty) Ltd v Becker* 1981 3 SA 406 (A).

[78] *Videtsky v Liberty Life Insurance Association of South Africa Ltd* 1990 1 SA 386 (W); Van der Merwe & Lubbe "Bona Fides And Public Policy" 1991 *Stell LR* 99-100. Our Supreme Court of Appeal has also been conservative in its approach regarding the principle of good faith; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Eerste Nasionale Bank Van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Afrox Health Care Limited v Strydom* 2002 6 SA 21 (SCA).

[79] *Central South African Railways v McLaren* 1903 TS 727; *Weinberg v Olivier* 1943 AD 181; *King's Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N); *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd supra*; *Strydom v Afrox Health* [2001] All SA 618 (T); *Botha v Swanepoel* 2002 4 SA 577.

[80] *Rosenthal v Marks* 1944 TPD 172 at 180. A clause contrary to public policy is legally unenforceable *Sasfin (Pty) Ltd v Beukes supra*. However, in this very case, Smalberger AJ at 9B-F warns "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds." This has been followed in *Brisley v Drotsky supra* as well as *Durban's Water Wonderland (Pty) Ltd* 1999 1 SA 982 (SCA).

[81] 1927 AD 69 at 72. A clause in the contract exempted liability from fraud.

English law recognises several bases which the courts may invoke to imply terms in contracts.[82] In English law, the courts correctly conceive that it is not their task to make contracts for the parties concerned, but only to interpret contracts already made.[83] Therefore, the cases in which the courts will imply a term into a contract are strictly limited.[84] Terms are mainly implied based on the presumed common intention of the parties or necessity only.[85]

Treitel has conveniently classified implied terms into three groups.[86] Firstly, terms implied in fact, that is, terms which were not expressly set out in the contract but which the parties must have intended to include.[87] The second group consists of terms implied in law. These terms are imported by operation of law, although the parties may not have intended to include them.[88] The third group consists of terms implied by custom.

2 3 1 *The Moorcock*

The most popular doctrine applied in English law for implying terms has traditionally been *The Moorcock* doctrine.[89] In terms of this doctrine the law only implies terms where it is obvious that the parties presumably intended such an inference[90] and with the object of giving efficacy to the transaction.[91] This case examined the implied

---

[82] Vorster 1987 *SALJ* 588.

[83] Beatson *Anson's Law of Contract* (1998) 143.

[84] This notion is based on the classical theory of contract discussed *supra*.

[85] Whincup *Contract Law and Practice* (2001) 30.

[86] Treitel *The Law of Contract* (2003) 185.

[87] Beatson 143; Treitel 189; Atiyah 202.

[88] Beatson 143; Treitel 190; Atiyah 202.

[89] *The Moorcock* 1889 All ER Rep. 530 [CA]. The principle laid down in *The Moorcock* has been approved and applied many times: *Silverman v Imperial London Hotels Ltd* (1927) 137 LT 57; *Aktieselskabet Olivebank v Dansk Svolsyre Fabrik* [1919] 2 KB 162; *Tappenden v Artus* [1964] 2 QB 185; *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452; *Page One Records Ltd v Britton* [1968] 1 WLR 157; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699; *British School of Motoring Ltd v Simms* [1971] 1 All ER 317.

[90] *Hamlyn v Wood* [1891] 2 QB 488. At 494 where the parties must have intended the stipulation in question. This strict requirement is watered down in *The Moorcock*.

[91] Bowen LJ developed this doctrine in his statement from *The Moorcock* in which he states that "the implication which the law draws from what must obviously have been the intention of the parties, the

warranty as distinguished from an express warranty.[92] Lord Bowen stated that an implied warranty is founded on the presumed intention of the parties and upon reason.[93] In the case of a business transaction, the law aims to create business efficacy by its implication of such a warranty provided that there is a common intention between the parties.[94] Bowen L.J. furthermore stated that when dealing with a presumed intention, the minds of the parties must be examined so as to determine whether it must have been in contemplation of both the parties that one should be liable.[95] Due to the nature of the transaction the judge concluded that the defendants were bound to take reasonable care to prevent danger to those using the jetty and that this was intended by the parties upon conclusion of their agreement.[96] According to Lord Esher[97] business cannot be carried on honestly between people in a transaction of this nature unless a duty is implied that the defendants undertake to take reasonable care concerning the condition of the riverbed.[98] It was also emphasised that such an implication is not burdensome on the defendants as the task is a reasonable and simple one.[99]

---

law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side." 534H-J.

[92] The facts were as follows; an agreement was made between ship owners and wharfingers that the ship owner's vessel should proceed to a wharf in the river belonging to the wharfingers for the purpose of discharging and loading cargo. It was common cause that on the tide ebbing a vessel at the wharf would be grounded. While the ship owners' vessel was moored alongside the wharf, she took ground and due to inequalities in the riverbed, sustained damages. The bed of the river where the vessel took ground was vested in the river Conservators and the wharfingers had no control over it. However, it was within their power to ascertain its state. The wharfingers had taken no steps to ascertain its state. The ship owners instituted an action for damages for the damage to their vessel. The plaintiffs were successful. A term was implied in the agreement that the defendants warranted that they had taken reasonable care to see that the berth was safe and that if it was not safe, they would warn the plaintiffs of that fact.

[93] 534.

[94] 534-535.

[95] 535.

[96] 535-536.

[97] At 534 D-E.

[98] At 534 D-F. "It is the business of persons conversant with rivers, especially when they are on the spot at every tide, to find out the state of the bottom in some way or another."

[99] 534.

There exists no uniformity amongst English authors regarding the exact category used to imply the term in *The Moorcock*. Professor Treitel refers to *The Moorcock* as one of the "doubtful cases" in English law regarding the implication of terms.[100] It is doubtful because sometimes there exists no clear-cut distinction whether a term is implied in fact or in law.[101] Despite the fact that *The Moorcock* is regarded as the leading authority for terms implied in fact and based on the presumed intention of the parties,[102] the implication was based on objective criteria of reasonableness and therefore resembles terms implied by law.[103] Terms implied by law are usually based on a specific contract type whereas in this instance the implication was rather related to a particular transaction.[104]

Lord Simon, in delivering the judgement of the majority of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*,[105] summarised the content of the *Moorcock* as follows

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (i) it must be reasonable and equitable; (ii) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (iii) it must be so obvious that it goes without saying; (iv) it must be capable of clear expression; (v) it must not contradict any express term of the contract."[106]

Subsequently, however, the strict principle in *The Moorcock* of giving effect only to the presumed intention of the parties when considering the implication of terms has become unpopular.[107]

---

[100] Treitel 194. Likewise, Atiyah 211 sees *The Moorcock* as a "special case" regarding the implication of terms in law when dealing with a non standard or uncategorized contract.

[101] Treitel 194.

[102] Guest *Chitty on Contracts* (2004) 904 categorises *The Moorcock* as a case dealing with terms implied in fact where it is necessary to give business efficacy and where the term implied represents the "obvious, but unexpressed, intention of the parties."

[103] Treitel 194.

[104] Treitel 194.

[105] 1978 52 ALJR.

[106] Vorster 1987 *SALJ* 588.

[107] Beatson 144. Lord Wilberforce in the *Liverpool City Council* case at 253G states that the degree of strictness in *The Moorcock* "seems to vary with the current legal trend."

2 3 2 Terms implied in fact

In terms of this well-established category, terms are implied only where it is necessary to give effect to the presumed intention of both parties to the contract.[108] The test is strict, based on the classical notion of freedom of contract.[109] Phang identifies the main problem in this category as being the formulation of a single test for the successful implication of terms.[110]

Two very well known formulations are used namely; the "business efficacy"[111] test as formulated in *The Moorcock*[112] and the "officious bystander"[113] test as formulated by Mackinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd.*[114]

Regarding the "business efficacy" test, it was Bowen L.J in *The Moorcock* and Scrutton L.J. in *Reigate v Union Manufacturing* [115] who said

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract i.e., if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case?', they would both have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'"

The latter test, appears from the words of Mackinnon L.J. in *Shirlaw v Southern Foundries*[116]

---

[108] Phang "Implied Terms Revisited" 1990 *Journal of Business Law* 395; Treitel 189; Beatson 143.

[109] Phang 1990 *JBL* at 395 "...the courts repeatedly affirming that they will not rewrite contracts on behalf of either or both parties to the contract."

[110] Phang 1990 *JBL* 96.

[111] Treitel 185; *Chitty on Contracts* 554; Atiyah 206; *Luxor (Eastborne) Ltd v Cooper* [1941] AC 108, 137; *Comptoir Commercial Anversois v Power , Son & Co* [1920] KB 868, 899-900; *Barclays Bank plc v Taylor* [1989] 1 WLR 1066, 1074; *The Star Texas* [1993] 2 Lloyd's Rep 444, 451.

[112] *Supra.*

[113] Treitel 185; *Chitty on Contracts* 555; *Comptoir Commercial Anversois v Powe , Son & Co supra* 868, 899-900; *The Manifest Lipkowy* [1989] 2 Lloyd's Rep. 138, 143; *The Bonde* [1991] Lloyd's Rep 136,145.

[114] [1939] 2 KB 206, 227.

[115] [1918] 1 KB 592, 605.

[116] *Supra.*

> "Prima facie that which is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties are making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course.'"

There exists a great amount of debate and uncertainty as to which test is to be applied.[117] Phang suggests that both tests should be used in a "complementary and cumulative fashion."[118] Phang emphasises that the two tests should not be equated, as they are not different ways of stating the same criterion.[119] However, Phang recognises that the two tests are related in the following manner. He considers the "business efficacy" test as a more general statement of principle, which serves as a theoretical guideline. The "officious bystander" is considered a more practical mode for giving effect to the general principle.[120]

The English writers and case law highlight the fact that the "business efficacy" test serves to emphasise the fact that the courts will not imply a term merely because it would be reasonable to do so.[121] It is stressed that a term is implied in the case of necessity and not merely on the basis of reasonableness or fairness.[122]

Phang points out a theoretical difficulty when dealing with terms implied in fact

---

[117] Phang 1990 *JBL* 396; Treitel agrees at 186 that "[t]he relationship between the [two] tests is, however, not entirely clear."

[118] Phang 1990 *JBL* 396. See *Reigate v Union Manufacturing Company (Ramsbottom) Ltd supra* as support for this view; cf *Wettern Electric Ltd V Welsh Development Agency* [1983] 2 WLR 897, 907; *Jones v Asssociated Tunnelling Co Ltd* [1981] IRLR 477, 480. See also the very famous formulation by the Judicial Committee of the Privy Council in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of Hastings Shire Council* (1977) 16 ALR 363, 376.

[119] Phang 1990 *JBL* 396.

[120] Phang 1990 *JBL* 397.

[121] Treitel 186; Atiyah 211; Beatson 144; *Trollope & Colls Ltd v N.W. Metropolitan Hospital Board* [1973] 1 WLR 601 at 609: "they will not … improve the contract which the parties have made for themselves, however desirable the improvement might be."

[122] Beatson 146; Treitel 187; Whincup 30.

> "It concerns the approach which the court concerned proposes to adopt with regard to the requirement of objectivity which, for example, is inherently present in the concept of the 'officious bystander.'"[123]

The main reason identified by Phang for this difficulty is that the concept of "objectivity" is not settled.[124] Different perspectives have been raised on the manner in which objectivity should be viewed. One perspective mentioned by Phang is that of the "fly on the wall theory,"[125] if the strict language of Mackinnon LJ's test is followed. This has however been criticised by American Realists and Critical Legal Scholars who believe that this approach is immaterial as in the end all boils down to the subjective choice of the judges concerned.[126] On the other hand it is also argued that this "fly on the wall" approach is a far too general and abstract theoretical inquiry, removed from the practical realities of everyday commercial life.[127]

According to Phang there are fewer problems with regard to the category of "terms implied in law" since the court is not overly concerned with the presumed intention of the contracting parties.[128]

2 3 3 Terms implied in law

Terms implied in law are certain standardised terms that are implied in all contracts of a specific type, provided there is no contrary intention.[129] Such terms have also been

---

[123] Phang 1990 *JBL* 398.

[124] Phang 1990 *JBL* 398. Howarth "The Meaning Of Objectivity In Contract" 1984 *The Law Quarterly Review* 265; Vorster "A Comment On The Meaning Of Objectivity In Contract" 1987 *The Law Quarterly Review* 274; Howarth "A Note On The Objective Of Objectivity In Contract" 1987 *The Law Quarterly Review* 527.

[125] The "fly on the wall theory" is also known as "detached objectivity" according to Howarth. See Vorster "A Comment On The Meaning Of Objectivity In Contract" *The Law Quarterly Review* 274.

[126] Phang 1990 *JBL* note 20.

[127] Phang 1990 *JBL* 398.

[128] Phang 1990 *JBL* 399

[129] Beatson 146; Treitel 188-189. Peden "Policy Concerns Behind Implication Of Terms In Law" 2001 *The Law Quarterly Review* at 459 describes terms implied by law as those terms "consistently implied into all contracts of a particular type [based on] the nature of the contract, rather than the supposed intentions of the parties."

described as legal incidents of particular contractual relationships.[130] Some of these standardised terms have been codified by statute.[131] Others, however, continue to emerge by a process of legal development.[132]

Terms implied in fact were the main category at common law until the House of Lords decision in *Liverpool City Council v Irwin.*[133] Until then, the notion of terms implied in law was used sparingly and restricted to cases of necessity.[134] The *Liverpool City Council* decision, however, created a new approach. This category is no longer based on the traditional criterion of necessity but, instead, upon the much broader rationale of public policy[135] which permits a test of reasonableness. The strict requirement of giving effect only to the presumed intention of the parties can now also be watered down where it conflicts with broader public policy considerations.[136]

In *Liverpool City Council v Irwin*, the tenants of a block of flats owned by the city council withheld their rent in protest at the conditions in the block. The complaints of the tenants were that there were defects in the flats and that the council was under a duty to keep in repair and maintain the common parts of the building such as the lifts, staircases and rubbish chutes. The tenants also claimed that the council's duty extended to the provision of lighting in these areas.

The council began proceedings for the possession of the defendants' flats due to non-payment of rent. The defendants filed a defence and counterclaimed for damages and an injunction alleging that the Council was in breach of an obligation implied by law to keep the common parts in repair, in breach of an implied covenant to allow quiet enjoyment of the property and in breach of the statutory covenant implied by the Housing Act 1961. This case was appealed several times until it eventually came before the House of Lords where it was found that there was an implied covenant but

---

[130] Treitel 190. According to Peden 2001 *The Law Quarterly Review supra* 459, the list of terms implied in law is not a closed one. Therefore new terms can be accepted and become legal incidents of the particular category of contract involved.

[131] See later *infra*.

[132] Beatson 146.

[133] 1976 2 All ER 39 [1977] AC 239.

[134] Phang 1990 *JBL* 394.

[135] Phang 1990 *JBL* 394.

[136] Phang 1990 *JBL* 394.

that the council was not in breach of it. In respect of the defects within the flats the Council was in breach of its obligation under the Housing Act, 1961.[137]

It is necessary to now consider how Lord Wilberforce dealt with the category of terms implied in law.

Lord Wilberforce commences his speech in the following manner:

> "[m]y Lords, this case is of general importance, since it concerns the obligations of local authority, and indeed other landlords as regards high rise or multi-storey dwellings towards the tenants of these dwellings."[138]

Lord Wilberforce pertinently states the legal question as simply being what the legal relationship between landlord and tenant as regards these particular matters is to be.[139] After identifying the other modes of implying terms,[140] his Lordship turns to implying terms on a different basis by firstly establishing the type of contract before him.[141] He states that an obligation is implied in law in cases of necessity and by considering the inherent nature of a contract and of the relationship established thereby.[142] Lord Wilberforce clearly follows the distinction applied in *Lister v Romford Ice and Cold Storage Co Ltd*[143] where a clear distinction is made between an implied term that is necessary to give "business efficacy" to the particular contract and a term based on wider considerations where such a term is part of the nature of the contract or a legal incident of the type of contract.[144]

---

[137] S 32 (1) (b) of the Housing Act imposes an absolute duty upon the landlord "to keep in repair and proper working order the installations in the dwelling-house…"

[138] 251F.

[139] 254C.

[140] 253F-H. Here his Lordship expresses his agreement with the majority in the Court of Appeal that the strict test as laid down in *The Moorcock* should not be applied in this instance.

[141] 254I.

[142] 254H.

[143] [1957] AC 555.

[144] 255A.

Regarding the repair of common parts, his Lordship states that these are essentials of the tenancy without which a tenant cannot dwell.[145] However, even though such an obligation is implied in the inherent nature of the contract, Lord Wilberforce stresses

> "[t]o imply an absolute obligation would go beyond what is a necessary legal incident and would indeed be unreasonable. An obligation to take reasonable care to keep in reasonable repair and usability is what fits the requirements of the case."[146]

His Lordship therefore recognises that the tenants themselves also have a reciprocal duty to act responsibly and reasonably.

Despite the fact that this category of terms is clearly established, Phang submits that this clarity holds only in theory.[147] He recognises that there exists linguistic ambiguity that has not been clarified when dealing with terms implied in law. This lack of clarification, in turn, has resulted in uncertainty on a practical level.[148]

In both his articles,[149] Phang maintains that the confusion lies in resorting to the criterion of necessity in respect of both categories of implied terms. According to Phang, terms implied in law are based on broader considerations of public policy, suggesting that the criterion of reasonableness is the more appropriate one.[150] Some judges suggest that the court can imply a reasonable term.[151] However, the majority

---

[145] 254G. "To leave the landlord free of contractual obligation as regards these matters, … , is in my opinion, inconsistent totally with the nature of this relationship."

[146] 256G-H.

[147] Phang "Implied Terms in English Law - Some Recent Developments" 1993 *Journal of Business Law* 243.

[148] Phang 1993 *JBL* 243.

[149] Phang 1990 *JBL* 400-401; Phang 1993 *JBL* 245.

[150] Peden 2001 *LQR* 459 seems to agree. Lord Wilberforce in *Liverpool City Council* 254-255 laid down this confusion. This was followed by Lord Bridge in *Scally v Southern Health and Social Services Board* [1991] 3 WLR 778 where the criterion of reasonableness is rejected at 778-779. When discussing the practical problems of application, Phang does hold that legal uncertainty is increased when policy factors are involved at 1990 *JBL* 409, which consequently opens the "floodgates" at 1993 *JBL* 246 249.

[151] Peden 2001 *LQR* 459 note 3.

stress that the mere fact that a term is reasonable is not sufficient, it must also be necessary.[152]

Terms implied in law have become a "broad and flexible instrument"[153] for supplementing contracts. This has been of assistance especially in "hard cases" in order to achieve justice.[154] However, there is concern that this development has gone too far and that unnecessary uncertainty has been created.[155]

In *Scally v Southern Health and Social Services Board*,[156] the plaintiffs sued the defendants for breach of contract, negligence and breach of statutory duty. They alleged that the defendants had failed to adequately advise and inform them of their statutory and contractual rights to purchase added years at advantageous rates in order to ensure the receipt of full benefits under a statutory scheme, which required a total of 40 years' contributory service.

The House of Lords held that, whilst there had been no breach of statutory duty, the defendants were nevertheless in breach of an implied term in the respective contracts of employment, which placed an obligation on them to take reasonable steps to bring the right of the plaintiffs to purchase added years to their attention.[157] Lord Bridge based his decision on the broader category of terms implied in law.[158] Despite acknowledging of the possibility of applying the category of terms based on the business efficacy test, Lord Bridge was nevertheless of the view that to do this would stretch the doctrine of implication for the sake of business efficacy beyond its proper reach.[159] In his concluding remarks, Lord Bridge fully appreciates that an implication of this nature is based on necessity and not reasonableness.[160] He takes the view that it is not merely reasonable, but necessary, in the circumstances postulated, to imply an

---

[152] *The Star Texas* [1993] 2 Lloyd's Rep 445 at 452.

[153] Phang 1993 *JBL* 254.

[154] As illustrated in *Scally* 778 *supra*; *Johnstone v Bloomsbury Health Authority* [1991] 2 WLR 1362.

[155] Phang 1993 *JBL* 254-255 who recognises that uncertainty has stemmed from linguistic ambiguity, unsound practical application, over extending of the concept of implied terms and not staying within the boundaries provided by the language of the contract.

[156] *Supra*.

[157] 788.

[158] 787.

[159] 778-787.

[160] 788.

obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in the position to enjoy its benefit.[161]

Overall, as Phang demonstrates, the concept of the implied term is still fraught with numerous problems, especially regarding the broader category of terms implied in law. His opposition toward this category lies mainly with its possible adverse practical consequences. He objects to excessive legislative powers being bestowed upon the courts and the heavy onus they must bear to guard against the liberal use of this power.[162] In favour of this category being maintained is that terms implied in law afford a point of transition for the ultimate enactment of such terms into statutory form.[163] Furthermore, this category provides a court with a legal basis to do justice in "hard cases" where previously this would not have been possible on the narrower basis.[164]

Peden adopts a more positive attitude towards this category of terms. According to her,[165] the main problem with this category of terms is the imprecision applied by the courts and a lack of definite principles. The author regards these terms as important in creating commercial and legal certainty in contracts. Thus, the author emphasises the need to develop a test flexible enough to allow for appropriate implications whilst maintaining sufficient certainty.

In her conclusion, Peden says that the technique of implying terms in law empowers courts to regulate the behaviour of parties, where they omitted to specify essential performance details, when contracting within a particular type of relationship.[166] She

---

[161] 788.

[162] Phang 1990 *JBL* 410.

[163] Phang 1990 *JBL* 410. This has indeed been achieved as English law of implication of terms is largely based on statute, for example, Sale of Goods Act 1979; Supply of Goods and Services Act 1982.

[164] "Narrower basis" here referring to the "business efficacy" and "officious bystander" criteria for terms implied in fact in order to give effect to the presumed intention of the parties. As illustrated by *Liverpool City Council supra*; *National Bank of Greece v Pinios Shipping Co* [1989] 1 All ER 213; *Elawadi v Bank of Credit and Commerce International SA* [1989] 1 All ER 242; *Scally v Southern Health and Social Services Board supra*; *Johnstone v Bloomsbury Health Authority supra*.

[165] Peden 2001 *LQR* 460.

[166] Peden 2001 *LQR* 475.

identifies two hurdles in this regard.[167] The first is the manner in which the courts characterise the relationship to which the "default rules" attach.[168] Here Peden suggests that the courts must consider evidence of the existing practices and relationships between the parties,[169] thereby focussing on the importance of trade usage. The second hurdle deals with judicial uncertainty regarding the meaning and relevance of policy considerations.[170] The courts need to be more open about policy issues they wrestle with.[171] This will ensure the development of guidelines as well as an indication of the amount of weight to be placed on different factors.[172] Courts must also attempt to balance a consideration of the particular situation of the parties and the framework of the contractual relationship within which they find themselves.[173]

Finally, Peden praises the House of Lords decision in *Malik v Bank of Credit & Commerce International SA*.[174] There it was decided that an appropriate justification for implying of terms in law is to ensure that the mutual duty of co-operation between the parties is upheld. According to the author, this case "provides a turning point and a signpost for future development."[175] Despite more emphasis on the underlying notions of fairness and reasonableness in society and the ideas of co-operation and good faith gaining ground, courts remain reluctant to interfere with the parties' intentions as expressed in their contract.[176] At the end of the day, judges must be convinced of the presence of considerations which outweigh the agreement of the parties before they will imply a term.

---

[167] Peden 2001 *LQR* 475.

[168] Peden 2001 *LQR* 475.

[169] Peden 2001 *LQR* 475.

[170] Peden 2001 *LQR* 475.

[171] Peden 2001 *LQR* 476.

[172] Peden adds that more openness will allow judges to feel less that they are creating law and more that they are ensuring the continuity of the common law's development, 476.

[173] Peden 2001 *LQR* 476. This entails considering factors such as which party is in the best position to bear the loss or insure against it, which party has a right to indemnity from the other, the bargaining positions of the parties, whether there is a remedy and the size of the burden.

[174] [1998] AC 20.

[175] Peden 2001 *LQR* 476.

2 4 The influence of English law in South Africa

Christie[177] states that South Africa's adoption of the leading English cases was based on convenience due to their clarity. The author goes on to say that the reception of English law started with the Privy Council decision in *Douglas v Baynes*[178] in which the judgement of Kay LJ in *Hamlyn v Wood*[179] was quoted with approval. Vorster[180] agrees that a comparison between the decisions of the Transvaal Supreme Court and the Privy Council in *Douglas v Baynes* is a convenient point of departure for an attempt to determine the impact of English law upon South African law.

In this case B undertook to transfer a farm to D in return for a fixed number of shares in a syndicate to be formed by D. D did form the syndicate and tendered the shares, but B refused to complete, contending that the working capital of the syndicate was not reasonably sufficient for the achievement of its purpose. The Transvaal Supreme Court held that B was not obliged to transfer the farm, as D had not complied with his obligation of ensuring adequate share capital. The Privy Council decision held, however, that there was no implied term in the contract stating that a sufficient portion of the share capital should be reserved for the purpose of providing a reasonably adequate working capital.

Vorster maintains that Innes CJ was not concerned with the intention of the parties or with the implication of a term in fact.[181] Innes CJ was attempting to impose an *ex lege* obligation on such a contract which, according to him, reflects not only "good law" but also "good sense"[182]

> "[I]n my opinion when a promotor undertakes to float a syndicate to develop a property he is bound to see that the syndicate is provided with working capital reasonably sufficient for the purpose for which it was formed. This appears to me both good law and good sense. If not, then the flotation is futile and the syndicate unable to obtain the objects for

---

[176] Peden 2001 *LQR* 474 475.

[177] Christie 158.

[178] 1907 TS 508; 1908 TS 1207; [1908] AC 477.

[179] [1891] 2 QB 488 (CA) 494.

[180] Vorster *Implied Terms* 116.

[181] Vorster *Implied Terms* 116.

[182] 513-514.

> which it came into existence. One witness said that syndicates in this country were often formed with the idea of booming the shares, and not at all with the idea of honest work. Unfortunately the experience of the courts of law shows that such a practice is only too common and few things are more calculated to retard the development of the mineral resources of the country. It disappoints and deludes the *bona fide* investor, and it encourages a gambling spirit fatal to the real mining world."

Lord Atkinson who delivered the judgement of the Privy Council, thought that the primary question for decision was whether words requiring D to provide the syndicate with a reasonably sufficient sum as working capital, were by implication imported into the contract.[183] His Lordship quoted from the judgement of Kay LJ in *Hamlyn v Wood*[184] and concluded[185]

> "In their Lordships' opinion there is nothing in the language of this contract, or the circumstances under which it was entered into to drive them to the conclusion that the parties to it ever intended to stipulate that a portion of the ... shares, sufficient to raise a reasonably adequate working capital, should be reserved for that purpose."

Lord Atkinson was clearly focusing on the intention of the parties. He basis his decision on the fact that there was no common understanding or agreement between the parties as to what amount was reasonably necessary for working capital.[186] As a result of this decision, many cases have been pleaded and decided on the assumption that the actual or presumed intention of the parties is the only basis for the implication of terms.[187] Another negative consequence of the Privy Council's decision is that South African courts have been fixated on Kay LJ's statement. This has led our

---

[183] 1210, 481.

[184] *Supra* at 494, 495. "The court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the court is necessarily driven to the conclusion that it must be implied."

[185] 1210.

[186] 1211 1210.

[187] Vorster *Implied Terms* 117.

courts to equate Kay LJ's statement, business efficacy and the officious bystander as relevant to one and the same basis for the implication of terms - the intention of the parties.[188]

Furthermore, the *Moorcock* doctrine is well established in our law.[189] Although not known by that name, the doctrine is regularly referred to and applied in the case law.[190]

2 5 The Classification of terms in South African Law

Despite the adoption of the principles regarding the implication of terms from English law,[191] South African courts have not consistently succeeded in preserving a clear distinction between implied and tacit terms.

2 5 1 The distinction between Implied and tacit terms[192]

Salmond and Williams[193] distinguish between implied and tacit terms in the following way

> "The implied terms of a contract, meaning thereby the terms devised and implied by the law itself and imported into the contract as supplementary to the express terms which have their origin in the actual intention of the parties, must be distinguished from those inferred as a matter of fact to have been actually, though tacitly, declared or indicated by the party or parties whose declared will constitutes the contract. These latter terms may be described as *tacit* terms. It is regrettable that the word *implied* is

---

[188] Vorster *Implied Terms* 118.

[189] Vorster *Implied Terms* 115.

[190] Vorster *Implied Terms* 116 note 9 for authority cited there.

[191] Introduction to chapter 2 *supra*.

[192] When considering the definition of the word "tacit" in the *Oxford English Dictionary* as "understood or implied without being stated" it is clear that the words implied and tacit are used to describe each other. This is the reason for these words being used interchangeably and the confusion this has created in a legal context. Kerr has discussed and criticised this confusion several times, "Unexpressed Provisions of A Contract: Terms To Be Used" 1972 *SALJ* 19; "Some problems concerning implied (tacit) provisions of contracts" 1993 *THRHR* 114 and "Dangers in the use of synonyms to describe different categories of contractual provisions: 'implied' and 'tacit'" 1994 *THRHR* 279.

[193] Salmond & Williams 36.

> ambiguous and is frequently applied not only to terms implied in law but also terms implied in fact, i.e., tacit terms …
>
> …[A]n implied term represents an intention which they [the contracting parties] are deemed by the law to have possessed and which is added by the law to the express contract accordingly."

By contrast, the terms 'tacit' and 'implied' have for many years been used interchangeably[194] by the courts, a practice which has resulted in prevailing confusion in the law of contract.[195]

Salmond and Williams' terminology has been adopted in *Minister Van Landbou Tegniese Dienste v Scholtz*[196] and *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration.*[197]

In *Minister Van Landbou Tegniese Dienste v Scholtz*[198] Van Blerk ACJ, highlighted the distinction drawn by Salmond and Williams.[199] According to Van Blerk ACJ, the purchaser was not relying on the *ex lege* warranty against latent defects, but on the breach of a tacit term, as defined by Salmond and Williams,[200] that the bull he purchased would be fit for stud purposes. The inference of a tacit term was held to be justified in view of the evidence and surrounding circumstances such as the expertise of the seller and the fact that he knew the purposes of the sale. It was clear to Van

---

[194] *Union National South British Insurance v Padayachee* 1985 1 SA 551 (A) 559D; *Richard Ellis SA (Pty) Ltd v Miller* 1990 1 SA 453 (T) at 460FF, *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 1 SA 822 (A) at 827FF. Also see *Group Five Building Ltd v Government of The Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 2 SA 593 (A); *Bezuidenhout v Otto & Others* 1996 3 SA 339 at 344B-C and *Sweets from Heaven (Pty) Ltd & anotherv Ster Kinekor Films (Pty) Ltd & Another* 1999 1 SA 796 (W).

[195] Lewis "General Principles of contract" 1990 *Annual Survey of SA Law* 50.

[196] 1971 3 SA 188 (A).

[197] 1974 3 SA 506 (A).

[198] *Supra.*

[199] 197B-E.

[200] According to the authors, tacit terms are inferred as a matter of fact to have been actually, though tacitly, declared or indicated by the party or parties whose declared will constitutes the contract. The judge refers to them at 197B-D.

Blerk ACJ that the parties had agreed on the delivery of a fertile bull and he therefore saw the term as a tacit one.[201]

In the *locus classicus* on implied terms, *Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration*[202] Corbett AJA said[203]

> "In legal parlance the expression 'implied term' is an ambiguous one in that it is often used, without discrimination, to denote two, possibly three, distinct concepts. In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual consensus: it is imposed by the law from without.... In a sense 'implied term' is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is a *naturalium* of the contract in question. In the second place, 'implied term' is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention...[V]arious expressions have been suggested in order to distinguish the two concepts involved. It is not a matter of great moment what terminology is adopted but in the interests of continuity I shall use the expressions 'implied term' and 'tacit term', as defined by *Salmond & Williams*."

This is a very neat and workable classification in line with the distinction proposed by Salmond and Williams. Corbett AJA seemingly uses the expression "implied term"

---

[201] At 201G

[202] *Supra*.

[203] 531D-532G.

as an umbrella term. Included are two separate categories; terms imposed by law or *naturalia* as well as terms inferred from an unexpressed actual or imputed intention of the parties, tacit terms. From the definition by Salmond and Williams it is clear that the authors do however clearly distinguish implied from tacit. The English authors do not use "implied" as an umbrella term as Corbett AJA seems to do. Therefore, the definition by Salmond and Williams is more clear cut and easier to apply.

Unfortunately, it is apparent from the subsequent case law that confusion persists. Confusion results from the courts using the phrase "implied term" in relation to terms which the parties had in mind but did not express and applying the hypothetical bystander test in relation to them.[204] Decisions following *Alfred McAlpine* have either utilised the notion "implied term" as suggested by Corbett AJA[205]or in the exact opposite sense.[206]

A good illustration of the imprecise usage of the terms "tacit" and "implied" is found in the case of *Sweets From Heaven (Pty) Ltd and Another v Ster Kinekor Films (Pty) Ltd and Another*.[207] In this case the court overlooked the distinction between requirements, which are required to apply the hypothetical-bystander test, and those for terms added by law in the absence of agreement between the parties. Malan J only dealt with the issue as to whether or not a tacit term can be imputed to the parties.[208] He applies the innocent bystander test [209] and refers to *Wilkens NO v Voges* [210] in which it is stated that a court is slow to import a tacit term in a contract as it is expected that parties who choose to commit themselves to paper do so properly and cover all the aspects of the matter. Based on this the court decided that there was no

---

[204] *Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co. Ltd* 1932 AD 25 at 31-33; *West Witwatersrand Areas v Roos* 1936 AD 62 74-75; *West End Diamonds Ltd v Johannesburg Stock Exchange* 1946 AD 910 921; *Mullin (Pty) Ltd v Benade Ltd* 1952 1 SA 211 AD 214-215.

[205] *Ranch International Pipelines v LMG Construction* 1984 3 SA 861 (W) 873I. Coetzee J concludes that a unilateral right of stoppage as a term implied by law is not a part of our legal system however it could be a tacit term.

[206] *Wedge Transport v Cape Divisional Council* 1981 4 SA 515 (A) 536A. It was held that there was no distinction between inferring a tacit term and an implied term.

[207] *Supra.*

[208] At 803I.

[209] 805H-J.

[210] 1994 3 SA 130 (A).

provision in the contract as claimed by the applicants that would pass the test. The court did not consider whether or not a provision added by law in the absence of one agreed by the parties existed even though this was raised in the pleadings which alleged that

> 'the breach of a tacit, alternatively, an implied term that the first respondent would not permit a business to be conducted in competition with the business of the second applicant'.

The court therefore did not take cognisance of the fact that the applicants clearly meant to refer to two different categories of terms.

2 5 2 Terminology used by South African writers

Kerr, possibly the greatest critic of the incorrect use of terminology by our courts, warns of the dangers in the use of synonyms to describe different categories of contractual provisions, as implied and tacit.[211] He pertinently states that

> "As long as courts use the words 'implied' and 'tacit', which are virtually synonymous, to indicate two quite different categories of contractual provisions, difficulties and confusion are likely to result" [212]

Kerr correctly criticises the terminology used by Corbett AJA in the *Alfred McAlpine* case.[213] As already mentioned the judge adopted Salmond and Williams' proposal but according to Kerr, unfortunately used the two separate terms as interchangeable and synonymous, resulting in great difficulty for the reader.[214] Kerr's solution is to use the label "residual" when describing provisions added by law. Due to the tendency of synonymy with "implied" and "tacit", the term "residual" is more suitable to describe provisions added by the law.[215] Thus, Kerr distinguishes between "tacit" or "implied" provisions, which the parties had in mind but did not express and "residual"provisions which are imposed by law."[216]

---

[211] See Kerr 1994 *THRHR* 279.

[212]Kerr 1993 *THRHR* 117.

[213] Kerr points out that in this case Corbett AJA twice referred to "implying" a "tacit" term, which he considers inappropriate; Kerr 1993 *THRHR* 117.

[214]Kerr 1993 *THRHR* 117.

[215]Kerr 1993 *THRHR* 118.

[216]Kerr 1994 *THRHR* 280.

Cornelius likewise states that implied terms are sometimes referred to as tacit terms and that this is unsatisfactory.[217] However, he proposes a different approach for classifying them. Tacit terms are those, which the parties actually had in mind when they concluded the contract.[218] Implied terms, on the other hand, reflect the imputed intention of the parties, a reasonable intention they would have had, had they considered the matter.[219] Cornelius thus distinguishes between terms based on an actual intention, which he calls a tacit term, and those founded on an imputed intention and criticises Kerr for not distinguishing between implied and tacit terms.[220]

Other South African writers also work with two main categories, terms implied by law and tacit terms.[221] Essentially, the authors tend to agree in substance but terminological difficulties are evident.

Christie states that a term implied by law in a written contract is just as much a term of the contract as the written terms.[222] Christie divides terms implied by law into those implied by the common law, statute and trade usage.[223] According to the author, terms implied by trade usage occupy an intermediate position between terms implied by law and tacit terms.[224] Van der Merwe et al in addition states that terms implied into a contract by law are known as the *naturalia* of that particular contract.[225] It is widely accepted by our courts, Roman Dutch authorities and modern commentators that it is the law which imposes residual rules based on reasonableness, fairness underlying principles of contract law and policy considerations.[226]

---

[217] Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) 158.

[218] Cornelius 158.

[219] Cornelius 158.

[220] Cornelius 158.

[221] Joubert 65; Christie 181 190; Van der Merwe et al 256; Lubbe & Murray 417; *LAWSA V* par 187.

[222] Christie 184.

[223] Christie 183.

[224] Christie 184. The author states that if both parties know the trade usage, the trade usage ought to be incorporated in their contract as a tacit term because of the presumed common intention of the parties to include a term customary to their knowledge. Should the trade usage be unknown it will be incorporated as an implied term based on the fact that the term is so "universal and notorious" that their knowledge and intention to be bound by it can be presumed.

[225] Van der Merwe et al 256; Lubbe & Murray 422. A further discussion on *naturalia* follows *infra*.

[226] Naudé *The Legal Nature Of Preference Contracts* (LLD thesis US, 2003) 265. See especially note 341 and authority cited there.

Regarding tacit terms, it is accepted by the authors that these are expressions of intention, which are not contained in words but embodied in some act or conduct, i.e. expressed in a non-verbal manner. Tacit terms are those inferred from facts based on the unexpressed or tacit common intention of the parties.[227] Joubert equates tacit terms with express terms since they are founded on the intention of the parties as expressed by their conduct.[228] In the strict sense, an unexpressed common intention comprises an actual subjective intention only; so that a term of this kind would depend on evidence sufficient to support an inference that the parties actually intended that the term would form part of their contract.[229] There is, however, support for the view that the parties need not have subjectively intended a proposed tacit term.[230] Vorster indicates that a "common intention" is generally taken to mean an actual as well as an imputed intention.[231]

2 6 Conclusion

It is clear from the above that the principles laid down by the English courts in the *Moorcock* doctrine have influenced South African law. English law has not been static, however, and the recognition by the courts of various categories for implying terms has been the subject of continuing debate and uncertainty.[232]

In South African law, however, our courts have not kept up with these developments.[233] According to Vorster, this is attributable to a preoccupation with

---

[227] Joubert 57; Christie 156; Van der Merwe et al 256.

[228] Joubert 57.

[229] *Liquidator of Booysen's Race Club v Burton* 1910 TPD 597 601 602 604 605 608 609; *Barnabas Plein v Sol Jacobson* 1928 AD 25 31; *OK Bazaars v Bloch* 1929 WLD 37 44 46; *Rapp v Aronovsky* 1943 WLD 68 74; *South African Mutual Aid Society v Cape Town Chamber Of Commerce* 1962 1 SA 598 (A) 606B 610E; *Cape Town Municipality v Silber* 1971 2 SA 537 (C) 543C; *Ornelas v Andrew's Café* 1980 1 SA 378 (W) 386F; *JRM Furniture Holdings v Cowlin* 1983 4 SA 541 (W) 545H; *Ranch International Pipelines v LMG Construction supra* 875B.

[230] *LAWSA V* par 187. *Cape Town Municipality v Robb* 1966 4 SA 329 (A) 338D 341H; *Van den Berg v Tenner supra* 277E-F; *Greenfield Engineering v NKR Construction supra* 909B-C; *Robin v Guarantee Life Assurance* 1984 4 SA 558 (A) 571D; Van der Walt "Die Huidige Posisie in die Suid-Afrikaanse Reg met betrekking tot Onbillike Kontraksbedinge" 1986 *SALJ* 646 653.

[231] Vorster *Implied Terms* 124.

[232] *Supra.*

[233] *Supra.*

terms based on actual or presumed intention at the expense of terms implied by law.[234] Vorster concludes that South African law has not utilised the other bases used by English law for the implication of terms as fully as they might have.[235] Unfortunately, this has retarded the possibility of recognising novel legal incidents on the basis of the *bona fides* or dictates of policy.[236]

Upon comparing the English law's "terms implied by law" and South African concept of *naturalia*, it is apparent that the two overlap. Similarly, they are defined as those terms that are constantly implied into all contracts of a particular type due to the nature of the contract, regardless of the intention of the parties. In both legal systems these terms can be implied by the law without a search for the actual or imputed intentions of the parties. However, both English and South African courts are very cautious of too liberal a use of their powers to find such terms. Fortunately though, it is recognised that implied terms play a vital role in providing the courts with a legal basis to do justice in "hard cases."

In the following chapter, the South African approach in dealing with unexpressed terms in contracts is discussed. The question to be answered is whether our courts must continue to struggle in ascertaining the parties' actual or presumed intentions or whether the category of novel *naturalia* or *ex lege* legal incidents should be more emphasised, developed and extended in lieu of this. South African case law will subsequently be considered to determine our treatment and use of *naturalia*.

---

[234] Vorster 1987 *SALJ* 597.

[235] Vorster 1987 *SALJ* 597.

[236] Vorster *Implied Terms* 117.

CHAPTER 3

The implication of terms in South African Law

3 1 Tacit terms or terms implied from facts

Tacit terms are terms inferred from facts[237] and are based on the actual or imputed intention of the parties.[238] According to Nienaber JA in *Wilkins NO v Voges*[239]

> "... [A] tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances."

South African courts are slow to import a tacit term into the contract.[240] Our courts have adopted from English law the test to import terms into a contract as expressed by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom)*.[241] According to South African case law[242] the test can be summarised as follows

> "The court has no power to supplement the bargain between the parties by adding a term which they would have been wise to agree upon, although they did not. The fact that the suggested term would have been a reasonable one for them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties, is not enough. The suggested term must, in the first place, be one which was necessary as opposed to merely desirable, to give business efficacy to the contract; and, what is

---

[237] Van der Merwe et al 256; Christie 190; Kerr 338.

[238] *Wilkins NO v Voges supra* 130 136I.

[239] *Supra* 136I-137A.

[240] *Techni-Pak Sales (Pty) Ltd v Hall* 1968 3 SA 231 (W) 236; *Wilkins NO v Voges supra* 143.

[241] *Supra*. Adopted by the Appellate Division in *Barnabas Plein & Co v Sol Jacobson & Son supra* 25 31; *Administrator (Tvl) v Industrial and Commercial Timber and Supply Co Ltd* 1932 AD 25 32-33; *West Witwatersrand Areas Ltd v Roos* 1936 AD 62 75; *West End Diamonds Ltd v Johannesburg Stock Exchange supra* 910 921; *Mullin v Benade Ltd supra* 214-215; *Van der Merwe v Viljoen* 1953 1 SA 60 9A) 65; *Minister van Landbou-tegniese Dienste v Scholtz supra* 209; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* 533; *Van den Berg v Tenner supra* 277; *Delfs v Kuehne & Nagel (Pty) Ltd supra* 827A-828E; *Wilkins v Voges supra* 142C-E.

[242] *Barnabas Plein & Co v Sol Jacobson & Son supra* 25; *Rapp & Maister v Aronovsky* 1943 WLD 68; *Mullin (Pty) Limited v Benade Ltd supra.*

> more, the Court must be satisfied that it is a term which the parties themselves intended to operate if the occasion for such operation arose, although they did not express it... it must be such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'what will happen in such a case,' they would have replied, 'of course, so and so will happen; we did not take the trouble to say that; it is too clear.'"[243]

It can therefore be said that there are three main pillars supporting a tacit term as part of a contract.

3 1 1 Business efficacy

The first pillar of the test relates to necessity in the business sense to give efficacy to the contract.[244] The mere fact that a contract without the term lacks business efficacy does not indicate that the parties subjectively intended a specific unexpressed term to form a part of the contract.[245] The absence of business efficacy may indicate the presence of a gap in the contract, which the parties may have intended to fill by means of some unexpressed term.[246] But it cannot or does not establish either the existence of the term or its tenor.[247]

Importantly, it must also be determined whether the proposed unexpressed term contradicts or is inconsistent with the express terms.[248] In order to decide whether a

---

[243] *Techni-Pak Sales (Pty) Ltd v Hall supra* 236 E-H. Similarly, according to Nienaber JA in *Wilkins NO v Voges supra* at 137 B-C "The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional."

[244] *Lanificio Varam SA v Masurel Fils (Pty) Ltd* 1952 4 SA 655 (A) 660G; *Durban City Council v Liquidators Durban Icedromes Ltd* 1965 1 SA 600 (A) 611C; *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A) 175D; *Union National South British Insurance Co Ltd v Padayachee supra* 559F.

[245] Vorster 1988 *TSAR* 171.

[246] Vorster 1988 *TSAR* 171.

[247] Vorster 1988 *TSAR* 171.

[248] *Barnabas Plein v Sol Jacobson supra* 30; *Van den Berg v Tenner supra* 274A.

term is to be inferred, the express terms of the contract must first be examined.[249] Terms cannot be inferred where the parties have deliberately excluded the possibility[250] or where the parties have made express provision in the contract for the issue covered by the alleged unexpressed term[251] or where the contract is clear and unambiguous.[252]

The case of *South African Mutual Aid Society v Cape Town Chamber of Commerce*[253] deals with the issue of a clear and unambiguous contract. At stake was an agreement designed to provide medical aid by the appellant for the benefit of certain employees of the respondent. When the appellant decided to cease admitting future employees, the Chamber challenged its right to do so.

In the court *a quo*, Diemont J held that it is a clear inference from all the facts that the parties must have intended, when they entered into the contract that the Society would be obliged to accept all the future employees during the currency of the agreement. On appeal Van Winsen JA said that the main question was whether there was any room for importing the term[254] and this question was answered in the negative. Because of the existing express, written and unambiguous agreement between the parties no reference could be had to surrounding circumstances

---

[249] Rumpff JA in *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd supra* 175C states "When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the agreement, there is any room for importing the alleged implied term."

[250] *Rouwkoop Caterers (Pty) Ltd v Incorporated General Insurance Ltd* 1977 3 SA 941 (C) 945 G.

[251] *Union Government (Minister of Railways) v Faux Ltd* 1916 AD 165 at 112: "Now it is needless to say that a Court should be very slow to imply a term in a contract which is not to be found there, more particularly in a case like the present, where in the printed conditions the whole subject is dealt with in the greatest detail; and where the condition which we are asked to imply, is, one of the very greatest importance on a matter which could not possibly have been absent from the minds of the parties at the time when the agreement was made." *FJ Hawkes & Co Ltd v Nagel* 1957 3 SA 126 (W) 132C; *Group Five Building Ltd v Minister of Community Development* 1993 3 SA 593 (A).

[252] *Mullin (Pty) Ltd v Benade Ltd supra* 215 D; *Cape Town Municipality v Silber* 1971 2 SA 537 (C) 543C.

[253] 1962 1 SA 598.

> "in order to subvert the meaning to be derived from a consideration of the language of the agreement only."[255]

Van Winsen JA used the officious bystander test[256] to determine whether a term not found in the express wording of the agreement could be implied and concluded that the parties had not necessarily intended that the Society would be obliged to accept future employees as members.

Rumpff JA, on the other hand agreed with the *court a quo*, but warned that a term could only be inferred when the court was persuaded by the intention of the parties and there was indeed room for such an inference.[257] He also stated that it is necessary to consider all the surrounding circumstances regarding the contract before a term can be inferred.[258] Rumpff found such an intention of the parties by a reasonable inference from the facts and because such a term had to be inferred with a view to the efficacy of the agreement.[259] The judge likewise applied the hypothetical bystander test and found that the parties would have answered in the affirmative as to whether the appellant would be obliged to take in future employees.[260]

Wilkins NO v Voges[261] is another example where the court did not infer a tacit term into the contract.[262] Nienaber JA took a strict approach in deciding whether certain alleged tacit terms formed part of the contract and held that none of the tacit terms

---

[254] 614H.

[255] 615D-E.

[256] 618H.

[257] 606A-B.

[258] At 606C.

[259] 607G-H.

[260] At 611F-G where the judge states, "As ek die hele transaksie in oënskou neem dan is dit my gevolgtrekking dat die partye die bedoeling moes gehad het dat die hele voorafbepaalde groep verseker moes word en ook sou word om doeltreffendheid te verleen aan hierdie sort versekeringskontrak en dat by die sluiting van die kontrak, op 'n vraag of die appellant verplig sou wees om toekomstige werknemers in te skryf, beide partye ja sou gesê het en daarby sou gesê het: dit spreek vanself . "

[261] *Supra.*

[262] Nienaber JA reiterated the well known phrase that "a Court is slow to import a tacit term into a contract," and at 143H, he justified his decision by saying that "parties who commit themselves on paper can be expected to cover all the aspects that matter." At 143H, furthermore, he stated that "not a single compelling reason has been advanced why the tacit term suggested by the defendant should be drafted into the contract."

relied upon existed.[263] The principal basis for this finding was that the tacit term relied on was not reconcilable with the whole agreement[264] but in fact inconsistent with it[265] and had not been properly formulated so as to permit an inference as to their existence.[266]

3 1 2 Officious bystander

The second pillar of the test is known as the officious bystander test. According to Joubert, this aspect of the test has enabled the courts to deal with the problems caused by the application of the terms of the contract to circumstances not foreseen at the time of contract conclusion.[267] This involves a question being posed hypothetically to the parties, resulting in a term being inferred with regard to contingencies which never occurred to the parties when the contract was concluded.[268] Despite its subjective thrust, it must according to case law and writers be applied objectively.[269] This is why the implication of terms *ex consensu* extends not only to an actual but also encompasses an imputed intention, i.e. what may reasonably be assumed to have been their intention.[270] Nienaber JA in *Wilkins NO v Voges*[271] distinguishes between an actual and imputed intention as follows

> "an actual intention is if both parties thought about the matter which is pertinent but did not bother to declare their assent, whereas it is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one."

---

[263] 144E.

[264] 139I.

[265] 140A.

[266] 143E. According to the judge, "A term so obvious as to occur as a matter of course will most likely be uncomplicated and capable of ready definition."

[267] Joubert 69.

[268] Vorster 1988 *TSAR* 171.

[269] *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd supra* 909. See also Van der Merwe 258; Joubert 69; Christie 195.

[270] Vorster 1988 *TSAR* 172.

[271] 1994 3 SA 130 at 136I.

It is not necessary to prove that the parties ever directed their minds to the question. Colman J expresses a liberal view in *Techni-Pak Sales (Pty) Ltd v Hall*[272] where he states

> "That does not mean, in my view, that the parties must consciously have visualised the situation in which the term came into operation. It does not matter, therefore, if the negotiating parties fail to think of the situation in which the term would be required, provided that their common intention was such that a reference to such a possible situation would have evoked from them a prompt and unanimous assertion of the term which was to govern it."

A tacit term will not be inferred merely because it is reasonable or convenient for the parties to have included it in their agreement.[273] The implication must be necessary and not merely reasonable.[274] It is suggested that the concept of necessity must be interpreted in the following manner: in order to establish a tacit term it is necessary to prove, by a preponderance of probabilities, conduct and circumstances so unequivocal that the parties must have been in agreement on the tacit term.[275] If the court is satisfied on the preponderance of probabilities that the parties reached agreement in that manner it may find the tacit term established.

It has been suggested that in the application of the test, the court is concerned with the probable reaction of the parties as reasonable persons.[276] Hoexter J in *Greenfield Engineering Works v NKR Construction*[277] adopted this approach when stating that

---

[272] 1968 3 SA 231 (W) 236-237. This was approved in the Appellate Division in *Van den Berg v Tenner supra* 227 D and see *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) 909; *Richard Ellis South Africa (Pty) Ltd v Miller supra* 460C-D; *Delfs v Kuehne & Nagel (Pty) Ltd supra* 827-828.

[273] It is rather a term which, by necessary implication, the parties must have intended would form part of their agreement or would have so intended if they had turned their minds to the particular issue, *Kelvinator Group Services (Pty) Ltd v McCullogh* 1999 4 SA 840 (W) 844 A-B.

[274] This is made clear by Lord Esher in *Hamlyn & Co v Wood supra*; Christie 194; Kerr 364.

[275] Christie 195.

[276] See e.g. *Administrator (Tvl) v Industrial and Commercial Timber Supply Co Ltd* 1932 AD 25 33 Wessels ACJ said: "The court is to determine from all the circumstances what a reasonable and honest person who enters into such a transaction would have done...."

[277] At 909E

the contracting parties questioned by the officious bystander must be taken to be persons endowed with the degree of shrewdness, knowledge and prudence reasonably to be expected of persons ordinarily engaged in conclusion of the relevant contract. According to Hoexter J,

> "[t]he test imports the standard of a reasonable man."[278]

Nienaber JA, however, is of the view that this oversimplifies matters.[279] He maintains that the enquiry must focus on the intention of the actual parties and not that of "archetypes of reasonable men."[280] The judge does, however, accept that

> "in the absence of indications to the contrary, ... the parties to the agreement are typical men of affairs, contracting on an equal and honest footing, without hidden motives and reservations. But when the facts show that the one or the other had special knowledge, which would probably have had a bearing on his state of mind, that fact cannot simply be ignored."[281]

According to Nienaber JA, the enquiry into the existence of a tacit term must remain directed at the intention of the parties and not become a matter of judicial invention.[282]

3 1 3 Clear and exact formulation

An intention will more readily be assumed if the alleged term is uncomplicated, capable of ready definition and does not compete with a number of alternatives.[283] The term to be implied must be capable of clear and exact formulation.[284]

In the old case of *Rapp and Maister v Aronovsky*, [285] Millin J laid down the clear and exact formulation requirement. In the later case of *Rice v Kark*[286] Clayden J stretched

---

[278] 909D.

[279] *Wilkins NO v Voges supra* 141C.

[280] 141C.

[281] 141C-D.

[282] 141D.

[283] *Wilkins NO v Voges supra* 143E.

[284] Christie 197. *OK Bazaars v Bloch* 1929 WLD 37 44 where Solomon J said: "I think the law is quite clear that, if I am to imply a term, the term to be implied must be as certain (although it was never mentioned between the parties) as if it had been carefully drawn up and embodied in a written deed."

[285] 1943 WLD 68.

this principle to "near the limit".[287] Christie contends that although the term must be capable of clear and exact formulation, it need not be capable of concise formulation.[288]

In the former case, Aronovsky gave Rapp and Maister an option to buy shares in two companies. The price of the shares was to be fixed according to the cost of building two blocks of flats for the companies. The flats were completed and Rapp and Maister claimed that there was a tacit term entitling them to an account of the cost so that they could have time to decide whether to exercise their option. Millin J applied the dictum of Scrutton LJ in the *Reigate* case.[289] He states that it is clear law that one is not entitled to read a term into a contract unless it is necessary to give effect to what was clearly the intention of the parties as disclosed by them in the express terms they have used and in the surrounding circumstances.[290] The judge further points out that a term cannot merely be inferred because it is reasonable and convenient.[291] He decides that this term appears only to be a term that would make the carrying out of the contract more convenient.[292] He adds that a term to be inferred must be capable of clear and exact formulation, "formulated substantially".[293] Furthermore he finds no justification to infer the term as the parties were dealing with a perfectly good and valid business offer.[294] The judge concedes that an exact formulation of the term was impossible.[295]

3 2 Novel *Naturalia*

---

[286] 1951 3 SA 294 (W).

[287] Christie 197.

[288] Christie 197.

[289] 73.

[290] 74.

[291] 74.

[292] 74.

[293] 75.

[294] 77.

[295] 78.

Naturalia are legal rules, which govern particular kinds of contractual relationships, provided that they are not inconsistent with the express terms of the agreement of the parties.[296]

As already mentioned, the parties by means of exemption clauses may exclude *naturalia*.[297] It is well established that the capacity of parties to contract out of the *naturalia* of a contract is restricted by considerations of public policy.[298]

Naturalia are based on policy considerations and as such are not stable.[299] Rather, they are subject to change in response to changing policies of different times.[300] There are several examples in our case law of courts recognising the *naturalia* of specific contract types[301] and modifying existing *naturalia* to suit the demands of modern times.[302]

In the well-known case of *Phame (Pty) Ltd v Paizes*,[303] Holmes JA, whilst affirming the seller's liability under the aedilitian edict expanded the remedies as recognised under Roman Dutch Law to apply to modern circumstances.[304] Under Roman Dutch

---

[296] Vorster 1987 *THRHR* 450. Kerr 370; Christie 181; Van der Merwe et al 256; Lubbe & Murray 422.

[297] See chapter 2 11 *supra*. *Central South African Railways v McLaren* 1903 TS 727; *Weinberg v Olivier* 1943 AD 181; *King's Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N); *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 3 SA 754; *Strydom v Afrox Health supra*; *Botha v Swanepoel* 2002 4 SA 577.

[298] *Rosenthal v Marks* 1944 TPD 172 at 180. A clause contrary to public policy is legally unenforceable *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A). However, in this very case, Smalberger JA at 9B-F warns that "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds." This has been followed in *Brisley v Drotsky supra*; *Durban's Water Wonderland (Pty) Ltd* 1999 1 SA 982 (SCA).

[299] Lubbe & Murray 423.

[300] Lubbe & Murray 423.

[301] *Saridakis t/a Auto Nest v Lamont* 1993 2 SA 164 (CPD) 172Awhere Farlam AJ recognises that an owner's risk clause is not a *naturalé* of the contract of *commodatum*; *Randfontein Transitional Local Council v ABSA Bank Ltd* 2000 2 SA 1040 (W) 1058H (owner's risk clause is not one of the *naturalé* of the contract of *depositum*).

[302] *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (AD); *A Becker and Co v Becker and Others* 1981 3 SA 409 (AD); *Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty) Ltd* 1983 1 SA 295 (A).

[303] *Supra*.

[304] 419H-420.

Law the aedilitian remedies were available only in cases of a fraudulent misrepresentation or warranty made by the seller in connection with the qualities of the *merx*. However, in the final analysis with a view to ensure equitable results, the court extended the concept *dictum et promissum* to encompass innocent misrepresentations made by the seller[305] and also suggested that in order to preserve the utility of the remedies in present conditions, their application in respect of the sale of incorporeals should be considered as well.[306] Similarly, in the case of *A Becker and Co v Becker and Others*[307] the ambit of the seller's warranty against eviction was extended to encompass the goodwill of the business in order to protect the purchaser against the effects of the solicitation of clients by the seller.[308] In Roman and Roman Dutch times, economic conditions did not require the protection of the purchaser's interests in this way.[309]

While it is apparent from our case law that our courts recognise the need for flexibility and even the development of novel *naturalia*, the progress has been slow and doubts have been expressed as to whether our courts will, in future, play a significant role in the creation of new *naturalia*.[310] In the *Videtsky*[311] case, the court did not agree with the insurer who argued that a contract of insurance contains a *naturalé* to the effect that an insured will not be entitled to claim on the policy if the claim is fraudulent or supported by fraudulent means.[312] Flemming J had the following to say about *naturalia* and legal incidents in our law

> "A decision guided by policy considerations about whether the attaching of a certain incident to a particular type of contract is good according to the tenets of public policy or is not justified by public policy, appears in

---

[305] 415H.

[306] 418G-H.

[307] *Supra.*

[308] 420A.

[309] 419H.

[310] Joubert "Regsontwikkeling by nuwe verkeerstipiese kontrakte." 1992 *TSAR* 213 215. He bases his doubt on the decision in *Videtsky v Liberty Life Insurance Association of Africa Ltd* 1990 1 SA 386 (W).

[311] *Supra.*

[312] 387D 388A-B.

> this context to be a choice which will find as much disagreement as support.[313]

Furthermore Flemming J states

> "But there is a more important reason why this court should not be guided by its own choice on the impact of considerations of desirability. It is not part of this Court's functions to create a legal incident to a contract which the development of the law hitherto has not done."[314]

Vorster, however, is strongly in favour of the need to create novel *naturalia*[315] and proposes guidelines to be taken into account in this regard.[316] *Ex Parte Sapan Trading (Pty) Ltd*[317] is an example of the recognition of this process. In this case, Streicher J agreed with the approach of Jansen JA in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis.*[318] Both judges concur that the courts have, in appropriate circumstances, the power to imply terms into a contract.[319] The judges maintain that this power stems from the *negotia bona fidei* concept[320], which empowers courts to complement or restrict the duties of the parties and to imply terms in accordance with the requirements of justice, reasonableness and fairness that change from time to time.[321]

3 3 Trade usages or custom

It is now necessary to consider the role of trade usage and custom in our law. Of particular importance is the extent to which these phenomena have been recognised and to what extent they can be understood as a source of novel legal incidents with a view of ensuring fairness and justice.

3 3 1 Definition and nature

---

[313] 390F.

[314] 390F-G. Lubbe and Van der Merwe contend that this approach by Flemming J is "cautious in the extreme;" 1991 *Stell LR* 91.

[315] Vorster *Implied Terms* 20-38; 150-159.

[316] Vorster *Implied Terms* 157 n 102-107.

[317] 1995 1 SA 218.

[318] 1980 1 SA 645 (A).

[319] 226I 227C.

[320] Contracts were taken to be *bonae fidei* in Roman Dutch law and gave rise to *actiones bonae fidei.*

[321] 226J-227A.

The concepts "trade usage" and "custom" must be defined. Custom is the original source of all law.[322] A custom is also said to be a rule of positive law.[323] There can be no doubt that custom is of great historical importance.[324] However, custom has very little merit as a formative source of law.[325] A trade usage is a practice generally known and regularly followed within a particular trade or market.[326]

3 3 2 Requirements and elements

Custom and trade usage are considered one and the same in our law.[327] A custom and trade usage must meet certain requirements in order to be classified as law.[328] Briefly, these include prevalence,[329] reasonableness,[330] a period of existence that must be long established[331] and notoriety,[332] certainty, and consistency with the contract itself[333] and positive law.[334] According to Vorster, the requirements, which have to be present for a trade usage to have legal force, differ in an important respect from those applicable to custom.[335] He is of the opinion that a trade usage need not be "ancient

---

[322] Van Niekerk "Some thoughts on custom as a formative source of South African law" 1968 *SALJ* 279.

[323] Van Niekerk 1968 *SALJ* 279.

[324] *LAWSA V Custom and Usage* par 373, considering the development of South African law from Roman and Roman Dutch law.

[325] Van Niekerk 1968 *SALJ* 279, *LAWSA V* par 373.

[326] *LAWSA V* par 378; Kerr 380.

[327] *LAWSA V* par 379.

[328] *LAWSA V* par 374.

[329] It must be universally and uniformly observed, a "definite and binding rule" *Meyerthal v Baxter* 1916 OPD 122 125

[330] In *Barclays Bank International Ltd v Smallman* 1977 1 SA 401 at 402G a claim for compound interest was awarded, based on custom found to be long established and reasonable.

[331] *Meyerthal v Baxter supra* 125. However, the recent origin of a usage in a new trade or an old trade experiencing new circumstances will not bar the recognition of such a usage; Christie 187.

[332] *Estate Duminy v Hofmeyer & Son Ltd* 1925 CPD 115 119 where Gardiner J says "It seems to me that it is not necessary to show that the man in the street knows of the custom. What has to be shown is that a person who is in the habit of dealing with auctioneers knows the custom."

[333] *Frank v Ohlsson's Cape Breweries Ltd* 1924 AD 289 296-297.

[334] *Freeman v Standard Bank of SA Ltd* 1905 TH 26 33 where it is stated that a local usage cannot overrule the general law.

[335] Vorster *Implied Terms* 147.

or long-established" in order for it to have the force of law.[336] Furthermore, for a trade usage, certain further requirements must be met, depending on the juridical nature of the trade usage.[337]

3 3 3 Juridical nature

The determination of the juridical nature of trade usage is more difficult[338] and it seems that there is no clarity and much debate in this regard. In English law, custom is regarded as positive law whereas a trade usage is seen as a tacit term of the contract.[339] The question therefore is whether a trade usage is a tacit term of a contract or a rule of positive law, a *naturalé* of a particular type of contract.

Despite Corbett AJA [340] classifying trade usage as terms implied by law, Christie is of the opinion that they actually occupy an intermediate position between terms implied by law and tacit terms.[341] Accordingly, if both parties are aware of a trade usage, their knowledge will be one of the surrounding circumstances indicating that it forms part of their contract as a tacit term. The law will not imply the term but it will be incorporated into the contract because of the presumed common intention of the parties to include a term customarily resorted to.[342] But even if one party is unable to prove that the other knew of the trade usage, it is nonetheless incorporated as an implied term in the contract if, in addition to other requirements, it is so universal and notorious that the party's knowledge and intention to be bound by it can be presumed.[343]

Kerr[344] does not agree with Christie. He is of the opinion that a trade usage is always incorporated into a contract as a residual provision.[345] Kerr argues that when it has to be decided whether a trade usage or custom should have the status of a legal incident,

---

[336] Vorster *Implied Terms* 18.

[337] *LAWSA V* par 379.

[338] Van Niekerk 1968 *SALJ* 282.

[339] Van Niekerk 1968 *SALJ* 282.

[340] *McAlpine Supra.*

[341] Christie 184.

[342] Christie 184. *Absa Bank Ltd v Blumberg and Wilkinson* 1995 4 SA 403 (W) 409H.

[343] Christie 184.

[344] Kerr "To which Category of Provisions of a Contract do Provisions originating in Trade Usage Belong? Problems in regard to Quasi-Mutual Assent" 1996 *THRHR* 332.

> "sufficient time must have elapsed to entitle a court to find that in the circumstances of the particular case the party who is ignorant of the usage or custom had every opportunity of knowing of it and ought to have known of it."[346]

Vorster contends that a trade usage, which has acquired the status of a legal incident, governs the relevant contractual relationship irrespective of whether the parties knew of its existence or not.[347]

Kahn defines a trade usage as a *naturalé*. It is an implied term imported into the contract by custom, unless the parties otherwise agree.[348] Lubbe and Murray agree by holding that established usages modify the legal consequences of contracts even though one or both of the parties were in fact unaware of its existence.[349] In *Falch v Wessels* [350] a term to the effect that a stove is included in the subject matter of a sale was implied *ex lege*.[351]

Attention must be given to the decision in the case of *Coutts v Jacobs*.[352] The plaintiff had sent wool to brokers in East London to sell but subsequently withdrew the wool from them and entrusted it to another broker. The defendants, the first party to whom the wool had been entrusted, retained a sum as brokerage in terms of a custom of long standing in the produce trade in East London. In terms of the custom, a charge equal to the amount of commission which would be earned on the price offered or reserved is made where mohair or wool is removed from one broker to another on instructions of the owner.[353] The magistrate upheld the existence of the 'trade usage' but found

---

[345] Kerr 1996 *THRHR* 332.

[346] Kerr 381.

[347] Vorster *Implied Terms* 148.

[348] Kahn 513.

[349] Lubbe & Murray 423.

[350] 1983 4 SA 172 (T).

[351] At 182B-C. Ackermann J implied the term by taking into consideration trade practice of almost 50 years. He also took cognisance of the fact that the appellant could have excluded the stove from the sale in the contract, which he did not do. He refers to his own decision in *Senekal v Roodt* 1983 2 SA 602 TPD at 609H where he came to the conclusion, based on the common law, that an accessory forms part of an immovable *res vendita*.

[352] 1927 EDL 120.

[353] At 123.

that because the plaintiff was not a member of the trade section of the East London Chamber of Commerce, and had been unaware of the existence of the usage, he could not be held bound to it.[354] On appeal, it was held that despite absence of knowledge on the part of the plaintiff concerning the trade usage, he was still bound to it because

> "a person who deals in a market is bound to enquire what its usages are."[355]

Van Niekerk maintains that the true basis of this decision is that the plaintiff was bound to pay commission as rule of positive law, as in the case of a custom. Had the custom or trade usage been merely a tacit term of the contract, the fact that the plaintiff was unaware of the existence of such a custom would have been an effective bar to the defendant's claim for commission.[356]

Hosten[357] argues that the true position is as follows

"[S]ince a trade usage does not by its nature differ from a custom and therefore, like a custom, constitutes positive law, it automatically regulates rights and duties of the parties to the contract, and its terms are therefore *ex lege* implied into the contract. It is for this reason that knowledge of its existence is not required on the part of both parties. But it is of course possible for a trade usage which in some respect does not comply with the requirements of a custom, to be tacitly or impliedly imported into a contract by the parties concerned, in which case knowledge of its existence and terms would be necessary."

3 3 4 Distinction

Roman Dutch law drew no distinction between custom and trade usage.[358] Similarly, our present-day South African law does not draw a distinction, as the English law

---

[354] At 127.

[355] At 136, the judge further added that "such a person under these circumstances is precluded from setting up, as against the persons he dealt with, his ignorance of that which he ought to have known, and must be taken to deal accordingly to the usage of the market."

[356] Van Niekerk 1968 *SALJ* 284.

[357] *LAWSA V* par 727.

[358] Unlike English law; Kerr "Trade Usage and Custom" 1970 *SALJ* 403.

does, between custom and trade usage.[359] Erasmus J in *Catering Equipment Centre v Friesland Hotel*[360] supports this in his dictum

> "It is with great respect true that the reasons underlying some English decisions in regard to trade usages and customs known to that system of law are not inconsistent with the principles of our law (*Blumenthal v Bond* 1916 A.D. 29 at 37) and that certain English trade usages [have] through the decisions of our courts to a great extent become part of our law, but it is a far cry from saying that our law of custom is the same as that of England as set out in Halsbury, *Laws of England*, or that our law of custom draws a distinction as the English law [does] between custom and trade usage."

It has nevertheless been suggested that there are grounds for distinguishing between custom and trade usage.[361] Kerr argues that there is a distinction in our law between custom and trade usage, which should not be overlooked.[362] He is of the opinion that custom operates more widely when he says

> "[r]ules of law may be made or unmade by custom" and that "any rule of law, no matter how settled, sure and binding, can be changed by custom."[363]

The operation of trade usage, on the other hand, is more restricted.[364] The essence of the distinction lies in the proposition that the efficacy of trade usage is limited when

---

[359] Van Niekerk 1968 *SALJ* 279 states that this "constitutes a jurisprudential landmark as regards custom as a formative source of law." This dictum was followed in *Tropic Plastic & Packaging Industry v Standard Bank of SA Ltd* 1969 4 SA 108D where Friedman J placed emphasis on the above-mentioned proposition in the *Catering Equipment Centre* case.

[360] 1967 4 SA 336 (O) 340C-D.

[361] *LAWSA V* par 378; these suggested differences seem to relate to trade usages in the narrower sense of the word, those deemed to form part of a contract involving such trade.

[362] Kerr 1970 *SALJ* 404. The author is of the opinion that "[t]he difference in the respective spheres in which custom and trade usage are effective does not appear to have been brought crisply to the attention of any South African court."

[363] Kerr 1970 *SALJ* 404. The author also gives examples of custom operating within a specific territory; *Van Breda v Jacobs* 1921 AD 330; or in a tribe or nation.

[364] Kerr 1970 *SALJ* 405. A trade usage, which is known to both parties, may be incorporated in express terms in their contract or may form the basis of an implied provision of the contract. Furthermore, no

compared with that of custom. This originates from the rule that a trade usage is not incorporated into a contract if it would be in direct conflict with the provisions of the contract.[365]

The English distinction between custom and trade usage has been applied in some cases[366] but there are cases in which the distinction has not been maintained.[367] The decision in *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd*[368] provides an example of an unsuccessful attempt to prove a trade usage where the distinction was not made. Corbett J followed the same views as was adopted in the already mentioned *Friesland Hotel* case and the *Tropic Plastic and Packaging* case.[369] Corbett J held that the appellant would be bound by the alleged trade usage provided that it is shown to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, does not conflict with positive law or with the clear provisions of the contract.[370]

3 3 5 Proof Required

According to Van Niekerk, custom, in order to merit recognition needs to satisfy a single test, namely the actual existence and operation of the custom. The test for a custom is very strict; the requirement of duration of time for proving a custom can be taken from English law as "time immemorial." Van Niekerk realises the harshness of this test but feels that it must not be relaxed unduly.[371] Christie disagrees with the conclusion that the same degree of proof is required for a trade usage as for a

---

trade usage is operative if it purports to contradict contractual rules, which cannot be varied by the parties.

[365] Kerr 1970 *SALJ* 406.

[366] *Meyerthal v Baxter* 1916 OPD 122; *Coutts v Jacobs* 1927 EDL 120; *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25 30-31; *Berman & Berzack v Finlay Holt & Co Ltd* 1932 TPD 142 147; *Nel v Collett* 1943 EDL 5 17; *Branch v Vic Diamond & Son (Pty) Ltd* 1957 1 SA 331 (SR) 334H.

[367] In these cases it was required that the custom or usage be long established; *Meyerthal v Baxter supra* at 125; *Estate Duminy v Hofmeyer* 1925 CPD 115 at 117; *Golden Cape Fruits v Fotoplate* 1973 2 SA 642 (C) 645G.

[368] *supra*

[369] Therefore, in order to prove the trade usage, the same degree of proof was required as is necessary to prove the existence of a custom in our law.

[370] At 645G. See also *ABSA Bank Ltd v Blumberg and Wilkinson* 1995 4 SA 403 (W) 409I.

[371] Van Niekerk 1968 *SALJ* 285.

custom.[372] The author feels that a more stringent test is appropriate for proof of the latter.[373] However, it has been stated that in view of the fact that according to case law there is no material difference between trade usage and custom, there seems to be no reason that a trade usage requires a less strict test than custom.[374]

3 3 6 Concluding remarks

Christie[375] expresses the view that a distinction between custom and trade usage must be maintained, as in English law. In English law, usage is distinguished from custom in that the requirement that a custom should have existed from "time immemorial" does not apply to usage.[376]

Vorster mentions a further distinction existing in English law between "legal custom" and "usage or conventional custom."[377] The latter is equated with legal incidents that govern particular contracts and have no connection with the intentions of the parties.[378] This allows for the recognition of a usage even though one party was unaware thereof.[379]

Vorster supports this classification as it clearly facilitates the creation and development of novel *naturalia*. Furthermore, there is no need to grapple with the intentions of the parties prior to attaching a usage to a particular contract.

If the above classification is not accepted, a party to a contract who wishes to assert that a trade usage has the force of law has to show that it complies with the requirements for a valid custom.[380] This is unacceptable, it is clear that such a strict

---

[372] Christe 190; the writer is not content with this decision in *Catering Equipment Centre* and *Tropic Plastic* cases.

[373] Christe 190.

[374] *LAWSA V* par 380.

[375] Christie 186.

[376] Christie 186; Vorster *Implied Terms* 19.

[377] Vorster *Implied terms* 18.

[378] Vorster *Implied Terms* 19.

[379] Vorster 19.

[380] Vorster *Implied Terms* 121. Vorster also refers to *Van Breda v Jacobs* 1921 AD 330 at 334 where Solomon JA mentions that requirement of Roman Dutch law is that a custom can have the force of law only if it is "ancient or long-established."

requirement will limit and preclude the courts from recognising and developing legal incidents or *naturalia*.[381]

3 4 A new classification

According to Joubert,[382] a court infers terms into contracts to do justice between the parties but only in a way consistent with what the court accepts as the arrangement the parties would themselves have made at the time the contract was concluded.

Vorster[383] on the other hand is of the opinion that although the courts have not yet clearly admitted that the implied term is a device used to conceal policy decisions, there is sufficient evidence of the manipulation of these tests by the courts in the interests of justice. There are cases illustrating the difficulty of applying the "officious bystander" test when it is applied mechanically.[384] Courts manipulate the tests if a term sought to be implied is obviously not advantageous to the parties.[385] One means of manipulation is by introducing the criterion of reasonableness in all the circumstances of the case.[386] In this way the court can imply a term, which it considers to be law where the "innocent bystander" test was made "difficult" or "easy" to apply.[387] There are also cases where the "business efficacy" test is used as an instrument of policy, rather than an indicator of the probable intentions of the parties.[388]

Vorster argues that the "innocent bystander" test coupled with the "business efficacy" test should be abandoned.[389] He states that there is no necessary connection between these two tests and the actual tacit intention of the parties. Rather, these tests serve to

---

[381] According to Vorster it would be detrimental to the interests of the business community not to recognise a legal incident on the basis of a reasonable, certain and notorious usage solely because it is of recent origin. Vorster *Implied Terms* 121.

[382] Joubert 69.

[383] Vorster 1988 *TSAR* 174.

[384] *Mnyandu v Mnyandu* 1964 1 SA 418 (N) 423G-H; *Gouws v Montesse Township and Investment Corp* 1964 3 SA 221 (T) 226C-D; *Diners Club South Africa v Durban Engineering* 1980 3 SA 53 (A) 68C; *Union National South British Insurance v Padayachee supra* 560D-G.

[385] *Voigt v South African Railways* 1933 CPD 4.

[386] Vorster 1988 *TSAR* 176.

[387] Vorster 1988 *TSAR* 177 notes 102 and 103 for examples cited there.

[388] Vorster 1988 *TSAR* 177. See also Vorster *Implied Terms* 185-187.

[389] Vorster *Implied Terms* 70-5, 85-91 and 187-96; Vorster 1987 *SALJ* 598; Vorster 1988 *TSAR* 177.

mask policy choices in the process of the implication of terms, which should rather be made openly and in a reasonable manner.[390] Unlike English law, South African law does not need these tests. English law did not receive the device of *naturalia contractus* (implied on the basis of the contractual purpose and *bona fides*)[391] from Roman law. They therefore used the fiction of intention to develop and evolve residual rules governing particular kinds of contractual relationships.[392] Vorster identifies and argues that four categories of implied terms should rather be recognised in our law.[393]

His first category refers to terms read into contracts to give effect to an unexpressed yet actual subjective consensus.[394] Vorster's second category comprises terms implied to protect the reasonable belief of a contracting party.[395] Vorster maintains that in some cases it is necessary to decide whether one of the parties was reasonably entitled to believe that the other was undertaking the obligation in question.[396] The courts have, however, recognised this principle in certain cases regarding the implication of terms.[397] There exists clear Appellate Division support for this approach in *Volkskas v Van Aswegen*.[398] Vorster warns, however, that a party may not rely on the principle of reasonable belief to justify the implication of a term if he did not subjectively believe at the conclusion of the contract that the other was

---

[390] Vorster 1988 *TSAR* 161 173.

[391] Vorster 1988 *TSAR* 167. As discussed *supra*.

[392] Vorster 1988 *TSAR* 161 178.

[393] Vorster *Implied Terms* 125; 1988 *TSAR* 161.

[394] Vorster 1988 *TSAR* 161.

[395] Vorster 1988 *TSAR* 162. According to Vorster, there is not an abundance of case law dealing with examples of terms implied on a basis of the principle of reasonable belief due to the fact that the officious bystander test has incorrectly been considered to be the standard test for the implication of terms.

[396] Vorster 1988 *TSAR* 162.

[397] *Pistorius v Abrahamson* 1904 TS 643 650; *Davis v Natal Government* (1909) 30 NLR 359 368-369; *Volkswagen v Van Aswegen* 1961 1 SA 422 (A) 496G; *Société Commerciale de Moteurs v Ackerman* 1981 3 SA 422 (A) 430E. See Jansen "Uitleg van kontrakte en die bedoeling van die partye" 1981 *TSAR* 97 104 n 39 where it is acknowledged that the construction of a contract may be determined by applying the principle of reasonable belief on a basis of the reliance theory.

[398] 1961 1 SA 493 (A) 496G. Steyn CJ rejected a proposed implied term because, inter alia, one party would not have assented to it and the other could not reasonably have thought that he did so assent.

assenting to it.[399] In absence of such a subjective belief the dispute has to be resolved by implying or refusing to imply a term on some other basis.

A third category identified by Vorster is terms implied in order to place a rational construction on the contract.[400] It often happens that at the conclusion of the contract the parties have no intention regarding a certain matter that later turns out to be the subject of litigation between them. Such a dispute cannot be resolved by the implication of a term *ex consensu* or on the basis of the principle of reasonable belief.[401] There is authority for the implication of words or terms in order to give effect to the most rational construction of the contract.[402] This is done by logical implication in which the judge uses his common sense and other rules of interpretation[403] to determine the legal effect the contract ought to have.

In the fourth category, Vorster recognises legal incidents or *naturalia* of particular contractual relationships.[404] He emphasises that the courts can and do make law regarding the recognition of new or the refinement of existing *naturalia*.[405]

Vorster stresses the importance of developing our law on the basis of policy and the recognition of novel incidents. He approves of and agrees with Botha J in *Rand Bank v Rubenstein* [406]

> "A judge must often, in the exercise of his judicial function, move about in areas of relative uncertainty, where he is called upon to form moral judgements without the assistance of precise guidelines by which to arrive at a conclusion...The application of broad considerations of fairness and

---

[399] The principle of reasonable belief raises unexpressed subjective consensus as a basis for the implication of terms. The principle should only be applied in the absence of proof of an unexpressed subjective consensus. Otherwise the actual intention of the parties will be defeated if they were inwardly agreed upon a term but reasonable men in their positions would have behaved differently.

[400] Vorster 1988 *TSAR* 163.

[401] Vorster 1988 *TSAR* 163.

[402] *Van den Berg v Tenner supra.* In this case the words read into the contract by Botha AJ as an implied term were necessary to give effect to the more rational construction of the contract, according to Vorster 1988 *TSAR* 166.

[403] The rules of interpretation are beyond the scope of this thesis and will not be discussed.

[404] Vorster 1988 *TSAR* 166.

[405] Vorster 1988 *TSAR* 167.

[406] 1981 2 SA 207 (W) 215E-F.

> justice is almost an everyday occurrence in a court of law... I do not see why a judge should shirk from performing this kind of task, however difficult it may seem to be."

3 5 Conclusion

It is clear from the above that South African law has many devices that enable judges to find unexpressed terms in contracts to regulate the consequences of the contract. However, that our courts experience difficulty and confusion in ascertaining the parties' true intentions is evident. For this reason, more emphasis must be placed on *ex lege* terms and *naturalia*[407] as opposed to a desperate search for the often non-existent intention of the parties. Naudé[408] states the following in support of this view

> "...it is helpful to treat the implication of terms for situations not provided for by the parties not as mere interpretation in the sense of identifying tacit terms, but as the determination of legal incidents so that 'an exasperating goose chase after non-existent contractual meaning' and the resort to fictional intention is avoided."

Since our Appellate Division in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*[409] accepted that *bona fides* underlies the South African law of contract and is equated with the requirements of justice, reasonableness and fairness;[410] a sound basis for the development of new *naturalia* exists. Despite good faith remaining an underlying notion,[411] it is along this basis that the development of new *naturalia* can occur. Vorster is correct when recognising that *naturalia* achieve the most satisfactory balance between justice and certainty.[412] This is so as *naturalia* are based on policy considerations generally applicable to a specific class of contract at a particular time.[413] Thus, courts can in a flexible manner adjust existing rules on grounds of policy and reasonableness. Despite such flexibility, Vorster emphasises

---

[407] Also referred to as residual rules by Kerr or legal incidents by Vorster.

[408] Naudé *The Legal Nature Of Preference Contracts* 283.

[409] 1980 1 SA 645 (A).

[410] 651E 652A-D.

[411] See discussion on *novel naturalia infra.*

[412] Vorster 1988 *TSAR* 181.

[413] Vorster 1988 *TSAR* 181.

that judges will not have an unfettered discretion to make law.[414] Our judges have in the past always been cautious when dealing with policy and reasonableness. In addition, when applying *naturalia*, precedent, statute and custom will always play a limiting or developing role.[415]

After having examined the role and treatment of the implication of terms in South African law, the new theories of contract law and implicit dimensions is examined in the next chapter. It has been observed that South African law follows a conservative approach when dealing with the implication of terms especially in respect of the recognition of the relational contract and implicit dimensions. Vorster's suggestions of emphasising the role of reasonable belief, a rational construction of the contract and the development of novel *naturalia* based on policy offers a sound approach to relax the present situation.

[414] 1988 *TSAR* 181.

[415] 1988 *TSAR* 181.

CHAPTER 4

Development in the law of contract

4.1 Introduction

Markets, whether domestic or global, are the principal mechanism for the production and distribution of wealth.[416] The law of contract governs transactions in these markets.[417] Essentially, the law of contract consists of a set of legal concepts systematically arranged, which not only reflect the events of economic transactions but also regulate the conduct of the parties thereto.[418] However, legal concepts do not work in isolation as ends in themselves and must, ideally, be guided by normative and moral considerations.[419] In this context, Hugh Collins states the following[420]

> "The legal concept of contract law constantly evolves by expanding or contracting its scope, further differentiating its rules, and revising its basic principles. This evolution is prompted by changes in the social practices of the economy, the reception of new social policies and political ideals, and interactions with other fields of law."

The purpose of this chapter is to make obvious certain changes in the economy and the effects this has had on the role of the law of contract and to highlight further changes that are needed. The new theories of contract that have arisen and developed are discussed. The relational contract theory, being a focal point of this thesis, is explained. The meaning of implicit dimensions of contracts is highlighted in order to show that as regards the determination of the consequences of contracts, the acceptance of implicit dimensions is unavoidable in order that contract law may continue to regulate relational market transactions effectively.

---

[416] Collins 1.

[417] Atiyah 3; Collins 1; Tillotson *Contract Law in Perspective* (1995) 5. The law of contract is responsible for *inter alia* the regulation of sale of goods, employment relations, credit arrangements and the provision of professional services, to name but a few key economic institutions.

[418] Collins 2.

[419] Collins 2.

[420] Collins 3.

4 2 Criticism of the classical law of contract

The classical law of contract was developed in the late eighteenth and nineteenth centuries.[421] An important characteristic of the classical theory of contract was that contracts were based on mutual agreement and that the creation of a contract was the result of individual and unhindered free choice.[422] This was its chief feature, resulting in contract as being defined in terms of consent and the expression of will.[423] The law emphasized and supported the liberty of individuals by facilitating and enforcing their voluntary choices by giving them legal effect.[424]

Furthermore, the classical law of contract comprised a standard set of fundamental, organizing principles.[425] This approach attempted to express all economic social relations as contractual agreements as far as possible.[426] Collins[427] explains this as follows

> "For social theorists in the nineteenth century who studied the structure of modern societies with their novel market economies, the idea of contract represented the hallmark of modern relations.... [Similarly], the idea of contract was embraced as a convincing interpretation of most social relations, and many welcomed this style of social relation as a liberating reconstitution of society."

---

[421] Collins 3; Atiyah 7; Gordley 161.

[422] *Supra* note 33 chapter 1 4-5.

[423] This emphasis of the law of contract during this period is known as the principle of freedom of contract. See *supra* chapter 1 5 as well as Collins 7 21; Atiyah 9-10; Gordley 161 163 180 213 214 230 233; Tillotson 14. See Eiselen "Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme" 1989 *THRHR* 539 for an in depth discussion on the meaning, development and role of the principle of freedom of contract.

[424] Collins 7.

[425] Collins 3-4. Atiyah 10 and Gordley 208-209 write that it was a common occurrence in English law that the actual rules of contract law were portrayed in terms of the intentions of the parties. The rules of contract law were thus subject to the intentions of the parties. From this basis the idea that judges did not have the power to make a contract for the parties was perhaps applied too stringently, as is apparent from the rules regarding implied terms.

[426] The extent to which the courts were prepared to conceive social relations in terms of contracts is illustrated in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 CA.

[427] Collins 17.

Legal reasoning in classical law was formal, confined to the strict application of a set of rules to the facts of a case, to regulate the then exploding market economy.[428] The closed system of thought created by the classical model of enforcing and giving legal effect to all outwardly expressed voluntary choices had little regard for the parties' weaknesses, underlying understandings, expectations and intentions.[429] Likewise, there was a different approach to fairness in contracts.[430] Undoubtedly, the scope for implied terms was thus also limited.[431]

The classical theory remains the basic framework of the legal analysis of market transactions today.[432] As a result of changes in the market order and contemporary ideals of social justice, however, this classical model is nevertheless under scrutiny.[433]

Developments relating to the changes in the market order as well as the nature and treatment of political and moral justifications in the legal order,[434] have exposed

---

[428] Collins 5, 6.

[429] See chapter 1 5 and note 41. Also, Collins 22 on 'justice of the exchange' as discussed *infra*.

[430] The classic ideal of 'justice of the exchange' postulated that the question of the substantive fairness of a contract, validly entered into, was beyond the scope of judicial enquiry. The importance of individual choice and the belief in the presence of equality and reciprocity in the exchange relation and the emphasis on the creation of wealth, in the context of a free market, allowed many alternatives for contracting parties, which were enforced as long as these characteristics were present. Mere compliance with the legal requirements and minimum standards set by society guaranteed a fair contract; Lubbe & Murray 21. The complexity with which a court had to deal in attempting to justify unfairness is illustrated in the case *Carlill v Carbolic Smoke Ball Co supra,* the courts had to justify the unfairness with circular reasoning and that the choice was essentially not a voluntary one. The ideal of the justice of exchange and the critique thereon are discussed *infra*.

[431] Gordley 208-209.

[432] As reflected in and discussed in chapter 2 and chapter 3. Collins 3; Tillotson 39. Gordley 231 points out that although the strict application of the will theory has been rejected, no comprehensive theory of contract has been developed to replace it. Therefore the classical law continues to be the framework today.

[433] This is discussed in more detail *infra*. Collins 3; Atiyah 15; MacNeil *The Relational Theory Of Contract: Selected Works Of Ian MacNeil* (2001) 5-9. Early critics in the eighteenth and nineteenth centuries already pointed out that the will theory was insufficient and could not resolve problematic areas such as offer and acceptance, mistake, fraud and duress.

[434] Collins 9.

shortcomings and defects in the classical model.[435] One must also bear in mind the influence of certain interrelated factors on contract law, such as the introduction of standard form contracts, the growth of consumer protection, statutory development and intervention in certain areas of contract law, the "implying" of suitable terms, the influence of economic theory in the law of contract as well as the law of contract protecting the reasonable reliance, belief and expectations of the parties.[436]

4 3 The main social causes of the transformation of contract

The development of the law of contract is largely associated with the development of commerce.[437] Tillotson highlights this correspondence between contract law and commerce as follows

> "In a society where the exchange of goods and services is central to its economic order, as in a developing capitalist society based on free enterprise, a means of supporting the process of exchange needs to be found. In this context the foundations of modern contract law were established."[438]

Due to the development of commerce, there exists the need to construct a new conception of the law of contract.[439] In order to do this, it is essential to understand the main social causes of the transformation of contract.

Friedmann[440] identifies four major factors as being responsible for the transformation in the law of contract, since the Nineteenth Century.

Firstly, the widespread practice of concentration in industry and business, due to an increasing urbanisation and standardisation of life has resulted in the mounting use of

---

[435] Collins 21 states the following regarding the different themes which possibly underlie the evolution of contract law: "For some authors the alterations reflect merely a greater concern for the protection of consumers, or a greater differentiation between commercial transactions and personal agreements; whereas others detect a more fundamental reorientation of the values expressed by the law moving from an emphasis on rights and freedom to a concern for needs and economic dependence."

[436] Atiyah 15-36.

[437] Atiyah 7.

[438] Tillotson 5.

[439] Over the years, many theories have been suggested and developed to either criticise or support the role of the classical law. These theories are discussed briefly *infra* 4 4.

[440] Friedmann *Law in a changing society* (1972) 129.

standard form contracts.[441] Positively, the standardisation of contract terms simplifies business practices in modern life, but it has a negative affect on freedom and equality of bargaining.[442]

Secondly, the growing substitution of collective for individual bargaining in the industrial society has resulted in the development of the collective contract between management and labour, with a varying degree of state interference.[443] This has resulted in the further protection of individuals and consumers by legislative and judicial interference.[444]

Thirdly, there has been an increase in the Public Law element of contract.[445] This is as a result of the expansion of welfare and social service functions of the state towards individuals. This has created an increase in statutory terms in contract and government or public authorities concluding contracts with private parties.[446]

Lastly, the economic security aspect of contract has been affected by the spread of political, social and economic upheavals.[447] This has resulted in an elaboration of the remedies of breach of contract.[448]

4 3 1 Market order

Markets are the social practices of making economic transactions.[449] Thus, market transactions play a central role in allocating wealth and power.[450]

Previously, the market system was based on free enterprise capitalism.[451] Contracting took place between small enterprises, individual merchants and independent

---

[441] Friedmann 129.

[442] Friedmann 131.

[443] Friedmann 129.

[444] Friedmann 132-133.

[445] Friedmann 129.

[446] Friedmann 138.

[447] Examples of such upheavals include wars, international tensions, social revolutions and economic upheavals.

[448] Legally this has resulted in the increasing use of the doctrine of frustration in English law.

[449] Collins 9.

[450] Collins 11.

[451] Tillotson 40.

craftsmen.[452] Due to the nature of exchange of this kind, sellers and buyers were deemed to be in equal bargaining positions. Predicated on a model of competitive self-interest, the classical law allows contractors to deal in a self interested way and take advantage of vulnerable and ignorant parties.[453] The freedom of contract principle flourished within this market context.

The above reflects the ideals of the justice of exchange paradigm.[454] The ideals of liberty, equality and reciprocity made up the notion of the market order as expressed by the classical law.[455] However, these ideals have lost their moral force and explanatory power.[456] This is due to the introduction of the Welfare State, in the early Twentieth Century, after the First World War.[457] The Welfare State attempts to uphold basic human needs and communitarian values by legislative and state intervention. This results in a greater emphasis on fairness in wealth distribution to uphold respect for and dignity of individuals.

Collins expresses criticism against the justice of exchange, in modern times, for the following reasons. First of all, the freedom of contract principle created oppressive power relations, legitimised by emphasising the liberty of the person who entered into the contract.[458] Secondly, reliance on the justice of exchange created an unfair distributive scheme as focus was placed on mere reciprocity as opposed to equivalence in value of performance. Due to the weight accorded the concept of liberty, the state played a minimal role in the regulation of social life.[459] This meant that the law of contract was designed to provide for the enforcement of private arrangements, which the contracting parties had agreed upon.[460] Finally, self-interest was the main motive for entering economic relations. Modern society recognises the

---

[452] Tillotson 40.

[453] Brownsword *Key Issues in Contract* (1995) 295.

[454] As referred to *supra* note 431.

[455] Collins *The Law of Contract* (1986) 8.

[456] Collins 9.

[457] Collins 1 9.

[458] Collins 11.

[459] Collins 13 14.

[460] Atiyah 8.

existence of contractual relations outside the strict confines of self-interested exchange and rather focuses on obligations requiring concern for others.[461]

Today, there is a decline in the free enterprise system, due to an increase in competitive capitalism and resulting in the formation of monopolies.[462] This is due to a widespread process of concentration in business in many areas of trade and industry, creating the growth of trade associations, monopolies and cartels and resulting in inter-business dealings.[463] Also, massive multinational corporate groups and government agencies today enter into contracts, clearly creating a significant degree of imbalance between the bargaining strengths of the parties.[464]

In addition, standard contracts, conditions and statutorily imposed terms of contract are more widely resorted to than ever, diluting the elements of choice and consent emphasised in classical law.[465]

The question that now needs to be considered is how such changes in markets have affected the operation of contract law as a mechanism for conducting exchanges?

4 3 2 The role of contract law

All the above changes in market order are just a few factors which encourage a shift from rigid principles and rules, underpinning the classical doctrine towards a less certain contract law based on notions of fairness, reasonableness and judicial discretion.[466]

It is generally accepted that all societies require a vehicle through which planned exchanges can be made.[467] However, the nature of contract law, which serves this purpose, has changed.

---

[461] Collins 14.

[462] Tillotson 40.

[463] Tillotson 41.

[464] Today there is the tendency of big fish eating the little fish. The economists Hunt and Sherman describe the market as a "financial slaughterhouse" where "the strong chop up the weak." (Tillotson 40 41).

[465] Brownsword 57; Tillotson 41.

[466] Tillotson 43.

[467] Poole *Textbook on Contract Law* (2001) 9.

The role of classical contract law was more clear-cut, concise and more suited to the market situation of former years.[468] Today, the role of classical contract law is less suited to our present market system.[469]

Today still, it is the duty of the law of contract to facilitate the allocation of wealth and power.[470] From this, it is clear that markets require steering, channelling and supplementation.[471] In addition, the law of contract provides for a number of ingredients for a flourishing market order.[472] The main focus of the law of contract is then to direct the practices around entering transactions and to keep an eye on the making of binding commitments.[473]

However, it is held that at present, the exchanges of goods and services, amounting to markets, require a complex social interaction.[474] Today, business parties tend to base their relationship on trust and co-operation with the view of an amicable and long-standing business relationship as well as the prospect for future business relations as opposed to contract-breaking and potential litigation. Due to the trend towards

---

[468] Tillotson 40. The social function of the law of contract in the nineteenth century can be summed up as follows: it was the legal key to the freedom of movement of goods, services and the factors of production; it provided insurance against calculated economic risks; it presupposed freedom of will and equality between parties.

[469] As illustrated in 4 3 1 *supra*.

[470] Collins 11. Collins highlights the two opposing viewpoints regarding the role of contract law in constituting the market order. Thomas Hobbes believed that without the law of contract, no market order could exist. Essentially, the law of contract provides insurance and sanctions against parties going back on their word. Others argue that parties act out of self-interest and that most transactions are self-enforcing, the parties just want to get on with their business; as a result the role of contract law is perceived as watered down.

[471] Collins 22.

[472] Collins 17. The following are examples of these key ingredients; the law lays down legal standards or ground rules and ideals of social justice hereby facilitating and strengthening the social practice of entering into contracts; legal rules help to specify reasonable expectations under contracts; the law provides legal sanctions against defective performance and breach of contract.

[473] Collins 1.

[474] Collins *Regulating Contracts* (1999) 97.

relational contracting,[475] the classical law's image of litigation as the paradigm of the law's response to market related problems has also diminished considerably.[476]

This shift to the importance of trust and co-operation in transactions has been articulated as follows[477]

> "Markets are comprised of patterns of entry into transactions by individuals. They choose to do so where the perceived benefits of the transaction outweigh the perceived risks of disappointment or betrayal. When transactions take place, the risks of disappointment or betrayal have not been eliminated, but they have been displaced, so that they no longer present a formidable obstacle to trade. Displacement occurs when the parties have a relation of trust based upon either a personal relation or a business reputation. Much activity in relation to contracts should be understood as creating the conditions under which this trust can be established. To make a commitment credible, a party may have to demonstrate that a valuable business reputation is at stake, or that investments will be lost."[478]

It is correct to say that by emphasizing the significance of formal contractual commitments at the expense of supporting the priority given by the parties to a transaction to the long-term business relation and the success of the particular deal for both parties, the legal system often misunderstands the rationality of contractual practices[479]

Essentially, the changing nature of the relationship between contract law and its economic and social environment cannot be ignored.[480] Collins is of the opinion that the modern law of contract must be in line with themes such as fairness, trust and co-

---

[475] This is discussed in detail *infra*.

[476] Tillotson 235.

[477] Collins 4-5 supports this viewpoint.

[478] Collins *Regulating Contracts* 125. Trust is essential and habitual in modern societies and is common occurrence when entering into contracts. No matter how low the stakes, there is always an element of risk involved; Collins 3.

[479] Collins *Regulating Contracts* 356.

[480] Tillotson 46.

operation as well as imposed duties of care and responsibility to enhance and maintain contractual relations.[481]

4 4 Theories to overcome the shortcomings of the classical model

The decline of freedom of contract is dated from 1870-1980.[482] During this period, many theories have developed, either in support of or against the classical law.

Since Mrs Thatcher's first administration in 1979, however, English law has gone in reverse again, trying to revive the ideal of free choice.[483] This is in line with those theories that have developed in support of certain aspects of the classical law - The Economic Analysis of the Law approach and The Contract as Promise theory.[484]

A common thread runs nevertheless through the different theories of legal scholars today: they all agree that the classical legal doctrine embodies a too formalistic and an inadequate understanding of contractual relationships.

The most widespread and thorough attempts in recent times to restate and justify the Classical law of contract has been the Economic Analysis of Law approach.[485] The economic analysis of contract stresses the importance of economics as a discipline for the law.[486] This approach involves the study of the interaction between legal rules and institutions as well as the behaviour of rational economic actors. The economic analysis of law is organised around the efficiency principle[487] and its link with the maximisation principle.[488] As Feinman puts it

---

[481] Collins 34.

[482] Atiyah 27.

[483] This is due to a change in political values and changes in the economy and particularly in legislative policy, where many privatization and deregulation measures have aimed to leave economic actors free to make their own agreements; Atiyah 27.

[484] Olivier *Die grondslag van kontraktuele gebondenheid* (LLD thesis US, 2004) 611-629; 641-651.

[485] Lubbe & Murray 22 note 6. Despite a very large following, Richard Posner and his book *The Economics of the Law of Contract* first published in 1979, together with Anthony Kronman, remains the most acknowledged leader in this field; Van Heerden "An introduction to Economic Analysis of law" 1981 *Responsa Meridiana* 146.

[486] Wheeler & Shaw *Contract Law: cases, materials and commentary* (1994) 87.

[487] Efficiency, according to Posner, is defined as follows: resources in the world are limited, compared to human desire. An allocation of scarce resources can be said to be efficient if no alteration in that allocation will make one person better off without making some other person worse off. Veljanovski

> "Economic analysis of the law begins with the hypothesis that people seek to maximise their welfare. It is implicit in this hypothesis that people respond to incentives, altering their behaviour to increase their welfare. When people are allowed to shape their behaviour to maximise their welfare, especially through voluntary exchanges with others, resources gravitate to their most valuable uses, increasing what is known as allocative efficiency. Allocative efficiency provides the economic criterion for evaluating legal doctrines and decisions."[489]

Anglo-American theorists have focused on Promise in Contract. One such a theorist is Fried, who equates the moral institution of promise and the legal institution of contract.[490] The contract as promise theory proposes that promises are enforceable because of the moral worth of promising and not because other people have relied on them or because they form part of a bargain. Here, more emphasis is placed on a moral duty as opposed to self-interest and the utilitarian aspects of the nineteenth century. Fried is of the opinion that the obligation to keep to a promise is based on respect for individual autonomy and trust.

> "The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and trust. Autonomy and trust are grounds for the institution of promising as well, but the argument for *individual* obligation is not the same. Individual obligation is only a step away, but that step must be taken. An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds - moral grounds - for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that

---

The New Law- and- Economics (1982) 26 explains the efficiency principle as achieving ends in the best possible way; Wheeler & Shaw *Contract Law* 88.

[488] "Man is a rational maximiser of his ends in life, his satisfactions"; Kronman & Posner *The Economics Of Contract law* (1979) 2-3.

[489] Wheeler & Shaw 88. Allocative efficiency is associated with normative economics, also called welfare economics, which looks at social policy choices on the bases of rationality.

[490] Wheeler & Shaw 108-110.

> confidence now is like (but only *like*) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust."[491]

The Critical Legal Studies originated in 1977 in the USA.[492] The main feature and point of departure of the CLS following is their disillusion with Western individualistic and liberal legal tradition.[493] To these scholars, the law is not merely a neutral tool of social ordering but, has "an ideological power, which reinforces a dominant hierarchy of values and interests within society."[494] This movement challenges the very notion of a single theory of contract. Critical authors believe that the modern law of contract is made up of many principles and counter principles.[495] Wilhelmsson views these counter principles as 'modern tendencies', which are not exceptions but the starting point for a new model of contract law, centred around concepts of social co-operation.[496]

Throughout his work, Gordley highlights the absence of a coherent theory of contract in the modern era. He believes that in order to establish a new theory of contract, we need to return to the precise concepts of the medieval Thomistic Natural law tradition, which the nineteenth century jurists disregarded.[497]

The theory of the Relational Contract, the focus of this study, offers a further model for the understanding of the process and practice of contracting today.[498] Relational contract theory argues that modern contractual relations are often characterised by ongoing long-term relationships in which co-operation between the parties is a stronger factor than conflict and self-interest.[499] The new theory of relational

---

[491] Wheeler & Shaw 109.

[492] Olivier *Die Grondslag van kontraktuele gebondenheid* 641. The CLS movement is in part a successor to the American realist movement. Antiformalism is the common feature between CLS and the realist tradition; Van Blerk "Critical Legal Studies in South Africa" 1996 *SALJ* 86 88.

[493] Van Blerk 1996 *SALJ* 89.

[494] Wheeler & Shaw 113.

[495] Wheeler & Shaw 113.

[496] Wheeler & Shaw 114.

[497] Gordley 232 245. These jurists threw out the older Aristotelian concepts and tried to manage without them - unsuccessfully. Contract law doctrines were built around moral law and virtues such as promise keeping, commutative justice and liberality; 10.

[498] Wheeler & Shaw 67.

[499] Wheeler & Shaw 68.

contracting furthermore examines the social practices surrounding the conclusion of contracts as opposed to rigid doctrines originating in the nineteenth century.[500]

All the above theories disapprove of the classical law doctrine on some or other point and have consequently moved away from its rigid classical ideas. In addition, all these doctrines embody certain elements present in the relational theory to an extent. However, the relational theory seems to be the most adequate. It best explains and highlights the relational elements of long-term contracts previously regulated by classical contract doctrine. It focuses on the main inadequacy of the classical doctrine, that all contracts are treated as discrete in nature and hereby not being able to assist parties to a relational contract.

4 4 1 Relational Contract Theory

As a point of departure, Relational Contract scholars contend that contractual ordering of economic activity occurs along a spectrum of transactional and relational behaviour.[501]

Discrete transactions are contracts of short duration.[502] They involve limited personal interactions, require minimal co-operative behaviour in the future and virtually everything connected to such a transaction is clearly defined. At the other end of the spectrum are ongoing contractual relations. Typical characteristics of such relations include; ongoing and long term duration, anticipated future co-operation and factors such as friendship, reputation and altruistic desires playing a role.

Viewed as a discrete communication system,[503] contractual conduct is narrowly judged by reference exclusively to the terms recorded in the declaration that embodies the transaction.[504] A discrete contract constitutes a discrete and isolated specification of particular undertakings and reduces a complex human association to elements that

---

[500] Collins "The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 18.

[501] Wheeler & Shaw 69.

[502] A typical transaction example is the exchange of a particular *merx* or service for a sum of money.

[503] See *supra* chap 1 4 note 31. Also, Brownsword 80 where it is correctly stated that the classical law takes the "one-off exchange" as its paradigm.

[504] Collins 21.

have significance within the contractual framework only.[505] Human actions and words are examined within a narrow time frame, ignoring the context, and the prior as well as present relations between the parties.[506]

Today, much contracting reveals a different pattern, which has been styled as relational to distinguish it from the discrete pattern.[507] In a relational context, the paradigm of the discrete contract creates the possibility of conflict between the agreed bargain and the reasonable expectations of the parties.[508] These expectations consist of informal understandings based upon the surrounding social relation regarding co-operation, trust and good faith.[509]

Macneil, the principal promoter of the relational approach, defines the relational contract as follows

> "…. where performance is likely to last for a period of time or perhaps indefinitely, the economic success of the transaction for the parties depends upon a relatively high degree of co-operation, which is often supported by incentive structures that share the profits, and the obligations undertaken by the parties cannot easily be confined to determinate obligations. It is evident that relational contracts are likely to be relatively incomplete in their specifications of the expected obligations, and therefore pose greater problems of interpretation. They may also require a different approach to interpretation, one that recognizes how they are highly dependent on implicit understandings between the parties about the expectations of co-operation."[510]

---

[505] A discrete transaction comprises relatively bounded obligations, performed more or less instantaneously.

[506] Their sentiments of trust and loyalty are irrelevant as well as the context in which the promise was made, how others are affected and how performance of the promise serves the interests and aspirations of the parties.

[507] Brownsword 80.

[508] Collins 21.

[509] Collins 21.

[510] Collins "The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 18.

Macneil's relational contract theory postulates that transactions constantly take place rooted in a relational context. For this reason, the understanding and analysis of any transaction requires the recognition and consideration of all significant relational elements surrounding a transaction.[511]

Macneil maintains[512]

> "The first thing to note about contract is the fact that it concerns social behavior...The next thing to note is that the kind of social behavior involved is co-operative social behavior, behavior characterized by a willingness and ability to work with others...contract involves people affirmatively working together."

In many instances today, the need to achieve efficient production and competitiveness can only be met by contracts that are, with a view to flexibility, designedly left incomplete, to be supplemented by implicit obligations for the protection of reasonable expectations of the parties.[513] These obligations place in the spotlight the elements of trust, responsibility, co-operation and good faith, as essential to relational contracts.

The reasonable expectations of honest men, within a contracting context entail one contracting party promising something and the other party reasonably and honestly expecting him to keep his word.[514] These contractual expectations can be formed on the strength of express promise or conduct.[515] Provided that these expectations are reasonable, they must be recognized and upheld.[516]

According to Brownsword, a relational contract typically signifies a contract that occurs when performance runs over an extended period of time or the contracting parties are not economic strangers-they deal with each other regularly. Brownsword 56-57.

[511] Collins "The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract Implicit Dimensions of Contract* 18.

[512] Macneil 9-10.

[513] Campbell and Collins "Discovering the Implicit Dimensions of Contract" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract Implicit Dimensions of Contract* 48; Brownsword 88 295.

[514] Brownsword 121.

[515] Brownsword 123.

[516] Brownsword 123.

Co-operation in contract is the matter of performing one's part of the bargain or making it possible for the other party to perform.[517] Parties to a contract both have a shared interest and stake in the contract and must act out their responsibilities by aspiring to co-operative behaviour.[518]

This also creates much-needed flexibility in long-term contracts. Flexibility is important, as in many relational commercial situations; the parties are not in a position to anticipate every facet of performance at the moment of contract formation.[519]

Long-term relational and network contracts, in addition, require legal support to protect against disappointment. This support must entail giving legal effect to implicit obligations if it is to help the parties to secure their transactions.[520]

It is now necessary to discuss two important inter-related aspects of relational contracting - the Social contract theory as well as a distinction between the real and the paper deal.

4 4 1 1 Social contract theory

According to the traditional view, two individuals who conclude a contract establish a discrete communication system. This specifies particular undertakings that the parties are committed to observe. Simultaneously, this discrete system focuses on the relationship by excluding any other expectations, which have not been included in the reciprocal undertakings. However, the social contract theory maintains that the communication system established by a contract is never entirely closed. It incorporates a set of standards drawn primarily from the conventions of the local market or particular trade practices, which convey the full content of those undertakings. The legal system now has the task of evaluating and regulating contractual behaviour in the light of this complex social context. This is particularly

---

[517] Brownsword 301.

[518] Brownsword 318.

[519] Brownsword 81. The recognition of implicit dimensions can water down the unrealistic presupposition of the classical law that contracts are formed in a snapshot or in a precise moment.

[520] Campbell and Collins "Discovering the Implicit Dimensions of Contract" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract Implicit Dimensions of Contract* 48.

the case where the performance of an economic transaction is not instantaneous and a more co-operative form of contracting is being sought.[521]

According to the Social contract theory, contracts are thus embedded in a particular context. It is this context that may influence the conduct of the parties.[522] Here we are dealing with the possible influences of conventional moral standards, conventions of market practices as well as the identity and past relations of the parties to the contract.[523] In this sense, a contract is considered as a social relation.[524]

4 4 1 2 Real and the paper deal

> "If we want our courts to carry out the expectations of the parties to contracts, both those that they express in writing and those that are left unrecorded or even unspoken, we must accept a contract law that rests on standards rather than on clear, quantitative rules."[525]

A formal and simple approach in contract law is that judges limit themselves to dealing only with the formal expressions of the parties. They only consider whether the parties signed or accepted a document and what significance lies in the document.[526] However, not all contracts capture every or most of the expectations of those who sign them and can very often be inconsistent with the actual expectations of the parties.[527] Therefore, the paper deal does not always reflect the real deal or the implicit dimensions of the contract.[528] Macaulay explains the real deal as meaning

---

[521] Collins 9; Macneil 23-27.

[522] Collins 26.

[523] Collins 26-28.

[524] Collins 3.

[525] Macaulay "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 53.

[526] Macaulay refers to such a document as the paper deal.

[527] Macaulay 53 "This approach requires courts to close their eyes to real expectations resting in the implicit dimensions of contract and significant reliance on them."

[528] Macaulay "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in: Campbell, Collins, and Wightman (eds) Implicit *Dimensions of Contract* 51.

both those actual expectations that exist in and out of a written contract and the general expectations that a trading partner will behave reasonably.[529]

Taking into account the real deal or looking beyond the written contract, is thus a means of recognizing and enforcing the implicit dimensions. However, upon looking further than the written document, one must bear in mind the well established doctrines, well-known to the law of contract and their effects.[530]

4 5 Implicit dimensions

The recognition of Ian Macneil's relational contract theory has brought with it an awareness of the need to take cognisance of implicit dimensions.[531]

As concluded above, the relational contract is a contract where performance is likely to last over a period of time, perhaps indefinitely. Characteristically, these contracts are often incomplete in their specifications of obligations and result in creating expectations and understandings *inter partes*. The parties thus enter into a more flexible relationship, which they wish to maintain and thus co-operation, rationality and trust are imperative.

Vital to the efficacy of such an agreement are its implicit dimensions, implicit expectations and understandings between the parties, in the context of their agreement. Implicit dimensions reflect the shared interest the parties have in their transaction, which both have entered into for wealth-enhancing reasons.

As illustrated, the development of the relational contract theory and the need for implicit dimensions is in line with changes in business, market transactions and the economic and social environment today.[532]

Thus, the Relational Contract theory recognizes that apart from the voluntary aspects, commercial transactions also entail implicit dimensions or understandings.[533] Collins

---

[529] Macaulay "The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 54.

[530] Especially the rules of interpretation and the Parol Evidence rule.

[531] *Supra.*

[532] *Supra.*

motivates the need for the recognition of these implicit understandings and the resultant impact on the classical law as follows

> "As the reasoning proceeds, however, exceptions and qualifications creep in to subvert the exclusive emphasis on the explicit, discrete contractual relationship through references to its social context and the implicit understandings generated by that context."[534]

Wightman identifies three types of implicit dimensions or implicit understandings.[535] Firstly, what he refers to as 'general understandings'. These stem from a shared language, acquaintance with the social institution of money, currency and a shared 'market mentality'.[536] Secondly, there are those implicit understandings, which emerge over time between the parties to a particular contract or a long-term trading relationship, 'inter-party understandings'. These understandings relate to party behaviour.[537] The third type of implicit understandings is known as 'customary understandings'. They relate to how commercial relations are carried on, practices and norms which traders need to become familiar with when participating in a particular sector.[538]

Doctrinal techniques or tools for enhancing legal relevance of implicit dimensions must also be developed.[539] Utilising such techniques, in a relational context will promote the recognition and development of implicit dimensions.

Great complexity exists with respect to proposals for how legal reasoning should develop the capacity for understanding the implicit dimensions of contracts and the

---

[533] However, it does not mean that the classical law did not recognize implicit dimensions but rather that its techniques for giving effect thereto were inadequate. In classical law, the point of departure is that judicial decision making need not reflect implicit dimensions.

[534] Collins "The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contracts* 26-27.

[535] Wightman "Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 147.

[536] Wightman 147. Market mentality includes many tacit understandings about buying and selling, money, modes of payment, banking system and expectations of interest.

[537] Wightman 148.

[538] Wightman 148.

[539] Collins "The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contracts* 3.

technical rules needed to give effect to them.[540] It is suggested that the techniques to be used will be clearer if regard is had to the underlying considerations such as fair-dealing, co-operation and trust, in a relational context.

4 6 Meaning of fair-dealing, co-operation and trust

When dealing with relational contracts and the concept of reasonable expectations and understandings, it seems clear that fair dealing, co-operation and trust are imperative for the success of these relationships. These concepts are all inter-related, working together, to ensure the success of maintaining the parties' relationship.

4 6 1 Fair dealing and co-operation

The extent of the recognition of fair dealing, good faith and co-operation in contract law depends on what ethic of contract law is being followed.[541] The two ethics of contract law are that of ethic individualism and that of co-operativism.[542]

The former places no requirement on one contractor to have regard for a fellow contractor's economic interest. By contrast, the latter requires contractors to have regard for each other's economic interests.

The scope of co-operativism within legal systems remains unclear, despite the existence of jurisprudence in English law.[543] Brownsword is of the opinion that more co-operative regimes of contract law can be found in other European countries.[544]

To illustrate the working together of good faith, co-operation and fair dealing, and the ethic supported, the following example can be used.

If one is presented with parties who are involved in a long term co-operative relationship, built on the renewal of 12-month fixed term contracts, which specify a

---

[540] Collins "The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contracts* 3.

[541] Brownsword "After Investors: Interpretation, Expectation and the Implicit Dimension of the 'New Contextualism'" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 103 124.

[542] Brownsword *supra* 124.

[543] *Baird Textile Holdings Limited v Marks and Spencer plc* [2001] EWCA CIF 274 illustrates the choice between individualism and co-operativism. The Court of Appeal clearly favoured the former.

[544] He basis his opinion on a study done on good faith in contract law by Reinhard Zimmermann and Simon Whittaker (eds) *Good Faith in European Contract Law* (2000). Brownsword did a review

one month notice to terminate and after more than forty years of trading, the question is whether one-month's notice (as stated expressly in the contract) is sufficient? A regime of contract law at the individualistic end of the spectrum, like English law[545], will treat the express term as decisive and the *de facto* co-operative relationship as irrelevant. A regime of contract law that adopts a more co-operative ethic[546] will treat the de facto relationship as relevant to the parties' reasonable expectations and modify the notice period accordingly.

Clearly, the more co-operative ethic is more suited to the concept of relational contracting, as well as the new contextual interpretation.[547]

Finally, duties of co-operation can be introduced into contracts through the process interpretation of contracts and the development of implied terms.[548]

4 6 2 Trust

Trust refers to the situation where one party voluntarily exposes themselves to the risk of opportunistic behaviour of others and that the party who is trusted does what they are trusted to do.[549]

Essentially, trust can serve as a cost reducing function, in avoiding the need to spell out all the obligations at the outset.[550] However, this depends upon the parties trusting each other that reasonable expectations and understandings will be met.[551]

Some of the content of trust will be spelt out in the terms of the contract. However, it is the incidentals that occur during contract performance that must be settled by co-operation, fair dealing and trust.

The reach of trust depends upon the contractor having an expectation that the other party will do what he has been entrusted to do, and on them being able to assess

---

article on their study, entitled Brownsword "Individualism, Co-operativism and an Ethic for European Contract Law" 2001 *Modern Law Review* 628.

[545] Clearly illustrated by the *Baird* case supra.

[546] According to the study conducted by Zimmermann and Whittaker, it is the Swedish, Finnish, Belgians, Greeks and the Dutch who follow a more co-operative approach.

[547] Contextual interpretation is dealt with *infra*.

[548] Collins 333.

[549] Wightman 165 166.

[550] Wightman 166.

[551] Wightman 166.

whether that thing has been done. Where the contractor being trusted knows that the other has such expectations, and can assess the outcome, the parties will be inclined, for reputation reasons, to justify the trust and do what is expected.[552] Thus, trust also places boundaries on the opportunistic pursuit of self-interest.[553]

4 7 Justification for the incorporation of implicit dimensions

4 7 1 Contractual justice to be enhanced

The main justification for the recognition of implicit understandings in contract law is that in order for the law of contract to be in harmony with and to assist in economic transactions, the law must permit a look beyond the express terms, greater than it is allowed to at present.

The classical legal doctrine overemphasises the value of the express terms and secondly, the non-interference of the courts with freedom of contract principle.[554]

The new theorists however reject these two arguments of the classical law. In their opinion, the mere reliance on the express terms of the contract is not a practical solution.[555] The principle of freedom of contract cannot be realised only by considering the express terms or the paper deal.[556] The duty of the law is to enforce the agreement of the parties and this task can only be achieved successfully by considering the real deal in addition to the paper deal.[557] Therefore, it is believed that by bringing implicit dimensions into focus against the individualistic contractual ethic and by giving due weight in appropriate circumstances to co-operation and trust, the legal system can achieve a greater ability for upholding freedom of contract and its

---

[552] Wightman 166.

[553] Wightman 167. See *infra* for a discussion on discretionary powers and the pivotal role of trust in such a relationship.

[554] As has been indicated *supra*.

[555] Campbell and Collins "Discovering the Implicit Dimensions of Contract" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 47.

[556] Campbell and Collins "Discovering the Implicit Dimensions of Contract" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 47.

[557] Campbell and Collins "Discovering the Implicit Dimensions of Contract" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 47.

subsequent benefits.[558] Furthermore, a judicial appreciation of implicit dimensions and by not confining attention to the express terms of a written contract can guarantee a more accurate decision based on the bargain that the parties truly sought after.[559]

4 8 Conclusion

From the above it is evident that the trend of contracting has changed immensely. With the influence of the economy today, standard contracts, mass contracting and minimal or no prior contract negotiation before contract conclusion,[560] implicit dimensions must be recognized to uphold contractual justice in changing times.

Evidently, the freedom of contract model, as theoretically applied in the nineteenth century has been watered down and adapts with difficulty to the influence of legislation, development of monopolies and the recognition of the different bargaining strengths of the parties.[561] Also, the shift towards maintaining contractual relationships, in the context of the present market trends, favours the need to recognise and develop implicit dimensions. Based on Eiselen's description of the modern contract as not only a product of consensus *ad idem* reached between the parties but also consensus based on the reasonable reliance and expectations as created between the parties[562] and reflecting upon the recent theories as discussed in this chapter, it is clear that implicit dimensions have a role to play.

What needs to be determined, however, are the implications of implicit dimensions for contract law and how the law can adapt to the task of recognising the implicit dimensions, as well as whether South African law has an adequate approach. From Chapter 3, it is clear that considerations of policy and reasonable belief do play a role in our law. The new contract theories and new ideas about appropriate legal incidents yielded in this chapter and Vorster's classification must now be evaluated, as well as to what extent these new theories and new ideas bear on aspects of existing law.

---

[558] Campbell and Collins "Discovering the Implicit Dimensions of Contract" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 47.

[559] Campbell and Collins "Discovering the Implicit Dimensions of Contract" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 48.

[560] Eiselen 1989 *THRHR* 539.

[561] Eiselen 1989 *THRHR* 519.

[562] Eiselen 1989 *THRHR* 537 538.

CHAPTER 5

Implicit dimensions of contract and their implications for South African law

5 1 Introduction

The implications of relational contracting and the recognition of implicit dimensions in South African law must now be considered. To this end, aspects of the general principles of contract relating to the determination of contractual consequences are systematically reviewed to determine to what extent implicit dimensions are taken into account and whether there exists a need to adjust existing rules to facilitate this.

To this end, regard will be had to whether the mechanisms of South African law permit the finding of unexpressed terms (trade usage and custom, *naturalia* and reliance) to the extent required by the new theories.

Today, discretionary powers are recognised in South African law as a feature of long term contracts. But regulation of the exercise of such powers require evaluation in light of standards of trust and co-operation regarded as implicit in such contracts by the new theories discussed in Chapter 4.

New theories place an emphasis on the "real" as opposed to the "paper" deal. With this in mind, two aspects of South African law, namely the *Shifren* 'straightjacket' and the parol evidence rule will be considered.

Thereafter, the implication of the new approach for the interpretation of contracts will be dealt with.

5 2 Determinants of contractual consequences

In chapter 3 it was concluded that contractual consequences stem not only from the express agreement of the parties but that our law has many devices to enable judges to find unexpressed terms in contracts to regulate their consequences. In this regard, unexpressed terms, embracing tacit terms, terms implied by law or *naturalia* as well as trade usage and custom play a role.

However, it was found that our courts experience difficulty and confusion in ascertaining the parties' true intentions. It was therefore suggested that greater emphasis should be placed on the development of *ex lege* terms or novel *naturalia*.

This also affords a method for the recognition of implicit dimensions in the context of relational contracts.

5 2 1 Trade usage and custom

Trade usage and custom have already been discussed.[563] It was concluded that the most suitable classification of trade usage and custom is to equate them with legal incidents.[564] This will facilitate the creation and growth of novel *naturalia*. Support for this classification is also congruent with the recognition and development of reasonable expectations and understandings in specific contracts. According to Wightman,[565] reasonable expectations and understandings are closely shaped by customs and trade practices of trading communities in which they operate.[566]

Wightman[567] proposes two models of contractual relations when dealing with customs and trade practices - the contracting community model[568] and the personal consumption model.[569]

The contracting community model entails contractual relations which occur within a market sector (contracting community) where there are established practices for carrying on a commercial trade. These contracts are continuously entered into by contractors who are "repeat players".[570] For this reason, the parties have specialist knowledge about their trade and features related to it. This specialist knowledge includes knowledge about the product, the way in which trade is carried on and knowledge of practices in cases where hitches in performance occur. Therefore, focus is placed on the shared understandings, which are based on the knowledge of those familiar with the contracting context. In this manner, implicit understandings which are customary in the contracting communities can develop.

---

[563] See chapter 3 46-54.

[564] In accordance with Vorster's view *supra* 53.

[565] Wightman 143.

[566] Wightman calls these customary understandings, already discussed *supra* 76.

[567] Wightman 143.

[568] Wightman 149.

[569] Wightman 160.

[570] Wightman 150.

According to Wightman,[571] these implicit understandings serve two functions. Firstly, they give content to a legal obligation, through contextual interpretation[572] of express contract terms and meaning is established. Furthermore, they provide the basis for implied terms, and also give content to standards of reasonableness.[573] Secondly, they confer authority on those obligations which flow from the familiar practices of the contract community.[574]

The personal consumption model reflects high value consumer transactions such as specialised products, building, financial services such as insurance, pensions, credit, banking and professional services such as medical services and legal services. These specific contractual relations have their own special features: (i) these contracts concern complex products which require specialist knowledge; (ii) they are entered into infrequently by the consumer whilst the supplier is in business to supply the product and (iii) the consumer acts on preference and is not profit driven as in the case of the contracting community model.

From these features, it is less likely that shared practices and understandings will arise due to the infrequency of dealing, the complex products and lack of a contracting community. However, this does not mean that there are no implicit understandings. In these cases it is possible that unilateral expectations can arise as discussed above.[575]

It must be noted that these two models are not exclusive, but rather related in the sense that not all contracts fall exclusively into one of the categories.[576] These two models can definitely assist in recognising and developing of implicit dimensions in respect of business practices and trade usages as a determinant of contractual consequences. Wightman explains that

> "[t]he two models are intended to capture the basic situations which are probably the most and least favourable to the formation of implicit understandings."[577]

---

[571] Wightman 160.

[572] As discussed *infra*.

[573] Wightman 160.

[574] Wightman 160.

[575] *Supra*.

[576] Wightman 173.

[577] Wightman 172.

In addition, Wightman expresses the opinion that customary understandings within a contracting community can also be used to "tame" standard form contracts.[578] Customary understandings can assist in taming standard form contracts by

> "eliminating inappropriately onerous terms, by communicating the practical consequences of particular terms through the establishment of trade practices, and by fostering a contracting culture in which the practice not to enforce terms may become embedded. ...[T]he accumulation of experience and the sharing of background understandings about how contracts typically function in a sector may thus amount to a more powerful legitimating reason for holding parties bound to terms which reflect practice than any act of express consent at the technical moment of formation."[579]

Within a contracting community Wightman recognises three ways in which the standard form can be tamed. Firstly, the standard form can be a product of negotiation between trade associations, creating a balance of interests concerned within a commercial sector and eradicating one sided terms.[580] In the second place, this negotiated agreement may be widely used across a market sector and become known through usage.[581] Thirdly, practices related to terms widely used in standard form contracts may create expectations that a party who is favoured by a particular term does not enforce it. Thus informal understandings and practices are preferred over the formal standard document.[582]

5 2 2 Co-operation, trust and fair dealing as *naturalia* of relational contracts

The meaning of co-operation, trust and fair dealing has already been considered.[583] The role of these concepts is not yet well-established.

Here it is suggested that the duties of fair-dealing, co-operation and trust must be regarded as *ex lege* terms to ensure the recognition and development of implicit dimensions. In this manner, standards of co-operation, trust and fair dealing, as

---

[578] Wightman 168.

[579] Wightman 172.

[580] Wightman 169.

[581] Wightman 169.

[582] Wightman 170.

naturalia, must be read into relational contracts to uphold the contractual relation between the parties and so as to enhance implicit dimensions in this context.

However, the position as is accepted in the *Brisley*[584] case, that fairness and good faith are considered as mere underlying principles, norms or standards has a different result. Perhaps, only after a certain period, in certain contexts and in respect of certain types of contract, automatic *ex lege* duties might be recognised.

More recently, the Supreme Court of Appeal affirmed the *Brisley*[585] case in *SA Forestry Co Ltd v York Timbers*[586] i.e. that there is no basis for the adoption of a general implied term requiring parties to act reasonably and in good faith. This was accepted for any type of contract, even long term or relational contracts, as was the contract in the present case. The *ratio* being that this would conflict with the *Brisley*[587] and *Afrox*[588] decisions by introducing good faith as more than an abstract notion but as an independent substantive rule that courts can employ to intervene in contractual relationships.[589] What is important is that the Supreme Court of Appeal did recognise that good faith may yield novel *naturalia*. This will be possible in respect of duties of general application capable of being framed in concrete terms appropriate to the contract and with a content that is more precise than merely to act reasonably.

5 2 3 Reasonable reliance and reasonable expectations

The reliance theory has been adopted as a supplement to the will theory, in cases of dissensus,[590] where it is nevertheless equitable to bind a party to an impression of

---

[583] Chapter 4.

[584] *Supra.*

[585] *Supra.*

[586] 2005 3 SA 323 SCA.

[587] *Supra.*

[588] *Supra.*

[589] *Supra* 338J-339D.

[590] Van der Merwe "Reasonable Reliance On Consensus, Iustus Error And The Creation Of Contractual Obligations" 1994 *SALJ* 679 686 687; *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A); *Sonarep (SA) (Pty) (Ltd) v Pappadogianis* 1992 3 SA 234 (A); *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A); *Saambou Nasionale Bouverreniging v Friedman* 1979 3 SA 978 (A); *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) (Ltd)* 1983 1 SA 978 (A).

consent which he created.[591] There are three requirements necessary for proving the existence of a contract on this basis;[592] (i) one of the parties to the agreement must have created the belief or reliance that consensus was reached, (ii) the party who wants to have his reliance on the existence of an agreement upheld must show that his reliance was reasonable and (iii) that he on that basis entered into the transaction. There exists some uncertainty regarding a fault requirement and the matter is not settled in case law.[593]

A resort to reasonable reliance can also be made in cases of partial consensus to determine the contractual consequences as established by reasonable conduct of one party and the reasonable reliance of another, within the contractual context.

A further step is that reasonable expectations can be resorted to during the subsistence of the contractual relationship to inform the interpretation of the contract and not merely be invoked as traditionally to determine the basis of contract formation in the case of dissensus or to determine consequences in the case of partial consensus.

This is especially important in cases of long-term commercial contracts where reasonable reliance and reasonable expectations must be upheld in order to assist and maintain the changing needs of the contractors and to fill gaps not provided for. Thus, in a relational contract greater effect must be given to reasonable reliance and reasonable expectations, within the relational context, as natural incidents of these transactions.

Primarily, what needs to be determined is the meaning and understanding attached to reasonable expectations. In addition, a standard of reasonableness needs to be determined.

---

[591] Our courts adopted this approach from the English decision of *Smith v Hughes supra* note 4.

[592] Van der Merwe et al 36.

[593] In *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp & De Beer* 1979 4 SA 74 (A) 78G, it was suggested that fault should be required but no general rule was laid down, by Jansen JA, in his minority judgement. In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A) 240 the court regarded the introduction of the fault element as unnecessary.

In order to determine whether an expectation is reasonable, Brownsword distinguishes between practice-based and entitlement-based expectations.[594] According to the former, an expectation is reasonable relative to recognised standards. These standards may be explicitly declared or implicitly accepted in practice. In an entitlement-based approach, on the other hand, it is exactly because an expectation is reasonable that it must be accepted as such. Here focus is more on the reasonable man as opposed to expectations reasonably derived from the parties' background knowledge and contracting situation.[595] Brownsword suggests these approaches to reasonable expectations are both of assistance in the new methods of contractual interpretation.[596]

If it is the modern view that fairness, reasonableness, good faith and justice ought to be a basis of every legal rule[597] and that the law of contract is to provide an effective and fair framework for contractual dealings, then effect must be given to the reasonable expectations of honest men.[598] The reasonable expectations of the parties must be judged both in an objective sense[599] and also in view of that which is common to both parties.[600] Brownsword concludes that in order for contract law to develop, especially regarding long-term contracts;

> "legitimate expectation should be adopted as the unifying base on which to found the modern law".[601]

The reasonable expectations of both parties have been discussed above. What about the role of unilateral expectations?

---

[594] Bronsword "*After* Investors: Interpretation, Expectation and the Implicit Dimension of the 'New Contextualism'" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 105.

[595] Brownsword 105.

[596] The "new contextualism" as it is referred to, is discussed *infra*.

[597] Here one is reminded of the *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) 41 decision in which Brand JA affirms *Brisley supra* and highlights that these ideas are only abstract, forming the background or basis of our contract law and are themselves not legal rules.

[598] Steyn "Contract Law: Fulfilling The Reasonable Expectations Of Honest Men" 1997 *The Law Quarterly Review* 433 434. Perhaps the recognition of fairness, reasonableness, good faith and justice as not just abstract ideas but legal rules will assist in this process.

[599] Reasonableness postulates community values, the contemporary standards of ordinary, right thinking people; 1997 *LQR* 434.

[600] Such as practices and trade usages common to their fields of business; 1997 *LQR* 434.

[601] Brownsword 124.

Wightman[602] explains a unilateral expectation as one which a party brings into the relationship where there is no background of customary understandings, which enables one to say that one party's set of assumptions are reasonable and the other's are not. Each side, upon contracting, may form an expectation about what is to happen and which, as far as each are concerned, seems reasonable. In this situation no customary understandings, shaped by the practices of a contracting community can assist.

Wightman[603] suggests that the ordinary rules of contract law are not well adapted to recognising unilateral expectations that are not customary. In the first place, the law's traditional emphasis on the usual outward manifestation of agreement, the written terms, remains hostile to the recognition of unilateral expectations. Secondly, the problem lies in the standard applied to determine reasonableness. As shown above, reasonableness is determined by an objective standard drawn from a contracting community, based on customary practices and usual background knowledge shared between the parties in their line of business, i.e. practice-based expectations. Wightman emphasises, however, that there are contracts, of a more discrete nature and concluded infrequently that occur without the context of a contracting community and in respect of which no shared understandings and practices develop. In such cases, unilateral expectations may arise that are worthy of protection.[604] It is here that entitlement-based expectations as suggested by Brownsword could play a role.

Wightman relies on legislation[605] and the application of good faith[606] as two possible solutions to give expression to unilateral expectations. Furthermore, Wightman is of the opinion that weight must be given to unilateral expectations based on the new

---

[602] Wightman "Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings" in: Campbell, Collins, and Wightman (eds): *Implicit Dimensions of Contract* 177 178.

[603] Wightman 143 181 182 184.

[604] Discussed *infra*. 95. These contracts fall under Wightman's Personal Consumption Model.

[605] Wightman mentions the current Unfair Contract Terms Act 1977 which imposes a reasonableness test on a clause by which one person claims to be entitled to render another a contractual performance substantially different from what was reasonably expected. However, its scope is very limited as it excludes most contracts for financial products.

[606] Wightman is of the opinion that parties are expected to act in an almost semi-fiduciary capacity. He further points out that in the US good faith is used as a standard in situations where a contracting community is absent.

view of the social processes of contracting, which is revealed by the emphasis on implicit understandings and expectations. In South Africa, the proposals of the South African Law Reform Commission regarding unfair contract terms, has been languishing since 1996.[607] It is thus doubtful as to whether legislation can assist in this regard for the South African law. The most appropriate and realistic solution would be for the courts to place more emphasis on and to give more recognition to the abstract underlying principles of contract law and to develop them into legal rules.

5 3 Discretionary powers

A provision in a contract, conferring a unilateral power to determine a performance to one of the parties, was previously not allowed in our law, as the contract was considered uncertain and void.[608] Today, however, a unilateral capacity to determine performance is not objectionable, provided that the discretion is exercised in a reasonable manner and in good faith.[609]

Discretionary powers are especially necessary in long-term contracts to assist the parties to deal with changes in the relation in a flexible manner.[610] According to Collins, the parties may agree to a discretionary power in order to provide for future uncertainty.[611] If the parties recognise that future events will require adaptations of the contract, they may either adopt a short-term contract or create a mechanism for adjustment of the contract to handle future contingencies. This enables adjustment of obligations and adaptation the contract in the light of future events.

Collins discusses the risk of opportunism associated with entering into a contract containing discretionary powers and whether the power holder will not be tempted to exercise the discretion in his favour.[612] Collins considers this from an economic

---

[607] Nortjé "General Principles of Contract" 2002 *Annual Survey of South African Law* 256.

[608] See *Shell-* case *supra*; *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1988 2 SA 555 (A); *Kriel v Hochstetter House (Edms) Bpk* 1988 1 SA 220 (T).

[609] *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 2 SA 170 (W); *Boland Bank Bpk v Steele* 1994 1 SA 259 (T) and *NBS Boland Bank Ltd v One Berg River Drive CC and others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank Ltd* 1999 4 SA 928 (SCA).

[610] Van der Merwe 217; Otto JM "Kontraktuele bedinge wat eensydige rentekoersevasstellings deur banke magtig" 1998 *TSAR* 603.

[611] Collins "Discretionary powers in contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 226.

[612] Collins 227.

perspective and gives two main reasons why the power holder is likely to refrain from opportunism.[613] One of the characteristics of relational contracting is that the parties aim to maintain their relationship. Opportunism would destroy their expectations of the extra flexibility to be achieved by discretionary powers and that this would contribute towards maximising their wealth.[614] Should the power holder resort to opportunism, he could face costly litigation as well as damage to his reputation.

Cockrell[615] discusses the circumstances in which South African courts are prepared to second-guess the exercise of discretionary contractual power of one party to a contract to counter abuse in cases where the power has not been expressly circumscribed by the criteria of reasonableness and rationality.[616] Despite there being no established body of doctrine allowing for such judicial second-guessing on a generalised basis, the law does prescribe standards of reasonableness.[617] Doctrines applied to ensure that the exercise of contractual powers are rational, include implying terms *ex lege* or *ex consensu*,[618] the notion of public policy and recourse to the good faith principle.[619]

Rationality is an important feature of contract law today in respect of relational contracting. The current law is more willing to import rationality grounds to govern the exercise of contractual powers when the relative position of the contracting parties is characterised by a disparity in social power, especially when the one party exercises monopoly powers in an area of social life.[620] Also, the law shows a greater willingness to imply rationality grounds so as to regulate the exercise of contractual powers when this is necessary to uphold the validity of a contract which would otherwise be rendered void for vagueness; particularly where the contractors are

---

[613] Collins 227-228.

[614] Collins 229.

[615] Cockrell "Second-guessing the exercise of contractual power on rationality grounds" 1997 *Acta Juridica* 26.

[616] Cases where the contract expressly circumscribed the discretion of the contracting party as "reasonable" include; *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 1 SA 616 624G; *Genac Properties Jhb (Pty) Ltd v NBC Administration CC (previously NBC Administrators (Pty) Ltd)* 1992 1 SA 566 (A) at 579C.

[617] This includes, objective reasonableness or acting *arbitrium boni viri*; Cockrell 1997 *Acta Juridica* 34.

[618] The most satisfactory form as discussed *supra* chapter 3 would be terms implied by law.

[619] Cockrell 1997 *Acta Juridica* 38-43.

[620] Cockrell 1997 *Acta Juridica* 50.

businesspersons and where an unfettered contractual discretion on the part of one contracting party would be likely to render the entire contract void for vagueness in a manner destructive of the parties' commercial expectations.[621] Furthermore, the law demonstrates a willingness to resort to a rationality standard so as to regulate the exercise of contractual power where this will serve to preserve the reciprocity of exchange that characterised the original bargain.[622]

The limitation by the courts of an unfettered discretionary power is in line with upholding of the implicit dimensions of the contract. Good faith and rationality must be enforced as they are key devices for establishing trust and co-operation between the parties, which are essential to the maintaining of their transaction.

5 4 *Shifren* 'straightjacket'

It is accepted legal practice to insert non-variation clauses into contracts.[623] The effect of such a clause is that no variation of the contract will be of any force or effect unless reduced to writing and signed by the parties.[624]

For a long time the validity of such non-variation clauses was disputed.[625] However, in 1964, the Appellate Division 'resolved' the controversy by deciding that these clauses are enforceable in the well-known case of *SA Sentrale Ko-op Graanmatskappy Bpk v Shifren*.[626]

It has been said that the rationale behind *Shifren* is to protect parties against disputes and to avoid difficulties with proving oral agreements[627] as well as to prevent

---

[621] Cockrell 1997 *Acta Juridica* 50.

[622] Cockrell 1997 *Acta Juridica* 50.

[623] Hutchison "Non variation clauses in contract: any escape from the Shifren straightjacket?" 2001 *SALJ* 720.

[624] Lubbe & Murray 139.

[625] A non-variation clause was held to be effective in *Independent Picture Palaces (Pty) Ltd v Independent Film Distributors (Pty) Ltd* 1936 NPD. 456 and in *Sotiriadis v Patel* 1960 2 SA 812 (SR). It was contended that such a clause is not effective in *Sette v DH Saker (Pty) Ltd* 1957 2 SA 87 (W); *Young v Land Values Ltd* 1924 WLD. 216; *Bank v Grusd* 1939 TPD 286; *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1962 3 SA 565 (C).

[626] 1964 4 SA 760 (A).

[627] *SA Sentrale Ko-op Graanmatskappy Bpk v Shifren* 1964 4 SA 760 (A) 766; *Brisley v Drotsky* 2002 4 SA 1 (SCA) 11.

litigation.[628] *Shifren* remains a problem in relation to long term, relational contracts. This is so, especially in respect of their need for frequent adjustments and the importance of trust as a feature of these contracts. This leads parties to believe that there is no need to stand on formalities and informal declarations are thus made, which are then later frustrated due to the working of *Shifren*. McLennan[629] does not approve of the existence of the *Shifren* principle. His disapproval stems from the insensitive manner in which this principle functions especially when it comes to regarding the manner in which ordinary commerce and business dealings are carried on and particularly the extent of use of the standard contract. The principle is even more problematic if account is taken of the high rate of poorly educated people in South Africa. McLennan concludes that the non-variation clause "has no place in the modern law of contract."[630]

Hutchison[631] agrees with Mclennan and feels that this principle is productive of injustice in contractual relations and if it is not scrapped, it must be limited. Hutchinson is a supporter for the recognition of good faith as a principle to limit the working of non-variation clauses. Hutchison affirms the underlying role of good faith in our law of contract but suggests the following

> "One possibility is that the principle may be employed directly, on the grounds that it affords a judge an equitable, discretionary power, based on public policy, to refuse to enforce a provision in a contract whenever a party's attempt to rely on the provision is unconscionable or in bad faith. The more widely accepted view is that good faith operates indirectly, in that it is always mediated by other, more concrete rules or doctrines. In terms of the latter view, the courts would be justified, even obliged, to develop the technical rules of the common law to ensure that the *Shifren*

---

[628] McLennan "The demise of the non-variation clause" 2001 *SALJ* 574 575 does not agree with this argument.

[629] McLennan "The demise of the non-variation clause in contract?" 2001 *SALJ* 574.

[630] 2001 *SALJ* 574.

[631] Hutchison "Non-variation clauses in contract: any escape from the *Shifren* straightjacket?" 2001 *SALJ* 270.

principle is applied in a way that is consistent with the dictates of good faith."[632]

The principle in *Shifren* has consistently been reaffirmed, despite the fact that the courts have frequently felt uncomfortable about applying the principle stringently. Nonetheless, the courts have reaffirmed *Shifren* especially when faced with addressing unease, by falling back on technical doctrines. The Supreme Court of Appeal in *Brisley v Drotsky*[633] took the opportunity to pronounce on the role and scope of good faith in our law. According to the majority in *Brisley*, good faith is not an independent, "free-floating" principle of the law of contract, but rather it constitutes an underlying value of the law of contract.[634] It is thus clear that good faith itself cannot be directly invoked to mitigate the harsh consequences of the strict application of non-variation clauses.

A variety of doctrines and principles have been developed or suggested to mitigate the harsh consequences that result from a strict enforcement of a non-variation clause following the *Shifren* straightjacket. Waiver,[635] estoppel[636] and the principle of good faith[637] have been invoked in this regard. It is also suggested that the *Shifren* straightjacket must be developed with reference to the Bill of Rights and more specifically the right to dignity.[638]

In respect of relational contracting, the role of good faith is continuously highlighted and thus good faith should definitely be invoked within this context.[639] It can furthermore be assumed that there is no place for the non-variation clause and the *Shifren* straightjacket in relational contracts. Relational contracts are characterised by ongoing developments and changes in the contracting relationship and thus oral variations are inevitable and form an integral part of such a long-term contract.

---

[632] Mclennan 2001 *SALJ* 746.

[633] *Supra.*

[634] 15 par 22.

[635] *Impala Distributors v Taunus Manufacturing Co (Pty) Ltd* 1975 3 SA 273 (T).

[636] In *Phillips v Miller (2)* 1976 4 SA 88 (W) 91H-93H, *Volker v Maree* 1981 4 SA 651 (N).

[637] Ntsebeza AJ in *Miller & another NNO v Dannecker* 2001 1 SA 928 (C), a view rejected and overruled in *Brisley supra* 13 [13].

[638] Van der Merwe et al 146.

[639] However, as illustrated *supra*, the *Brisley* decision is an obstacle in this regard.

Hence, the need to be addressed here is to focus on the real rather than the paper deal as well as to safeguard the need for trust and co-operation in respect of relational contracts. The only possibility at the moment in the relational contract is to consider public policy within a relational commercial context.

5 5 Parol Evidence

The parol evidence or integration[640] rule generally comes into play to restrict the nature and extent of the evidence that may be brought in respect of a written contract.[641] The theoretical foundation of the rule is that since the parties themselves integrated their agreement in a document, which represents a final presentation of their consensus, oral or other extrinsic evidence regarding the negotiations and the contents of the document is irrelevant and misleading and cannot be presented to prove the terms of the contract.[642]

The rule was formulated in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*[643] as follows

> "[W]hen a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

The impact of this rule, applied strictly, is that once the agreement is represented by an integrated document, all prior conduct and agreements reached between the parties,

---

[640] There is another rule connected to the parol evidence or integration rule, the interpretation rule. The latter restricts the evidence that may be considered to determine the meaning of the terms set out in the written contract- when and to what extent extrinsic evidence may be brought to interpret the words used in a document.

[641] Van der Merwe et al 157. It is a rule of English law of evidence and was received into South African law.

[642] *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 3 SA 16 (A) 26; *Johnston v Leal* 1980 3 SA 927 (A) 938D-F.

[643] 1941 AD 43.

regarding the transaction is irrelevant and no evidence may be presented to determine the nature and extent of such terms.[644]

Clearly, the strict application of this rule only leads to injustice and thus, the scope of the rule has been limited by principles and exceptions.[645] Despite the underlying rationale for this rule that certainty of transactions is enhanced, fraud is prevented and that the number of disputes will be decreased,[646] it cannot be supported.

Does an emphasis on implicit dimensions have implications for the working of the parol evidence rule? According to Macaulay, a very uncomfortable law of contract would be created if it is attempted to apply the parol evidence rule strictly to all situations.[647] Furthermore, in relational contracting, parties are seeking goals and maintaining relations as opposed to strict contract uniformity. The parol evidence rule only applies in cases where the document is a complete integration of the parties' agreement.[648] In relational contracting, the contract document will not be an exhaustive record of the transaction and thus the parol evidence will not apply.[649] In addition, the contractual relations are prolonged and require co-operation and trust between the parties regarding changes that need to be made to the original document.

There are certain writers who advocate legislative reform[650] and there are those who contend that a more relaxed approach is the admission of extrinsic evidence in aid of the interpretation of written contracts undermines this rule and could lead to its eventual disappearance.[651]

---

[644] Cornelius 2001 *TSAR* 425.

[645] For a full discussion on the principles and exceptions to limit the scope of this rule, see 2001 *TSAR* 425-426.

[646] Cornelius "A Reconsideration of the Admissibility of Extrinsic Evidence in the Interpretation of Contracts" 1999 *TSAR* 344 347.

[647] Macaulay "The Real and The Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 62.

[648] Van der Merwe et al 158.

[649] Cornelius 2001 *TSAR* 425.

[650] Cornelius 1999 *TSAR* 345; where Cornelius mentions Zeffert & Paizes *Parol Evidence with Particular Reference to Contract* (1986) 8.

[651] Van der Merwe et al 279.

Cornelius is opposed to legislative intervention.[652] He is of the following opinion

> "'n Ondeurdagte herroeping van alle reëls wat die toelaatbaarheid van ekstrinsieke getuienis by die uitleg van geskrewe kontrakte beperk, kan onverwagse en onaangename gevolge vir die kontraktereg en die handel inhou. Die beter opsie sal waarskynlik wees om die ontwikkeling van die reëls oor te laat aan die howe, wat reeds aangetoon het dat hulle bereid is om die strenge toepassing daarvan te versag."[653]

In his article[654] he discusses the Law Commission's findings on whether the parol evidence rule should be retained or abolished in South Africa. The Commission recommend the abolition of this rule. It was concluded that evidence of what passed between the parties, or of the background or surrounding circumstances, should be admissible to assist in the interpretation of the contract if such evidence provides the best means of understanding what the parties meant or whether words are capable of some other meaning.[655] Cornelius holds that the Commission erred in not distinguishing between the integration rule and what he calls the "clear meaning" or interpretation rule.[656] Cornelius maintains that the function of the parol evidence is too important and that its compatibility with other principles and rules of South African law must not be undermined.[657]

Cornelius believes that our law must develop in accordance with the American approach.[658] Accordingly, evidence should be admitted to explain the terms of a

---

[652] Cornelius 1999 *TSAR* 351.

[653] Cornelius 2001 *TSAR* 427.

[654] Cornelius 1999 *TSAR* 344-345.

[655] To support their findings, reference was made to foreign jurisdictions. Civil law countries do not use the parol evidence rule. Also, in common law jurisdictions, where this rule is well established, it is diminishing.

[656] Cornelius 1999 *TSAR* 346.

[657] He mentions especially consensus as the theoretical bases of contractual liability in our law, the presumptions that support reliance on the parol evidence rule and the *caveat subscriptor* principle, which the commission failed to consider; Cornelius 1999 *TSAR* 348-349.

[658] The *locus classicus* in this regard is the judgment of the Supreme Court of California in *Pacific Gas and Electrical Company v GW Thomas Drayage & Rigging Company Inc* (40 ALR 3d 1373 1377-1378). Judge Traynor CJ indicates that evidence is admissible to prove a meaning to which the language of the instrument is reasonably susceptible: "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and

written contract. The document still remains conclusive evidence, thus the parol evidence rule still exists and no evidence can be brought to add to, vary and contradict the terms of the written document. Therefore, it is the interpretation rule that is being affected and not the parol evidence rule.

A party who then wishes to rely on the true agreement (real deal) of the parties agreement, which is not accurately reflected in the written document (paper deal), cannot do so directly.[659] The parol evidence requires the document to be rectified before relief based on the true intention of the parties will be granted.[660] Therefore, the retention of the integration rule as advocated by Cornelius is not an obstacle to the recognition of the real deal. The requirements for rectification were dealt with in *Meyer v Merchants' Trust Ltd*[661]

> "In essence such claim must necessarily be for rectification of a mutual error and is based upon the hypothesis that the parties have done an act which owing to such error failed to place both parties just where they intended to place themselves in their relations to each other... The inquiry in each case must therefore be: What state of affairs did the parties intend to bring about when they executed the written contract."

In *Weinerlein v Goch Buildings Ltd*[662] it was held that all a court does when rectifying an agreement is to allow what both parties, upon proper proof intended to be put in writing but erroneously did not, to be recorded. Hoffman and Zeffert[663] are of the opinion that rectification may be obtained even if the effect of the written contract is not what the parties intended.

---

unambiguous on its face, but whether the evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. A rule that would limit the determination of the meaning of a written instrument to its four corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained."

[659] Lubbe & Murray 225.

[660] Lubbe & Murray 225.

[661] 1942 AD 244 253-254.

[662] 1925 AD 282.

[663] Hoffman & Zeffert *The South African Law of Evidence* (1981).

> "it is not necessary that the parties should have meant to insert different terms or use different words from those which appear in the written contract."[664]

This is the approach followed by our own Supreme Court of Appeal. [665]

This view is consistent with the approach required in respect of long-term contracts and the need to maintain the relationship and the co-operation between the parties. In the *Weinerlein* case, mention was made of rectification as being a special application of the equitable principle underlying the *exceptio doli*.[666] In this context, rectification can thus be seen as a mechanism for recognising good faith between the parties and in this manner, taking cognisance of the real deal as opposed to the paper deal only.

5 6 Interpretation

The recognition of implicit dimensions definitely has implications for the method of contractual interpretation.

Our theory of interpretation includes both the subjective and objective aspects of interpretation.[667] The subjective method of interpretation focuses on the actual expressions of the parties and relies heavily on the express document as the expression thereof.[668] The objective method of interpretation tends to place the parties conduct within the context of legal policy at a particular time.[669] A combination of these two approaches is ideal. However, our legal system may be more biased towards the subjective approach.[670]

According to Brownsword,[671] "abstracted literalism"[672] is in English law being replaced by a "new contextualism."[673] Brownsword refers to *Investors Compensation*

---

[664] Hoffman & Zeffert *Evidence* 240.

[665] *Tesven CC v SA Bank of Athens* 2000 3 SA 257 (SCA); *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 4 SA 1315 (SCA).

[666] *Supra* 292; 293 and 296.

[667] Van der Merwe et al 279.

[668] Van der Merwe et al 279; Brownsword 103 *supra* "[t]he plain, natural and ordinary meaning of the language used by the contractors".

[669] Van der Merwe et al 279.

[670] Lubbe & Murray 451.

[671] Brownsword *supra* 103.

Scheme Ltd v West Bromwich Building Society[674] where Lord Hoffman states the following

> "[a]lmost all the old intellectual baggage of legal interpretation has been discarded."[675]

Upon taking cognisance of policy and context, the purpose of contract law shifts focus, to protect and respect the reasonable expectations and understandings of contractors.[676] To ensure that contracts are interpreted in a way that upholds the reasonable expectations of the contracting parties, three elements must be considered to determine the meaning of the contract.[677] These elements include (i) the reasonable person, (ii) consideration of the situation the parties were in at the time they made their agreement, and (iii) the background knowledge the parties have at the time of their agreement must also be of significance.[678]

Other academics and authors,[679] including South African commentators, seem to be in accordance with this new liberalisation of the law relating to contract interpretation as well as the idea that the purpose of the law of contract is to give effect to the reasonable expectations and understandings of the parties to an agreement.

---

[672] Literalism treats the words of a contractual agreement as having an abstracted life, or meaning, of their own; Brownsword *supra* 109. See also 1997 *LQR* 433 440 where Lord Steyn agrees that "[t]he literalist methods are in decline".

[673] Contextualism, by contrast, treats the words of a contractual agreement as taking their meaning from the context in which the agreement was made; Brownsword *supra* 110.

[674] [1998] 1 All ER 98.

[675] 114.

[676] The key ideas were put forward by Lord Steyn in *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209 221. Lord Steyn is of the opinion that when dealing with a question of interpretation today, contractual language, the contractual scheme, the commercial context and the reasonable expectations of the parties must be considered.

[677] *Total Gas Marketing Ltd v Arco British Ltd supra* 221.

[678] From *BCCI v Ali* [2001] 1 All ER 961 975 where Lord Hoffman said "background" is very wide and "there is no conceptual limit to what can be regarded as background."

[679] McLauchlan "The New Law of Contract Interpretation" 2000 19 *New Zealand Universities Law Review*; 1997 *LQR* 433 440; Van Heerden "Uitleg van kontrakte - die vermoede dat partye 'n redelike gevolg beoog het" 1997 *THRHR* disagrees with the court's decision in *Olivier v National Manganese Mines (EDMS) Bpk* 1996 1 SA 661 (T) where the court followed a literal approach to the interpretation of a contract as opposed to considering the possibility of the reasonable intention of the parties.

Traditionally, South African law of interpretation seems to place emphasis on the factual or historical-psychological approach to interpretation.[680] Our rules of interpretation fall into two categories.[681] The first category consists of rules, which embody presumptions regarding the intention of the parties, based upon considerations of grammatical usage and particular forms of expression. The second category embodies considerations of a normative nature. These rules tend to determine the legal consequences of a transaction on grounds of policy irrespective of the intention of the parties.[682]

Interpretation is further informed by the restrictive approach of the parol evidence rule to the resort to extrinsic evidence.[683] According to the *Delmas* case, our courts are as far as possible restricted to a linguistic treatment of the document and evidence of surrounding circumstances and negotiations may only be admitted if uncertainty persists after a linguistic treatment of the document. Due to the fact that *Delmas* has not been formally overruled, the use of extrinsic evidence as to background circumstances has been introduced but used cautiously.[684] In the *Van der Westhuizen*[685] case Lewis AJA criticised the formalistic approach to interpretation, based on current authority, under which a court is not entitled to consider surrounding circumstances if there exists clarity and no ambiguity.[686] However, despite the conservative approach in *Delmas*, the Supreme Court of Appeal in *Pangbourne*

---

[680] *Rand Rietfontein Estates Ltd v Cohen* 1937 AD 317 324; *Gravenor v Dunswart Iron Works* 1929 AD 299; *Union Government v Smith* 1935 AD 232; *Worman v Hughes* 1948 3 SA 495 (A); *Van Rensburg v Taute* 1975 1 SA 279 (A); *Johnston v Leal* 1980 3 SA 927 (A) 940.

[681] Lubbe & Murray 453.

[682] *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 3 SA 99 (A); *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 4 SA 818 (D). In 2002 several cases dealing with exemption clauses were decided, normative interpretation was applied in order to achieve a desired result; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2002 6 SA 256 (C); *CibaGeigy v Lushof farms (Pty) Ltd* 2002 2 SA 447 (SCA); *Van der Westhuizen v Arnold* 2002 6 SA 453 (SCA).

[683] *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A).

[684] There is also no clarity regarding the meaning of background circumstances in case law; *Swart v Cape Fabrix (Pty) Ltd* 1979 1 SA 195 (A); *Streek v East London Daily Despatch (Pty) Ltd* 1980 1 SA 151 (E); *Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 1 SA 433 (W); *Van der Westhuizen v Arnold supra.*

[685] *Supra.*

[686] 465 par 22.

Properties (Pty) Ltd v *Gill and Ramsden (Pty) Ltd*[687] mentions the adoption of a more liberal approach.[688] Recent cases[689] recognise the admissibility of extrinsic evidence in respect of so-called background circumstances, in all instances, and not only where the document is marked with ambiguity. More recently, in *SA Forestry Co Ltd v York Timbers Ltd*[690] it was held that where a clear intention of the parties is evident, a court cannot superimpose its own notion of fairness. In case of ambiguity though, the intention of the parties is determined on the basis that they have negotiated in good faith, based on the idea that all contracts are governed by good faith.

From the above, it is evident that our law regarding interpretation is not completely an historical-psychological enquiry. Instead, the rules reveal a normative component so that, apart from the intention of the parties, considerations of fairness contribute to the shaping of contractual content.[691] It is suggested that this normative approach to interpretation is probably an inevitable consequence of the court's inability to deal directly with issues of contractual justice as a result of the rejection of a direct substantive doctrine of bona fides in *Brisley v Drotsky*.[692]

5 7 Concluding remarks

It is evident from this chapter that South African contract law theory does not, as of yet, deal directly with the issue of relational contracts and implicit dimensions, as suggested by the English commentators. The contract law doctrines, as explored in this chapter, do not completely restrict and inhibit the recognition and application of implicit dimensions. However, there are features of relational contracts that are overshadowed by our court's continuous exercising great caution when dealing with what they express as abstract notions of fairness, reasonableness and good faith. These so called abstract notions as well as co-operation, trust and fair dealing do need greater scope in the relational contract context, as *naturalia*. It is furthermore

---

[687] 1996 1 SA 1182 (A).

[688] 184A D/E.

[689] *Coopers & Lybrand & Others v Bryant* 1995 3 SA 761 (A); *Sun Packaging (Pty) Ltd v Vreulink* 1996 4 SA 176 (A).

[690] *Supra.*

[691] Lubbe & Murray 469.

[692] Nortjé "General principles of contract" 2002 *Annual Survey of SA Law* 277.

suggested that reasonable reliance and reasonable expectations also be considered as *naturalia* of relational contracts.

CHAPTER 6

Evaluation

6 Conclusion

The aim of this study was to examine the role or significance of implicit expectations and understandings of the contracting parties in the determination of the consequences of contracts. An examination was made of how the law must engage in these implicit dimensions of the contracting relationship in order to make sense of a contractual agreement and fully determine the legal consequences of a transaction.

Implied terms in the context of the supplementation of contracts were discussed in chapter 2 and chapter 3. Vorster's opinion that the criterion used by the courts to imply terms, the presumed intention of the parties, is inadequate and defeats the purpose of implying terms, is supported in these chapters. In addition, Vorster believes that good faith, as a determinant of contractual consequences, must be considered as a *naturalé*, relating to specific contract types,[693] in order to assist in widening the scope of reasonableness and fairness. Neels has a wider view in this regard.[694] He is of the opinion that good faith has a much wider scope than the *naturalia* of specific contract types. He maintains that terms can be implied based on certain circumstances at the conclusion of the contract, as well as during the subsistence of the contract as opposed to mere contract type, this will result in the further development of new *naturalia*. He finds support for his view in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*[695] in which Jansen JA decided that the courts have a wide discretion to read terms into a contract.[696]

In chapter 4, the change in the contracting trend as well as the inadequacy of applying nineteenth century contract theory to relational contracts was highlighted. An exposition was given of more recent theories in an attempt to overcome the shortcomings of the classical contract theory. In so doing the implicit dimensions,

---

[693] Chapter 3 46 57-58 *supra*.

[694] Cornelius 1999 *TSAR* 697.

[695] 1980 1 SA 645 (A).

[696] 652D-F.

encompassing implicit expectations and understandings, between the parties, was brought to the fore.

The extent to which account is taken of implicit dimensions in our law, if at all, and the manner in which our existing contract law doctrines deal with implicit dimensions was discussed in chapter 5.

Overall, it is concluded that implicit dimensions have an important role to play, especially in the context of relational contracts. Clearly, traditional contract law theory is unsuited to these long term contractual relationships where more value is placed on the real deal as opposed to the paper deal. It is evident that South African contract law, in this context, is lagging behind when it comes to the recognition and application of implicit dimensions and the relational contract theory.

It is suggested that the recognition of the principle of good faith is a sound approach to give cognisance to implicit dimensions and to regulate relational contracts. The problem however, as Hutchinson believes, is that good faith is still obscure in our law as it operates indirectly, through other more technical doctrines, as opposed to an independent principle or standard.[697]

Nehf[698] and Wilhelmsson[699] agree that good faith plays a central and critical role in commercial transactions envisaging an ongoing relationship, where one party has been given the discretion to perform in some unspecified manner, over an extended period and where the opportunities for abusing of discretion are manifold.

---

[697] Hutchison "Good Faith in the South African Law of Contract" in Brownsword, Hird and Howells: *Good Faith in Contract* (1999) 213 233. The same can be said for English law: "One of the claims made by advocates of a good faith doctrine for English contract law is that it would enable the purposes and values underlying the law to be recognized more clearly for what they are, without there being distorted by being refracted through doctrines which are not suited to express them"; Wightman "Good Faith and Pluralism in the Law of Contract" in Brownsword et al *Good Faith in Contract* 41 47. Cornelius "Bepaalde verskyningsvorme van goeie trou in die kontraktereg" 2001 *TSAR* 241. In this article, Cornelius highlights the vast amount of decisions that our courts have made, in which the principles of good faith have been applied either expressly, by implication and indirectly 249-255.

[698] Nehf "Bad Faith Breach of Contract in Consumer Transactions" in Brownsword et al *Good Faith in Contract* 113 127.

[699] Wilhelmsson "Good Faith and the duty of Disclosure in Commercial Contracting - The Nordic Experience" in Brownsword et al *Good Faith in Contract* 165 181.

In the context of relational, commercial contracts, Brownsword maintains that in recognising a general principle of good faith, courts are better able to respond to the expectations of parties and are better able to detect co-operative dealing.[700] In this manner, the law is able to give effect to the spirit of the deal in a way that prioritises the parties' own expectations.[701]

Brownsword believes that once the distinction between the classical discrete contract and its short term adversarial dealing and the relational longer term contract, is better drawn, it will be more plausible to imply terms that involve some act of co-operation or sharing of risk.[702] Courts will also be able to imply terms on the basis that those terms are necessary to be faithful to the parties' unexpressed intentions and expectations.[703]

In addition, Wilhelmsson proposes the inclusion of a pre-contractual duty to disclose under the general principle of good faith.[704] He relies on the theory of relational contracting for support.[705] In relational contracting, the contracting process is not stagnant but can be continuously changed. So too, does the relationship come into being in phases, making it unacceptable to draw very strict lines between circumstances preceding the conclusion of the contract and later occurrences. Therefore, he deems it logical to include a pre-contractual duty of disclosure based on good faith.[706]

---

[700] Brownsword 13 27.

[701] Brownsword 27.

[702] Brownsword 29.

[703] Brownsword 29.

[704] Wilhelmsson 183.

[705] Wilhelmsson 182.

[706] Hutchison supports this view but highlights that our law still adheres to the view that no general duty rests upon contracting parties to disclose or to negotiate in good faith. There is however case law that supports the contrary view *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Ltd)* 1987 2 SA 149 (W) 198A-B. It must be noted that in Nordic Law, the idea of loyalty towards each other and the taking into account the interests of the other party applies as part of the duty of disclosure; Wilhelmsson *supra* 182. Also, in German law, where good faith is a fundamental principle, it applies even during negotiations between the parties. They find themselves in a quasi-contractual relationship of trust and of taking into account each other's legitimate interests. A similar approach is followed in the Dutch, French and Belgian systems; Cornelius 2001 *TSAR* 244-246.

Brownsword concludes that if good faith finds a settled place in the law, and as the contractual environment becomes more congenial to trust and risk-taking, it is possible that these reciprocal influences will work together to promote more co-operative thinking in both legal doctrine and contracting practice.[707]

Brownsword summarises what he believes as being the positive view of adopting a good faith doctrine, as follows

> "A good faith doctrine allows problems of bad faith to be addressed in a clean and direct fashion; it enables judges at all levels to deal in a coherent and effective manner with cases of unfair dealing; it can bring the law much more closely into alignment with the protection of reasonable expectations and it can contribute to a culture of trust and co-operation that enhances the autonomy of contractors and that, on a larger scale, is an important feature of successful economies".[708]

Finally, the relational contract's potential position and role needs to be evaluated within the context of South African contract law. It has been emphasised throughout this study that the classical law of contract as applied in our law has a limited approach to implicit dimensions. An example discussed is the technique of supplementing express terms by implied terms. As was shown, this technique is often problematic as well as limited in our law. Therefore, it is inadequate when it comes to relational contracts and implicit dimensions.

As is apparent from the discussion of good faith and its importance in contracts, this is perhaps a good point of departure for our law. Upon recognising good faith as a principle, the scope for implying terms to maintain reasonableness and fairness will be increased in all contracts. As regards relational contracts, good faith as a principle is inevitable. In the light of good faith, co-operation, trust and fair-dealing can be considered as *naturalia* of relational contracts.

In concluding, this thesis has highlighted that

> "[t]o create the necessary long-term supply relations, the parties have to be confident that the legal framework, which comprises the written contract together with the obligations inserted by the law that supplement

[707] Brownsword 32.

[708] Brownsword 32.

or qualify that agreement, will support the implicit understanding of co-operation and loyalty to the joint economic interests of the parties".[709]

[709] Collins "Introduction: The Research Agenda of Implicit Dimensions of Contracts" in: Campbell, Collins, and Wightman (eds) *Implicit Dimensions of Contract* 4-5.

Bibliography

South African sources

Books

Christie RH *The Law of Contract* (2001) (4ed) Butterworths, Durban

Cornelius SJ *Principles of the Interpretation of Contracts in South Africa* (2002) LexisNexis Butterworths, Durban

De Wet JC & Van Wyk AH *Kontraktereg en Handelsreg* (1992) (5ed) Butterworths, Durban

Hoffman LH & Zeffert DT *The South African Law of Evidence* (1981) (3ed) Butterworths, Durban

Joubert DJ *General Principle of the Law of Contract* (1987) Juta & Co, Ltd, Cape Town

Joubert NL *Die Finansiële Huurkontrak* (1991) Navorsingseenheid Vir Bankreg Randse Afrikaanse Universiteit, Johannesburg

Kerr AJ *The Principles of the law of Contract* (2002) (6ed) Butterworths, Durban

Kahn E, Lewis C, Visser C *Contract & Mercantile Law* (1988) (2ed) Juta & Co, Ltd, Cape Town

5 *LAWSA* 'Contract' (2004) LexisNexis Butterworths, Durban

Lubbe GF & Murray CM *Farlam & Hathaway: Contract: Cases, Materials, Commentary* (1988) (3ed) Juta & Co, Ltd, Cape Town

Van der Merwe SWJ, Van Huyssteen LF, Reinecke MFB & Lubbe GF *Contract General Principles* (2003) (2ed) Juta Law, Cape Town

Zeffert DT & Paizes A *Parol Evidence with Particular Reference to Contract* (1986) Centre for Banking Law, Rand Afrikaans University, Johannesburg

Articles

Cockrell A "Second-guessing the exercise of contractual power on rationality grounds" 1997 *Acta Juridica* 26

Cornelius S "A reconsideration of the admissibility of extrinsic evidence in the interpretation of contracts" 1999 *TSAR* 344

Cornelius S "Bepaalde verskyningsvorme van goeie trou in die kontraktereg" 2001 *TSAR* 241

Cornelius S "Die toelaatbaarheid van ekstrinsieke getuienis by die uitleg van geskrewe kontrakte" 2001 *TSAR* 415

Eiselen GTS "Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme" 1989 *THRHR* 539

Havenga P "Good faith in insurance contracts" 1998 *THRHR* 356

Hefer JJF "Billikheid in die kontraktereg volgens die Suid-Afrikaanse regskommisie" 2000 *TSAR* 142

Hutchison D "Non variation clauses in contract: any escape from the Shifren straightjacket?" 2001 *SALJ* 720

Jansen EL "Uitleg van kontrakte en die bedoeling van die partye' 1981 *TSAR* 97

Joubert NL "Regsontwikkeling by nuwe verkeerstipiese kontrakte" 1992 *TSAR* 213

Kerr AJ "Dangers in the use of synonyms to describe different categories of contractual provisions: 'implied' and 'tacit'" 1994 *THRHR* 281

Kerr AJ "Some problems concerning implied (tacit) provisions of contracts" 1993 *THRHR* 114

Kerr AJ "To Which Category of Provisions of a Contract Do Provisions Originating In Trade Usage Belong? Problems In Regard To Quasi-Mutual Assent" 1996 *THRHR* 332

Kerr AJ "Trade Usage and Custom" 1970 *SALJ* 403

Kerr AJ "Unexpressed Provisions of A contract: Terms to Be Used" 1972 *SALJ* 19

Lewis C "General principles of contract" 1989 *Annual Survey of South African Law* 31

Lewis C "General principles of contract" 1990 *Annual Survey of South African Law* 54

Lewis C "General principles of contract" 1996 *Annual Survey of South African Law* 194

Lewis C "Towards an equitable theory of contract: the contribution of Mr Justice EL Jansen to the South African law of contract" 1991 *SALJ* 249

Lubbe GF "Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse Kontraktereg" 1990 *Stellenbosch Law Review* 7

Lubbe GF "Kontraktuele diskresies, potestatiewe voorwaardes en die bepaaldheidsvereiste" 1989 *TSAR* 159

McLennan JS "The demise of the non-variation clause" 2001 *SALJ* 574

Neels JL "Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" 1999 *TSAR* 685

Nortjé M "General principles of contract" 2001 *Annual Survey of South African Law* 196

Nortjé M "General principles of contract" 2002 *Annual Survey of South African Law* 277

Otto JM "Kontraktuele bedinge wat eensydige rentekoersvasstellings deur banke magtig" 1998 *TSAR* 603

Otto JM "Unilateral determination of interest rates by creditors: The Supreme Court of Appeal (almost) settles the matter" 2000 *SALJ* 1

Van Blerk AE "Critical legal studies in South Africa" 1996 *SALJ* 86

Van der Merwe SWJ "Reasonable reliance on consensus, Iustus Error and the creation of contractual obligations" 1994 *SALJ* 679

Van der Merwe SWJ, Lubbe GF en Van Huyssteen LF "The *exceptio doli generalis: requiscat in pace vivat aequitas*" 1989 *SALJ* 235

Van der Walt CFC "Die huidige posisie in die Suid-Afrikaanse Reg met betrekking tot Onbillike Kontraksbedinge" 1986 *SALJ* 646

Van Heerden F "Uitleg van kontrakte-die vermoede dat partye 'n redelike gevolg beoog het" 1997 *THRHR*

Van Niekerk BVD "Some thoughts on custom as a formative source of South African Law" 1968 *SALJ* 279

Vorster JP "The Basis for the Implication of Contractual Terms" 1988 *TSAR* 161

Vorster JP "The influence of English Law on the implication of terms in the South African Law of contract" 1987 *SALJ* 588

Vorster JP "The resolution of contractual disputes: Interpretation versus The Recognition of Novel Naturalia" 1987 *THRHR* 450

Theses

Naudé T *The Legal Nature of Preference Contracts* 2003, (unpublished LLD thesis) US

Olivier PJJ *Die Grondslag van kontraktuele Gebondenheid* 2004, (unpublished LLD thesis) US

Vorster JP *Implied terms in the law of contract in South Africa and England* 1987, (PhD thesis) Cambridge

Foreign Sources

Books

Adams J, Brownsword R *Key Issues In Contract* (1995) Butterworths, London

Atiyah PS *An Introduction to the Law of Contract* (1995) (5ed) Clarendon Press, Oxford

Beatson J *Anson's Law of Contract* (2002) Oxford University Press, Oxford

Brownsword R, Hird NJ, Howells G *Good Faith in Contract* (1999) Ashgate Dartmouth

Campbell D, Collins H, and Wightman J (eds) *Implicit Dimensions of Contract* (2003) Oxford and Portland, Oregon

Collins H *Regulating Contracts*, (1999) Oxford University Press, Oxford

Collins H *The Law of Contract* (2003) (4ed) Lexis Nexis Butterworths, UK

Collins H *The Law of contract* (1986) Weidenfeld and Nicholson, London

Friedmann W *Law in a changing society* (1972) (2ed) Stevens & Sons, London

Gordley J *The Philosophical Origins of Modern Contract Doctrine* (1991) Clarendon Press, Oxford

Guest A *Chitty on Contracts* (2004) Sweet & Maxwell, London

Kronman AT & Posner RA *The Economics of Contract law* (1971) Little, Brown and Company, Boston

Macneil IR *The relational theory of contract: Selected works of Ian Macneil* (2001) Sweet & Maxwell, London

Ogus AI *The Law of Damages* (1973) Butterworths, London

Poole J *Textbook on Contract* (2001) (6ed) Blackstone Press, London

Salmond J & Williams J *Salmond and Williams on Contract* (1945) (2ed) Sweet & Maxwell Limited, London

Tillotson J *Contract Law in Perspective* (1995) (3ed) Cavendish Publishing Limited, London

Treitel GH *The Law of Contract* (2003) Thomson Sweet & Maxwell, London

Whincup MH *Contract Law and Practice* (2001) (4ed) Kluwer Law International, The Hague

Articles

Brownsword R "Individualism, Co-operativism and an Ethic for European Contract Law" 2001 *Modern Law Review* 628

Howarth "A note on the objective of objectivity in contract" 1984 *The Law Quarterly Review* 527

Howarth "The meaning of objectivity in contract" 1984 *The Law Quarterly Review* 265

McLauchlan "The new law of contract interpretation" 2000 *New Zealand Universities Law Review* 19

Peden E "Policy Concerns Behind Implication of Terms in Law" 2001 *The Law Quarterly Review* 459

Phang ABL "Implied terms in English Law- Some Recent Developments" 1993 *Journal of Business Law* 243

Phang ABL "Implied Terms Revisited" 1990 *Journal of Business Law* 395

Steyn J "Contract Law: Fulfilling the reasonable expectations of honest men" 1997 *The Law Quarterly Review* 433

Vorster JP "A comment on the meaning of objectivity in contract" 1987 *The Law Quarterly Review* 274

Table of Cases

South African Cases

Breytenbach v Van Wijk 1923 AD 541

Brisley v Drotsky 2002 4 SA 1 SCA

Broderick Properties Ltd v Rood 1962 4 SA 447 (T)

Cairns (Pty) Ltd v Playdon & Co Ltd 1948 3 SA 99 (A);

Cape Town Municipality v Robb 1966 4 SA 329 (A)

Cape Town Municipality v Silber 1971 2 SA 537 (C)

Cassimjee v Cassimjee 1947 3 SA 701 (N)

Catering Equipment Centre v Friesland Hotel 1967 4 SA 336 (O)

Central South African Railways v McLaren 1903 TS 727

Ciba-Geigy v Lushof farms (Pty) Ltd 2002 2 SA 447 (SCA)

Collen v Rietfontein Engineering Works 1948 1 SA 413 (A)

Colonial Government v De Beers Consolidated Mines Ltd (1905) 22 SC

Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd 2002 6 SA 256 (C)

Constantia Graswerke Bpk v Snyman 1996 4 SA 117 (W)

Coopers & Lybrand & others v Bryant 1995 3 SA 761 (A)

Coutts v Jacobs 1927 EDL 120

Datacolour International (Pty) Ltd v Intamarket (Pty) Ltd 2001 2 SA 284 (SCA)

Davis v Natal Government (1909) 30 NLR 359

De Pinto v Rensea Investments (Pty) Ltd 1977 4 SA 529 (A)

Delams Milling Co Ltd v Du Plessis 1955 3 SA 447 (A)

Delfs Kuehne & Nagel (Pty) Ltd 1990 1 SA 822 (A)

Diners Club South Africa v Durban Engineering 1980 3 SA 53 (A)

Douglas v Baynes 1907 TS 508; 1908 TS 1207; 1908 AC 477.

Durban City Council v liquidators Durban Icedromes Ltd 1965 1 SA 600 (A)

Durban's Water Wonderland (Pty) Ltd 1999 1 SA 982 (SCA)

Edwards v Tuckers Land and Development Corporation (Pty) Ltd 1983 1 SA 617 (W)

Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman NO [1997] 3 All SA 391 (SCA)

Engen Petroleum Ltd v Kommandonek (Pty) Ltd 2001 2 SA 170 (W)

Estate Duminy v Hofmeyer & Son Ltd 1925 CPD 115

Falch v Wessels 1983 4 SA 172 (T)

First National Bank Ltd v Avtjoglou 2000 1 SA 989 (C)

FJ Hawkes & Co Ltd v Nagel 1957 3 SA 126 (W)

Frank v Ohlsson's Cape Breweries Ltd 1924 AD 289

Freeman v Standard Bank of SA Ltd 1905 TH 26

Friedman v Standard Bank Ltd 1999 4 SA 928 (SCA)

Genac Properties Jhb (Pty) Ltd v NBC Administration CC (previously NBC Administrators (Pty) Ltd 1992 1 SA 566 (A)

Goldblatt v Fremantle 1920 AD 123

Golden Cape Fruits v Fotoplate 1973 2 SA 642 (C)

Gouws v Montessa Township and Investment Corp 1964 3 SA 221 (T)

Gravenor v Dunswart Iron Works 1929 AD 299

Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978 4 SA 901 (N)

Grobbelaar v Bosch 1964 3 SA 687 (E)

Group Five Building Ltd v Government of The Republic of South Africa (Minister of Public Works and Land Affairs) 1993 2 SA 593 (A)

Hall-Thermotank Natal (Pty) Ltd v Hardman 1968 4 SA 818 (D)

Holz v Thurston & Co 1908 TS 158

Impala Distributors v Tanus Manufacturing Co Ltd 1975 3 SA 273

Independent Picture Palaces (Pty) Ltd v Independent Film Distributors (Pty) Ltd 1936 NPD 456

Janse van Rensburg v Grieve Trust CC 2000 1 SA 315 (C)

Johnston v Leal 1980 3 SA 927 (A)

Jonnes v Anglo African Shipping Co (1936) Ltd 1972 2 SA 827 (A)

Joubert v Enslin 1910 AD 6

JRM Furniture Holdings v Cowlin 1983 4 SA 541 (W)

Kantor v Kantor 1962 3 SA 207 (T)

Kelvinator Group Services (Pty) Ltd v McCullough 1999 4 SA 840 (W)

King's Car Hire (Pty) Ltd v Wakeling 1970 4 SA 640 (N)

Kriel v Hochstetter House (Edms) Bpk 1988 1 SA 220 (T)

Lanficio Varam SA v Masurel Fils (Pty) Ltd 1952 4 SA 655 (A)

Lavery & Co Ltd v Jungheinrich 1931 AD

Legogate Development Co (Pty) Ltd v Delta Trust & Finance Co 1970 1 SA 584 (T)

Levenstein v Levenstein 1955 3 SA 615 (SR);

Liquidator of Booysen's Race Club v Burton 1910 TPD 597

Lowrey v Steedman 1914 AD 532

MacDuff Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd 1924 AD 573

Maritz v Pratley 1894 11 SC 345

Marquard & Co v Biccard 1921 AD 366

Menelaou v Gerber & Others 1988 3 SA 342 (T)

Meskin v Anglo-American Corporation of SA Ltd 1968 4 SA 793 (W)

Meyerthal v Baxter 1916 OPD 122

Miller & another NNO v Dannecker 2001 1 SA 928 (C)

Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 2001 4 SA 1315 (SCA)

Minister Van Landbou Tegniese Dienste v Scholtz 1971 (3) SA 188 (A)

Mnyandu v Mnyandu 1964 1 SA 418 (N)

Mondorp Eiendomsagentskap (Edms) Bpk v Kemp & De Beer 1979 4 SA 74 (A)

Mort NO V Henry Shields-Chiat 2001 1 SA 464 (C)

Mullin (Pty) Ltd v Benade Ltd 1952 1 SA 211 (A)

Nasionale Bank Van Suidelike Afrika Bpk v Saayman NO 1997 4 SA 302 (SCA)

National & Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 2 SA 473 (A)

National Board (Pretoria) (Pty) Ltd v Estate Swanepoel 1975 3 SA 16 (A)

NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank Ltd 1999 4 SA 928 (SCA)

Nel v Cloete 1972 2 SA 150 (A)

Nel v Collett 1943 EDL 5

Neuhoff v York Timbers Ltd 1981 4 SA 666 (T)

North & Son (Pty) Ltd v Albertyn 1962 2 SA 212 (A)

North Vaal Mineral Co Ltd v Lovasz 1961 3 SA 604 (T)

OK Bazaars v Bloch 1929 WLD 37

Olivier v National Manganese Mines (EDMS) Bpk 1996 1 SA 661 (T)

Ornelas v Andrew's Café 1980 1 SA 378 (W)

Otto v Heymans 1971 4 SA 148 (T)

Pan Americam World Airlines Inc v SA Fire and Accident Insurance Co Ltd 1965 3 SA 150 (A)

Pangbourne Properties (Pty) Ltd v Gill and Ramsden (Pty) Ltd 1996 1 SA 1182 (A)

Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty) (Ltd) 1983 1 SA 295 (A)

Patel v Adam 1977 2 SA 653 (A)

Petersen v Incorporated General Insurances Ltd 1982 3 SA 1 (C)

Phame (Pty) Ltd v Paizes 1973 (3) SA 397 (A)

Phillips v Miller (2) 1976 4 SA 88 (W)

Pistorius v Abrahamson 1904 TS 643

Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd 1984 3 SA 861 (W)

Rand Bank Ltd v Rubenstein 1981 2 SA 207 (W)

Randfontein Transitional Local Council v ABSA Bank Ltd 2000 2 SA 1040

Rapp & Maister v Aronovksy 1943 WLD 68

Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd 1943 AD 232 A

Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1962 3 SA 565

Richard Ellis SA (Pty) Ltd v Miller 1990 1 SA 453 (T)

Richter v Richter 1968 4 SA 403 (O)

Rietfontein Engineering Works 1945 1 SA 413 (A)

Robin v Guarantee Life Assurance Co Ltd 1884 4 SA 558 (A)

Rosenthal v Marks 1944 TPD 172

Rouwkoop Caterers (Pty) Ltd v Incorporated General Insurance Ltd 1977 3 SA 941 (C)

Rufdo (Pty) Ltd t/a Castle Crane Hire v B& E Quarries (Pty) Ltd 2002 1 SA 632 (E)

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

SA Sentrale Ko-op Graanmatskappy Bpk v Shifren 1964 4 SA 760 (A)

Saambou Nasaionale Bouvereniging v Friedman 1979 3 SA 978 (A)

Saridakis t/a Auto Nest v Lamont 1993 2 SA 164

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

Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Ltd) 1987 2 SA 149 (W)

Schmidt v Dwyer 1959 3 SA 896 (C)

Senekal v Roodt 1983 2 SA 602 TPD

Sette v DH Saker (Pty) Ltd 1957 2 SA 87 (W)

Shatz Investments (Pty) Ltd v Kalovyrnas 1976 2 SA 545 (A)

Shell SA (Pty) Ltd v Corbitt 1986 4 SA 532 (K)

Shoprite Checkers Ltd v Pangbourne Properties Ltd 1994 1 SA 616

Société Commerciale de Moteurs v Ackerman 1981 3 SA 422 9A)

Sonarep (SA) (Pty) (Ltd) v Pappadogianis 1992 3 SA 234 (A)

Sonday v Surrey Estate Modern Meat Market (Pty) Ltd 1983 2 SA 521 (K)

Sotiriadis v Patel 1960 2 SA 812 (SR)

South African Mutual Aid Society v Cape Town Chamber Of Commerce 1962 1 SA 598 (A)

Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) (Ltd) 1983 1 SA 978 (A)

Springvale Ltd v Edwards 1969 1 SA 464 (RA)

Standard Finance Corporation of South Africa Ltd v Langeberg Ko-operasie Bpk 1967 4 SA 686 (A)

Steyn v Lomlin 1980 1 SA 167 (O)

Steyn v LSA Motors Ltd 1994 1 SA 49 (A)

Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd 1979 3 SA 754

Streek v East London Daily Despatch (Pty) Ltd 1980 1 SA 151 (E)

Strydom v Afrox Health [2001] All SA 618 (T)

Sun Packaging v Vreulink 1996 4 SA 176 (A)

Swart v Cape Fabrix (Pty) Ltd 1979 1 SA 195 (A)

Sweets from Heaven (Pty) Ltd & Another v Ster Kinekor Films (Pty) Ltd & Another 1999 1 SA 796 (W)

Tamarillo (Oty) Ltd v BN Aitken (Pty) Ltd 1982 1 SA 398 (A)

Techni-Pak Sales (Pty) Ltd v Hall 1968 3 SA 231 (W)

Tesven CC SA Bank of Athens 2000 3 SA 257 (SCA)

Theunissen v Burns 1904 21 SC 421; Shields v Minister of Health 1974 3 SA 276 (RA)

Thoroughbred Breeder's Association v Price Waterhouse 2001 4 SA 551 (SCA)

Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd 1984 1 SA 433 (W)

Tropic Plastic & Packaging Industry v Standard Bank of SA Ltd 1969 4 SA

Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 1 SA 645 (A)

Union Government (Minister of Railways) v Faux Ltd 1916 AD 165

Union Government v Smith 1935 AD 232

Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43

Union National South British Insurance Co v Padayachee 1985 1 SA 551 (A)

Van Breda v Jacobs 1921 AD 330

Van den Berg v Tenner 1975 2 SA 268 (A)

Van der Merwe v Viljoen 1953 1 SA 60 (A)

Van der Westhuizen v Arnold 2002 6 SA 453 (SCA)

Vasco Dry Cleaners v Twycross 1979 1 SA 603 (A)

Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1

Videtsky v Liberty Life Insurance Association of South Africa Ltd 1990 1 SA 386 (W)

Voigt v South African Railways 1933 CPD

Volker v Maree 1981 4 SA 651 (N)

Volkskawagen v Van Aswegen 1961 1 SA 422 (A)

Wedge Transport v Cape Divisional Council 1981 4 SA 515 (A)

Wehr v Botha 1965 3 SA 46 (A); 1988 1 SA 290 (A)

Weinberg v Olivier 1943 AD 181

Wessels v Kemp 1921 OPD 58; Reid v Spring Motor Metal Works (Pty) Ltd 1943 TPD 154

West End Diamonds Ltd v Johannessburg Stock Exchange 1946 AD 910

West Witwatersrand Areas v Roos 1936 AD 62

Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1988 2 SA 555 (A)

Wilkins v Voges 1994 3 SA 130 (A)

Worman v Hughes 1948 3 SA 495 (A)

Young v Land Values Ltd 1924 WLD 216

Zuurbekom Ltd v Union Corporation Ltd 1947 1 SA 514 (A)

English Cases

Aktieselskabet Olivebank v Dansk Svolsyre Fabrik [1919] 2 KB 162

Baird Textile Holdings Limited v Marks and Spencer plc [2001] EWCA

Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452

Barclays Bank plc v Taylor [1989] 1 WLR 1066

BCCI v Ali [2001] 1 ALL ER 961

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council 1978 52 ALJR

British Crane Hire Corporation Ltd v Ipswich plant Hire Ltd [1975] QB 303 (CA)

British School of Motoring Ltd v Simms [1971] 1 All ER 317

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 CA

Comptoir Commercial Anversois v Power, Son & Co [1920] KB 868

Denmark Productions Ltd v Boscobel Productions Ltd [1969] 1 QB 699

Elawadi v Bank of Credit and Commerce International SA [1989] 1 All ER 242

Greaves & CO v Baynham Meike [1975] WLR 1099

Hadley v Baxendale 9 Ex 341 (1854)

Hamlyn & Company v Wood & Company [1891] 2 QB 488 (CA)

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha ltd [1962] 2 QB 26 [1962] 1 ALL ER

James Douglas v Joseph Baynes [1908] AC 477 (PC) 482

Johnstone v Bloomsbury Health Authority [1991] 2 WLR 1362

Jones v Associated Tunnelling Co Ltd [1981] IRLR 477

Koufos v Czarnikow Ltd, The Heron II [1969] 1 AC, [1967] 3 ALL ER 686 HL

Liverpool City Council v Irwin [1976] 2 All ER 39 [1977] AC 239

Luxor (Eastborne) Ltd v Cooper [1941] AC 108

Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803

National Bank of Greece v Pinios Shipping Co [1989] 1 All ER 213

North West Metropolitan Regional Hospital Board v TA Bickerton & Son Ltd [1970] 1 All ER 1039

Page One Records Ltd v Britton [1968] 1 WLR 157

Pettitt v Pettitt [1970] AC 777

Reigate v Unioin Manufacturing [1918] 1 KB 592

Scally v Southern Health and Social Services Board [1991] 3 WLR 778

Shirlaw v Southern Foundries [1939] 2 KB 206

Silverman v Imperial London Hotels Ltd (1927) 137 LT 57

Sim v Rotherham Metropolitan Borough Council and other actions [1986] 3 All ER 402

Smith v Hughes (1871) LR 6 QB 597

Tappenden v Artus [1964] 2 QB 185

The Bonde [1991] Lloyd's Rep 136

The Manifest Lipkowy [1989] 2 Lloyd's Rep 138

The Moorcock 1889 All E.R. Rep 530 [CA]

The Star Texas [1993] 2 Lloyd's Rep 444

Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd's Rep 209

Trollope & Colls Ltd v N.W. Metropolitan Hospital Board [1973] 1 WLR 601

Wettern Electric Ltd v Welsh Development Agency [1983] 2 WLR 897

American cases

Aluminium Co of America v Essex Group 499 F Supp 53 (WD Pa 1980)

Pacific Gas and Electrical Company v GW Thomas Drayage & Rigging Company Inc 40 ALR 3d 1373