UNIVERSITY OF ZIMBABWE.

FACULTY OF LAW

NAME: CHARLES CHINYAMA

REGISTRATION NUMBER: R930555U

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TOPIC:

'A COMPARATIVE ANALYSIS OF THE UNENDING GOOD FAITH DILEMMA IN CONTRACT UNDER THE PRISM OF THE CONSTITUTION'

(SUPERVISOR: DR MAJA)

DISSERTATION

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By

CHARLES CHINYAMA

July 2022

DECLARATION

I CHARLES CHINYAMA, registration number: R930555U, declare that 'A COMPARATIVE ANALYSIS OF THE UNENDING GOOD FAITH DILEMMA IN CONTRACT UNDER THE PRISM OF THE CONSTITUTION' is my own work and that it has not been submitted in any degree or exam in other universities, and that all the sources I have used or quoted here have been indicated and acknowledged by complete reference. I also authorize the University of Zimbabwe lend this dissertation to any institution for the purposes of scholarly research only.

SIGNED: …….

I hereby certify that the above statement is true and correct.

SUPERVISOR: DOCTOR INNOCENT MAJA

SIGNED: …….

DATE: …….

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ABSTRACT

"The doctrine of good faith is the legal equivalent of a chameleon – it takes on the characteristics of its environment "[1]

The interplay between good faith and the law of contract is not something of the new, same is as old as the law of contract itself [2]with Scalia J holding it to be "a rechristening of the fundamental principles of contract law well established "[3]. The concept of good faith in the law of contract has generated much debate amongst both academic writers, practitioners of law and judicial officers both in common law jurisdictions which are hostile to its reception [4] and civil Law jurisdictions which are quite receptive to it resulting in several articles and judgments of court being published/ handed down in that area. Irrespective of the several writings and judicial pronouncements on it, it remains a dodgy and contentious area regarding its definition,[5] structure, theoretical foundations, role, and influence in the law of contract at large. This article does not, in anywhere claim to bring a panacea to the problems be delving good faith but seeks to add to the ongoing debate currently on good faith and its role in the law of contract running from the inception, performance and termination of contract. Jurisprudential reflections on good faith as a principle not a rule of contract also invites interrogation of particular importance is to inquire on what good faith as a principle of contract entails both in the subjective and objective sense and how it can be positively utilized in the law of contract not just as a defence to claims but also as a good cause of action in the event of breach of contract. Noting that good faith as a principle of contract is too broad, the paper will deal more on objective good faith after noting the inherent weaknesses of employing subjective good faith and inherent dangers it poses to judicial functionaries like the judges. The interplay between good faith and public policy or contracts that cannot be enforced by our courts on ground of

[1] Leonhard 2009-2010 Conn J Int'l L 308
[2] Tymshare Inc 727 2d 1145 (1984)
[3] Tymshare (no. 2 above).
[4]COLIN LIEW, Singapore Journal of Legal studies, A Leap of Good Faith in Singapore Contract Law
[5] As Hawthorne observes, "[t] he recognition of the influence of good faith in South African law of contract ranges from acknowledgment to denial"-Hawthorne 2003 SAMLJ 272.

unconscionability will also be interrogated. The paper will also critique the current position in Zimbabwe and

South Africa comparing it with the position adopted in other jurisdictions. The effect of the constitution on the judicial position in relation to principle of good faith will be examined and interrogated in this paper with a view to find out how both our policy makers and the courts can come out of the dilemma or legal quagmire. The claim advanced by this paper is that good faith must either be promoted from a principle of contract law to a rule of contract law. This can only be achieved through reform and how that reform is achievable is again a contentious area given that reforms can come through two ways, that is, either through judicial activism now sanctioned by the constitution or through legislative reforms. Courts in Zimbabwe have been so sceptical of crossing the red line separating its functions from that of the legislature leaning rather on the parameters set by the separation of powers principle. Simply put, courts are generally unwilling to mingle in matters perceived to fall into the purview of the law maker. The paper will end with recommendations for reforming the law on good faith as a principle of contract law which could come in two ways either through judiciary activism encouraged in terms of section 46(1) of the constitution or through legislative intervention .In Zimbabwe courts have been slow or unwilling to unsettle the legislative role to enact laws by coming up with decisions which promote the development of common law preferring to leave this function to parliament in line with the principle of separation of powers unlike in South Africa where courts have used the relevant similar section effectively to develop the common law .The paper will also critique the current position in Zimbabwe and South Africa comparing it with the position adopted in other jurisdictions.

The new constitutional dispensation in these two jurisdictions cannot avoid scrutiny, especially their effect on the law of contract. South Africa is chosen as country of comparative analysis simply on the basis that it shares the same common law with Zimbabwe with legal- historical connections and similar constitutional provisions in the areas of interest. The United States and United Kingdom are also chosen on the basis that there have been some developments in application of the principle of good faith across all states and move from a strict positivist approach to good faith

to embracing the naturalist philosophers' school of thought of good faith in the law of contract. Some recommendations for reform be it through judicial process or legislation will be touched on. The paper therefore seeks to contribute to the development of the law of contract in Zimbabwe which is in sync with developments in another jurisdiction.[6]

CHAPTER 1

INTRODUCTION

1.1 DEFINING THE LEGAL PROBLEM

For several decades, good faith has always played a central role in the law of contract but its recognition by courts vary from country to country depending on legal jurisprudential theories influencing a given country, with others viewing it as too subjective a principle whose application by courts should be taken with some pitch of salt given its potential to cause collateral damage to the whole fundamental of the law of contract if accepted and enforced by our courts without caution[7] . Innes CJ (as he then was) emphatically sets out the common law default position against interference or hostility to the reception of good faith thus.

> "*Our law does not recognize the right of the court to release a contracting party from the consequence of an agreement duly entered into by him merely because that agreement appears unreasonable*."[8]

The same sentiments were expressed by Patel JA in Kundayi Magodora & Others v Care International Zimbabwe case [9]. Because of this, there has been a general reluctance by courts both in Zimbabwe and South Africa (mixed jurisdictions) to embrace meaningfully the principle of good faith in the law of contract notwithstanding the central role good faith plays right from the making, performance, and enforcement of a contract. The courts have consequently refused to find a cause of action based on good faith or its breach thereof by the other party. It has remained a negative duty implied by law[10] that parties to a contract must act in good faith. The problem which is sought to be investigated here is.

What is good faith in the law of contract and what does it entail, what position should good faith occupy in the law of contract in Zimbabwe and how is that

[7] Burger v Central South African Railways, 1903 TS 571 at 576.
[8] Burger case (no. 7 above).
[9] SC 24/14.
[10] Sharma K, Some Reflections on Good Faith in Contract Law, Oxford University Obligations Group, 2012.

achievable? What does the phrase “good faith “entail and how does it interplay with public policy and the constitutions both of Zimbabwe and South Africa as a principle of the law of contract as opposed to a rule? Should it remain a negative duty implied by operation of law that every part to a contract should act in good faith to ensure the coming into fruition of what they had agreed on? Is judicial review of contracts necessary and if so, to what extend should we allow judicial supervision of contracts?

This paper is intended to contribute to the development of the law of contract and policy makers are urged to implement the findings and recommendations made herein under by promoting the principle of good faith from just a mere principle to a rule of contact either through judicial activism through use of permissible constitutional provisions or by way of legislative reform. It's time the judiciary finds its feet and wake up from the slumber or fear of the unknown when applying the principle good faith to the law of contract? What effect would it have on existing known principles of contract established since time immemorial? Is it likely to bring about endless litigation if the principle of good faith were to be promoted to a rule of contract?

1.2 WHAT IF ANY, IS GOOD FAITH IN CONTRACT LAW? - AN OVERVIEW

It must be accepted that there is no universally accepted definition of “good faith “in the law of contract neither is there any consensus as to what it entails [11].Suffice to mention in passing that it has its theoretical underpinnings in natural law as it seeks to infuse the concept of morality in the law of contract[12] . It is from this legal theoretical foundation that it finds itself in sharp contrast to, and, in a constant and continuous legal battle for recognition with the proponents of positivist school of thought who views law as is, not, as it ought to be. This has to a large extent taken full space in the Hart – Fuller Debate [13]which is not intended to be pursued in greater detail here. The principle of good faith brings to clash two legal theoretical giants, positivist and natural law legal theorists who are repugnant to each other. From its theoretical foundation (natural law), it is poised to suffer a stiff battle for recognition and survival as a principle of the law of contract bearing in mind the

[11] Sharma (no.10 above).
[12] Hart, HLR, The Concept of Law, 2 ed. (1994) 100 on the rule of recognition.
[13] Lon Fuller The Morality of Law 1964.

hostility of positive legal theory to notions of natural law. Each country defines good faith in terms of its socio-economic and historical context. In our jurisdiction," it is attributed to good faith the character of a legal principle, meaning that it can create, modifying, or extinguishing specific legal relationships"[14]. It encompasses loyalty in contractual dealings often referred to as loyalty to the bargain[15].

It is worth noting that the phrase has not been defined by the Zimbabwean judiciary in the law of contract though some statutes[16]make constant reference to it without defining what it is. The Labour Act is also awash with references to good faith. The closer the Zimbabwean Courts came to deal with the phrase good faith was in the case of Ashanti Gold fields [17]where Guvava JA opined that if the appellant (Ashanti) were to continue denying that there was an agreement of sale that can only go to show that they dealt in bad faith. It is based on moral standards in as much as it is a legal ethical principle entailing honesty in the making of the contract running down to its performance. Normally it is implied by law in the absence of any express clause in the parties' agreement. This presents itself as direct interference by the courts in the domain which principled scholars of the classical theory of contract would raise a red flag to counteract any interference which has the potential to tore apart the old-aged principles of contract law which view the parties' agreements as sacrosanct and would fight to maintain such private and sanctity of contract. According to this theoretical premise, interference by courts in this no-go area is unwelcome. It leads to uncertainty after shacking the whole foundation our law of contract is based on. Party autonomy is buried in the process with many established principles being left bruised. According to legal positivists, the role played by good faith in contract law can be well played by other established principles of contract law without upsetting the established legal foundation of contract law.

[14] Ejan Mackaay GOOD FAITH IN CIVIL LAW SYSTEMS. A LEGAL-ECONOMIC ANALYSIS.
[15] Sharma (10 above).
[16] Consumer Protection Act Chapter 14:44]. Insurance Act [Chapter 24:07].
[17] SC 24\14.

1.3 THE DEFINITIONAL PROBLEM OF GOOD FAITH

There are difficulties associated with the concept of good faith and it appears good that after reviewing its historical developments and the place it occupies in contemporary law today that we examine the difficulties associated with the concept. This journey starts by getting to understand what good faith means.

During the Roman times, Cicero once defined it as having a very broad meaning, "*they express all the honest sentiments of a good conscience without requiring a scrupulousness which would turn selflessness into sacrifice - the law banishes from contracts ruses and clever manoeuvres, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance.*"[18]

Lamentably, this definition of good faith did not receive universal acknowledgement.

Getting to appreciate or understand what good faith is has proved problematic in that there is no universally acceptable definition of good faith. Over the years, courts have attempted to come up with their own definition centred on practise and experience and these differ from one jurisdiction to the other. Even dictionaries could not assist in finding a way out of this definitional problem of good faith in that they tend to define it not by what it is but by its characteristics and what it is not.

Black's Law Dictionary for an example defines "good faith" to "encompass an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. "The definition is not satisfactory in that it leaves undefined what good faith is, someone is left wondering as to what good faith is after having been told what it is not and what it encompasses. That need-to-know factor is not quenched by the definition to the extent that one would require to read on to find out exactly what good faith is.

The Oxford Advanced Learner's Dictionary defines it to mean "the intention to be honest and helpful, trust in somebody' ability or knowledge; trust that

[18] De Officiis, Published in 44BC.

somebody/something will do what has been promised". It is taken to be trust. The same definition runs through the Webber Dictionary, but could good faith be limited to mere trust at law, is it just a question of fair dealing or honesty? These unsatisfactory definitions led to judicial formulation of what good faith is based on court experience of cases that had come before them and on how the concept was understood to mean by merchants and based on a study of what scholars in the field of contract law understood it to mean.

The good faith dilemma is, as demonstrated above, definitional, the problem starts by seeking to understand the object of study, that is, attempting to understand what good faith in a legal context is and what it entails, by so doing one would have gained an appreciation of and insight into the legal problem under probe here what the problem question itself is all about?

The proper place and meaning of good faith in Zimbabwean private law just like in South Africa, is a vexing question. At one stage it is recognized come the next day, it is denied having ever been part and parcel of Zimbabwean and South African law.[19]Hawthorne, writing ion the elusive nature of good faith in South Africa stated that:

> "*In recent years, in South Africa, good faith has regularly been brought out of the display cabinet, dished off, and heralded as the basis of all law of contract, only then to be put away having become nothing more than a glass of figurine. Good faith is so fragile that to use the concept to introduce equity into our law of contract would cause such uncertainty that our classical contract law would be undermined and rendered unworkable*."[20]

In South Africa the whole rot is traceable from cases that have passed through the Supreme Court running to the Constitutional Court of South Africa in some instances and these range from Brisley[21], Afrox[22] and Napier[23] through to Bredenkamp[24],

[19] Hawthorne 2003 South African Mercantile Law Journal. P272.
[20] Hawthorne 2005 SAMLJ. P214.
[21] 2002 (4) SA 1 (SC).
[22] Afrox Healthcare Bpk v Strydom 2002 6 SA (SCA).
[23] Napier v Barkhuizen 2006 4 SA 1 (SCA).
[24] Bredenkamp v Standard Bank of South Africa Ltd 2010 4 SA 468 (SCA).

Mphango[25] and Potgieter[26] which decisions clearly demonstrate the conservative approach to good faith adopted by the South African Courts. Suffice to mention that good faith is undervalued. It has been defined as to have

> "*Acquired a meaning wider than mere honesty or the absence of subjective bad faith. According to this extended meaning, it has an objective content which includes other abstract values such as justice, reasonableness, fairness, and equity.*"[27]

It comes out clearly from Brand's definition which has been confirmed by the constitutional court of South Africa in Barkhuizen v Napier 2007 (5) SA323 (CC) para 80; that good faith has a dual existence. It can exist in the subjective sense, being subjective good faith or in the objective sense as objective good faith. It is subjective good faith which most opponents of the principle of good faith are afraid of. They are afraid that if judicial officers are allowed to intervene by way of review, subjective elements will creep into the law of contract. On that basis alone, they hold that judicial interference in Contract law is unwelcome. They hold it to be such a dangerous move to provide judicial powers pf review top judges to review contractual terms because of subjective elements of good faith, morality, or equity. They hold that such a move will destroy not only the principle of precedent but also the very fabric upon which the principles of contract law rest and that it opens the doors of subjective elements of a singular judge to come in to replace to replace what the parties' intention at the time of contracting was, thereby eroding the principle of certainty. Lamentedly, even reasonable people like judges may differ on what it is that constitutes subjective good faith.

The observations were made by Brand JA, as he then was, in Potgieter v Potgieter[28] when he spoke against sweeping reforms to the law pf contract to include the granting of powers of review to judicial officers as follows

> "*The reason why our law cannot endorse the notion that judges may not decide cases because of what they regard as reasonable, and fair is*

[25] Maphango v Aengus Lifestyle Properties 2011 5 SA 19 (SCA).
[26] Potgieter v Potgieter 2011 ZASCA 181.
[27] Brand 2009 SALJ73.
[28] 2011 ZASCA 181.

> *essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge*."

It is indeed true that "*fairness is a slippery concept*"[29].

The common law position is embraced in a number of classical theories like the classical liberal theory of contract which is resistant to change and under it, you have such running principles of party autonomy that is the freedom of the parties to choose when and when not to contract, freedom of contracts and sanctity of contracts which principles they maintain are at the danger of extinction should subjective elements be allowed into the law of contract. This forms the theoretical basis of the hostility common law jurisdictions maintains to the reception of good faith. It also explains the theoretical underpinnings of the problem questions.

Some have defined it by its characteristics[30] , its essential elements but suffice to note that whatever it is by definition, it plays a critical role in the smooth flow of commerce. Different jurisdictions have different socio – historical experiences which sharp the doctrine from one jurisdiction to the other. It comes as no surprise that each jurisdiction may have its own understanding on the doctrine based on its socio, economic and historical experiences but the sine quo non is the role of good faith in contract law is acknowledged world over.

In Brisley [31]case, the court defined good faith after going through several academic writings and decided cases as follows,

> "What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an *ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract*. It finds expression in various technical rules and doctrines, defines their form, content, and field of application, and provides them with moral and theoretical foundation.

[29] Bredenkamp v Standard Bank of SA ltd 2010 4 SA 468 (SCA) para 54.
[30] Sir Anthony Mason, Lecture delivered at Oxford University obligations Group 1 February 2012.
[31] Brisley v Drotsky 2002(4) SA 1(SCA).

> Good faith thus has a creative, a controlling and legitimating or explanatory function. It is not, however the only value or principle that underlies the law of contract: nor perhaps, even the most important one."

It is not, however, a legal rule with specific requirements that must be checked but may be called an open norm whose contents may not be established in an abstract manner but takes shape only by the way in which it is applied.[32]It is rooted on the community sense of what is fair or right. Society expects contracting parties to conduct themselves in a particular way during the contracting period and during the lifespan of contract. It is this societal expectation that is imposed from without the contract to give force to good faith.

In the Brisley case, the court was faced with the question whether it could intervene to find several contractual phrases to be unfair notwithstanding the fact that they were contained in the party's agreement. It was called upon decide whether the principle of bona fides could be invoked to refuse to enforce an ejectment order. The parties had a lease agreement which contained some non- variation clauses in the clauses which states that all amendments to the contract should follow specified formalities. The lessor plaintiff claims for ejectment of the defendant who argues that the entrenchment clauses ought not to be enforced because of unreasonableness, unfairness and that enforcement will conflict with the principle of bona fides. It should be noted that before Drotsky, the Appellate Division was called to deal fair dealings in Sasfin v Beukes[33].

The brief facts were that Sasfin, a finance company and Mr Beukes an anaesthetist signed an agreement for provision of financial service in the form of an overdraft. Over and above the overdraft facility the agreement contained a clause entitling Sasfin for as long as it wants all of Mr Beuke's income regardless of whether he owed them anything or was going to owe them in future. Further, in terms of a clause of the agreement Mr Beukes could not terminate the agreement, only Sasfin could. The agreement further contained a severance clause where anything in the contract could be severed, and the remaining portion would still be enforceable regardless

[32] Zimmermann, Reinhard/Whittaker, Simon, Good Faith in European Contract Law, Cambridge 2000
[33] [1989] 1 AII SA 347(A).

of whether it reflects the true intention of the parties. Mr Beukes approached the court which held that parts of the agreement had the effect of making Mr Beukes a slave for life to Sasfin and was therefore against public policy.

After having discarded good faith as not part and parcel of the South African Common law the Court had to look for something that would justify the non-enforcement of contracts on moral basis, and it found cover under the principle of public policy which some authors' view as meaning the same as good faith. The definition of good faith in Brisley case comes with some theoretical problems of its own which makes it to be received in South Africa with a mixed bag. The greater part of the South African bench is deeply embroiled in common law and its positivist per thinking.[34]Their reception of good faith or fallibility to reform is thus affected by the theoretical foundation of good faith. This explains why much care and caution is exercised on its recognition, role, and place in contract law.

The writer has not lost sight of the reservations expressed by Hawthorne when he explained that good faith is too fragile a concept to the extent that it will be too dangerous to use the concept of good faith as a launch pad for the introduction of equity in our law of contract owing to fear of uncertainty and the possible danger of undermining other well-established principles of contract law. But the courts had to find a way out, and only equitable values like public policy presented itself to the courts as a way out and, indeed public policy was the only avenue.

The bed for this was prepared when the Supreme Court of Appeal after an extensive study of both authorities and caser law came to conclude that

> "*What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlines and informs the substantive law of contract. It finds expression in various technical rules and doctrines, define their form, content, and field of application, and provides them with the moral and theoretical foundation. Good faith, thus has a creative, controlling and*

[34]AM Louw, YET ANOTHER CALL FOR A GREATER ROLE OF GOOD FAITH IN THE SOUTH AFRICAN LAW OF CONTRACT: CAN WE BANISH THE LAW OF THE JUNGLE, WHILE AVOIDING THE ELEPHANT IN THE ROOM.

legitimating or explanatory function. It is however not the only value principle that underlies the law of contract, nor perhaps, even not the most important one."[35]

Good faith is thus a value imposed by society at every stage of contracting, society expect parties to a contract to work towards realisation of the bargain and not to frustrate the materialisation of what parties had agreed to. It has its root in social behaviour and societal appreciation and benchmarks of what's good behaviour, /morally just and what is not.

1.4 THE CURRENT LEGAL POSITION IN ZIMBABWE AND SOUTH AFRICA

The Zimbabwe legal position regarding the role and place of good faith in the law of contract is largely influenced by English law which is predominantly a common law jurisdiction where the role of judges is that of law makers, judges make the law. This is in sharp contrast to the position in civil law jurisdictions where the duty of a judge is limited to applying and interpreting the law as is. Freedom and sanctity of contract rules. Party autonomy or choice to enter or not to enter in a contract is highly respected, the choice theory of contract. This is in line with the classical theory of contract which emphasise the role of contract law is to give effect to the agreement. Under common law, there is no room for good faith in the law of contract. The principle is viewed as an infringement to the very fundamental upon which the law of contract is predicated on. It destroys the very fabric of party's choice and right to choose when to be bound and when not. It steers the very honest nest of the parties 'freedom to contract and consequently it has had no place to occupy and no role to play on the law of contract. Despite Zimbabwe being a hybrid jurisdiction following both the common law and civil law jurisdictions, the Supreme Court has since spoken on this point when Guvava JA concluded that.

"*It is an accepted principle of our law that courts are not at liberty to create contracts on behalf of the parties, neither can they purport to create or extend obligations, whether mandatory or prohibitory from contracts that come before*

[35] Barkhuizen v Nappier 2007 5 SA 323(CC)

them. The role of the courts is to interpret the contracts and uphold the intentions of the parties when they entered into agreements provided always that the agreements meet all the elements of a valid contract."[36]

The Zimbabwean position regarding good faith as an implied principle of contract is thus, without reference to it directly sealed in that matter. Courts in Zimbabwe are not at liberty to create an implied obligation on behalf of the parties which is not specifically incorporated in the agreement of the parties which agreement is considered sacrosanct. The morality of the agreement is not for the court to consider. Courts simply deal with the law as is and not as it ought to be. It is not at all interested in the penumbra or inner meaning of the law which would bring morality into play when dealing with contractual terms. Law, according to this school of thought, which is purely positivistic in approach is divorced from morals and morals occupy no place in the law of contract, thus a judicial officer cannot look either to the right or to the left in interpreting a contract. His duty is a strait jacket, he does not see beyond what the parties had agreed to in black and white.

In the Ashanti gold case, the court was called upon to decide whether the parties had concluded a valid and enforceable agreement of sale. Ashanti gold had offered its houses for sale to its workers, and it proceeded to deduct monthly instalments from its worker's payslip. The purchase price was agreed on but, in the process, Ashanti sought to backtrack on this and to evict its employee from the premises. The employee approached the court seeking to enforce the agreement. The court found for the employee, a finding which did not go down well with Ashanti resulting in the appeal to the supreme court.

In Kundai Magodora and others v Care International Zimbabwe Patel JA came to the same conclusion when he maintained that

"*In principle, it is not open to the courts to rewrite a contract entered between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See Wells V South African*

[36] Ashanti Goldfields Zimbabwe Limited v Jafati Mdala SC 60/17.

Alluminate Company 1927 AD 69 at 73. Christie. The Law of Contract in South Africa (3rd ed) at p 14-15. Nor is it generally acceptable to read into the contract some implied or tacit term that is directly in conflict with its express terms. See South African Mutual Aid Society v Capetown Chamber of Commerce 1962(1) SA 598 (A) at 615 D: First National Bank of SA Ltd v Transvaal Rugby Union Ana Anor 1997(3) SA 851 (W) at 863 E-H"

The facts of the case in Kundayi Magodora matter the facts were that Magodora and others were employed by the respondent on fixed term contracts of 9 months duration. Before the expiry of the last contract, the respondent terminated the appellant's contract of employment three months before the expiry of the life term of the contract. The Respondent offered to pay the appellants one month's salary in lieu of notice. This was contrary to a clause in the contract of employment which required the respondent to proceed by way of retrenchment in the event of the respondent opting to prematurely terminate the contract. The appellants took up issues with that and the respondent accepted that termination could have been unlawful. It proceeded to cancel the notice of termination and to reinstate the contracts with full pay to date of the full life of the contracts. The matter was referred to arbitration and the arbitrator concluded that the appellants were not retrenched and in the circumstances the respondent was entitled to cancel the notice of termination and to reinstate the contract. An appeal was noted to the labour court which upheld the arbitrator's decision. The appellants approached the Supreme Court seeking an order declaring them to have been unfairly dismissed and declaring them to be permanent employees on contracts without limit of time and without loss of salary and benefits running from the date of dismissal. In the alternative, they sought for an order deeming them to have had been reemployed for a further period of nine months from the date of dismissal on the same terms and benefits.

Despite these vicious attempts to exclude good faith from the law of contract, Guvava JA could not help but come back to the principle in Ashanti Goldfields case when she eventually used good faith as a negative tool in interpreting a contract. The learned judge lastly opined that if Ashanti Goldfields were to continue with its argument that there was no agreement, then it "*can only be*

construed to be acting in bad faith and as stated in the above cases, courts are not there to absolve a party of its obligations to the another particularly where the other party contracted in good faith and carried out its side of the agreement."

This forward and backwards movement by the court clearly point to the existence of a legal problem in relation to the place, role, and relevance of the principle of good faith in our law of contract as hybrid jurisdictions justifying this inquiry.

It is quite lamentable that despite the coming into existence of the Constitutional Court of Zimbabwe no case on good faith has been referred to the constitutional Court for consideration. It would have been interesting to see how the Apex Court would have dealt with good faith in contract law.

A closer look at the law of insurance in Zimbabwe will accept that the principle of uberima fide, that is, utmost good faith is a running theme and forms the cornerstone of all insurance contracts.

The Zimbabwean position generally follows that obtaining in South Africa as shall be demonstrated below. It is characterised by the usual common law hostility to the reception of good faith under the unknown fear of destroying old age principles in our law of contract which have stood the test of time. It is further feared that allowing judges a blank cheque to review contractual agreements freely and voluntarily entered by the parties based on the judge's own subjective understanding of what is morally wrong or good will result in the individual judges substituting their perceived subjective intentions to those of the parties. Seen in that light, Zimbabwean response to reforms accommodating the principle of good faith is not characterised with the speed of a revolution but rather same is gradual. This could be a result of overreliance on precedence in our law and precedence unknown to be unacceptable to change.

This conservative position in Zimbabwe law of contract has not yet been tested following the recent constitutionalisation of the Zimbabwean common law of contract under section 46 of the Constitution of Zimbabwe, which section introduces moral standards into our law of contract under the Bill of Rights which must be

considered when interpreting any provision in a contract. It is however likely that the Zimbabwean courts will follow the direction taken by South African Courts in this regard. The Bill of Rights entails such principles of legitimate expectation, equity, fairness, and honesty, which are all but subjective moral considerations. Constitutionalism in Zimbabwe has indeed ushered in a new era and a new lifeline to good faith as a principle of contract. It remains to be seen how the Superior Court will deal with the provisions of section 46(2) to accommodate good faith and to spearhead its elevation from a mere principle to a rule of contract. Failure by courts to consider this constitutional requirement may lead to a decree of invalidity[37] being granted. It is however noted with regret that the same constitution does not make the freedom to contract a fundamental right.

1.5 THE CURRENT SOUTH AFRICAN LEGAL POSITION

There is currently going on in South Africa a debate on the relationship between good faith and the law of contract. This has been going on for some years in appeal courts of South Africa and has now spilled to the Constitutional Court of South Africa. Still, no solution could be provided to the unending dilemmas of good faith in the law of contract. The South African Constitutional Court is reluctant to embrace good faith as a principle of contract law. This unwillingness stems from the influence which positivism have on South African law of contract. It comes with a system of precedents which 'does not lend itself to radical change. It has an inherent restraint, in that judge who take steps forward to do so in the knowledge that they are not only deciding the cases before them, but that they are laying down the ground rules for deciding tomorrow's cases as well. The result is changes by courts are implemented incrementally-and, as far as possible- within the framework of existing legal principles.'[38]Previously, the exceptio doli was recognised as a defence both in Zimbabwe and [39]South Africa and it was used to introduce the concepts of equity into the Zimbabwean and south African law. In South African jurisprudence, the exceptio doli generalis suffered a crashing death in 1988 in the Bank of Lisbon and

[37] Section 2 of the Constitution of Zimbabwe.
[38] Mr Justice F D J Brand, The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common law and the Constitution. 2009 (126) SALJ. 71.
[39]Reinhard Zimmermann& Daniel Visser, 'Introduction, South African law as a mixed legal system' (1996) 1 at 25.

South Africa Ltd v De Omelas[40]under the hand of Joubert JA, writing for the majority where the learned judge buried the doctrine as 'superfluous defunct anachronism'. The majority held that the exceptio dolis was wrongly accepted into South African law, it was never part and parcel of Roman law. To enhance certainty in the law of contract the court found it noble to do away with the exception which was viewed to conflict with the principles of sanctity and freedom of contracts. This was also a means of doing away with subjective intent of judges which would in most cases replace the real intention of the parties. It is important to note that the courts found it difficult to completely do away with the exceptio doli generalis because it had become part and parcel of the south African law of contract whose common law is to a greater extent based in English law. It contains several equitable principles which forced Joubert to note that 'but equity, as distinct from and opposed to law, does not prevail with us. Equitable principles are only of force insofar as they have become authoritatively incorporated and recognised as rules of law.'[41]It has often been said that the exceptio doli in South Africa did not have to wait for three days before resurrection, it resurrected on the same day of burial with descending judgment of Jansen J writing for the minority when he said in the Bank of Lisbon case:

"The exceptio doli generalis constitutes a substantive defence, based on the sense of justice of the community. As such it is closely related to the defence based on public policy (interest) or bonis mores."

The minority judgment in the Bank of Lisbon case sows a seed for its resurrection, thus in Bristle v Drosky [42]the majority judgment criticised attempts to resurrect the doctrine which it said was not part and parcel of South African law thus pronouncing the funeral rites for the doctrine.

However, in Barkhuizen v Napier[43] the Constitutional Court of South Africa left the door open for future development of good faith in contracting [44]. The door has even

[40] 1988(3) SA 580(A).
[41] Kotze J in Weinerlein v Goch Buildings Limited 1925 AD 282at 295
[42] 2002 4 SA 1(SCA).
[43] 2006 4 SA 1 (SCA).
[44] AM LOUW (no.34 above).

been left wide open in the more recent case of Everfresh Market Virginia v Shoprite Checkers[45]

Good faith seems to be given a lifeline through consumer protection legislation both in Zimbabwe and South Africa. In Zimbabwe, section 41 and 45 of the Consumer Protection Act[46] are on point. The case of Parkview Properties v Chihambakwe [47]seem to have given life to the doctrine but later decisions after it seem to endorse the decision in Sasfin (pty) ltd v Beukes[48].With the confirmed death of the exceptio dolis, there arose the need to consider other approaches to the question of unconscionable contracts[49].

One commentator sums it all when he described the circle of good faith as that of "recognition and denial".[50]It is interesting to note that the progressive constitutions in both South Africa can usher in a new dimension to good faith considering the ubuthi value in South African constitution and our bill of Rights in Zimbabwe. It remains to be seen how this constitutional wave will affect the nature, place and proper role and meaning of good faith in our law of contract. It is claimed that the future of good faith in the law of contract in both Zimbabwe and South Africa is quite brighter considering the new constitutional dispensations in those two countries. It is hoped that the superior courts will make a pronouncement on this vexing question of good faith in contract sooner than later, if not, then such hopes can only be pinned on legislative reforms.

[45] 2012 1 SA 256 (CC).
[46] Chapter 14;44.
[47] 1998(1) ZLR 409(H).
[48] 1989(2) SAL (A).
[49] Malan FR and Pretorius IT, "Contemporary issues in South African Banking Law" (2001) THRHR 268 at 283
[50] AM Louw YET ANORTHER CALL FOR A GREATER ROLE OF GOOD FAITH IN THE SOUTH AFRICAN LAW OF CONTRACT: CAN WE BANISH THE VLAW OF THE JUNGLE, WHILE AVOIDING THE ELEPHANT IN THE ROOM?

1.6 LITERATURE REVIEW

As conceded to earlier on, this is not the first write up on this area. Several academics and judicial officers have written at length about this subject.[51] Christie summaries the issue as being about unconscionability of a contract clause

Whether courts should be given powers on review to strike down such contract clauses as being unconscionable or unreasonable? The starting point by both Zimbabwean and South African courts is always the common law's hostile approach to the reception of good faith expressed recently by Leggatt J in Yan Seng PTE Ltd v international Trade Corporation Ltd [52] as that "… *in English contract law, there is no legal principle of good faith of general application…… Three main reasons have been given for what [has been called] the traditional hostility towards the doctrine of good faith …. The first is …… that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism whereby parties are free to pursue their own free interest not only in negotiating but also in performing the contract provided they do not act in breach of a term of the contract. The third main reason is the fear that recognizing a general requirement of good faith in performance of contracts would create too much uncertainty.*" Christie noted that the default clause is against interference. This is in line with several Zimbabwean judgments by superior courts though no pronouncements have been done on the matter at the time of writing by the Constitutional Court of Zimbabwe. In South Africa, the application of the principle has been punctuated by swerving from one end to the other but generally courts adopt a default stance of non-interference in the agreements of parties. Other academic writers like Jonathan Lewis [53]maintain that default clause is no longer tenable and urge for a more progressive approach which entails a shift from a positivist dominated mentality of the judiciary to acceptance of the general application of good faith in contract law. They argue that fear of uncertainty is just a fear of things unknown, and that legislative intervention

[51] Christie The Law of Contract in South Africa 4 ed (2001) 17.
[52] 2013 EWHC 111 [QB].
[53] FAIRNESS IN SOUTH AFRICAN CONTRACT LAW.

is necessary to change the legal position as courts are generally afraid of usurping the functions of the legislature by coming up with judge-made laws. Contemporary trends in other jurisdictions are also taken into consideration. In America, changes came through legislation like the Uniform Commercial Code [54]and the same thing happened in the United Kingdom where changes also came through legislation like the Sale of Goods Act[55]. Basically, there are two competing schools of thought, one for and the other against good faith. Those against hold the view that there are already in existence other established principles of contract which can perform better the same task to be performed by the province of good faith without causing uncertainty to the future of the law of contract. These are influenced by positivist legal philosophy. On the other hand, there are others for it who hold the view that good faith is so central to the law of contract to the extent that it cannot be ignored. To them, good faith embodies elements of public policy' equitable considerations and moral standards. It's like our new constitutional framework[56] talks to good faith in as much as it imposed on courts new interpretation rules [57]requiring them to consider the bill of rights in interpreting any provision [58].One cannot escape equity considerations anymore because any interpretation against the constitution will be contrary to this evasive phrase -public policy and will be declared invalid to the extent of its inconsistency[59].

1.7 METHODOLOGY OF STUDY

The methodology of research adopted here is generally referred to as positivism which involves posing of questions, and attempts at interpreting certain terms based on logic, sometimes referred to as logical positivism, with a view to see how law as a science, can be developed. Law is seen from this context as is and the role of the judge is to interpret it as is.

[54] 1953.
[55] 1979.
[56] Constitution of Zimbabwe.
[57] S 46 (10 (a) &(b) of the Constitution of Zimbabwe.
[58] S 46 (2) Zimbabwe Constitution.
[59] S2 (2) of the Constitution of Zimbabwe.

The research starts from observation, a process which involves data gathering through generalisation and formulation of law sometimes referred to as induction. It is followed by verification of the generalised facts and a search for new facts. Each and every new fact is subsumed or explained under a process known as deduction. Human experience has also been used where reference is made to other jurisdictions.

Research proceeds from analytic interrogation of current jurisprudence available around study inclusive of critical analysis of decided cases both in Zimbabwe and South Africa, examination of place of rules and principles in the law of contract, an inquiry into the conceptual basis of legal rules, principles or doctrine and comparative analysis with legal position obtaining in other countries. It will end by making use of constructive tools to recommend a legal position.

1.8 PLAN OF STUDY

This research is divided into five (5) chapters. Chapter 1 is made up of the introduction and a defining statement to the problem to be addressed. Noting that the area of research is too vast an area, the same chapter also seeks to limit the scope of study to objective good faith as opposed to subjective good faith and comes up with some research questions to be answered and it also puts into perspective the justification for the research. Chapter one (1) also covers what definition has been understood to mean both by the courts and in those jurisdictions where it is codified, it thus deals with the definitional problem of good faith, the current legal position in Zimbabwe and South Africa, literature, and methodology of study. Chapter two (2) covers the theoretical bedrock of good faith, good faith in historical perspective tracing its origins to Roman law. It also covers the position of good faith in medieval and 19th century law of contract. Having traced the historical and theoretical origins of good faith the chapter also seeks to identify the universal nature of the definitional problem, the legal nature of good faith and will mainly concentrate on objective as opposed to subjective good faith. The chapter will close by looking at the essential elements of good faith and its application by Zimbabwean and South African Courts. Chapter three (3) is mainly concerned with the interplay between public policy and good faith. To enable readers to reach an objective understanding of the interaction between public policy and good faith, the chapter

seeks to give a definition of public policy and its theoretical foundations. Chapter four (4) deals with the constitutional framework and mainly with the aspect of how the constitution can be used to bring about reforms to our law of contract through the infusion of constitutional values into common law. It thus seeks to identify the place of moral values in the constitution. Chapter five (5) winds up the whole thesis by way of a conclusion and addressing the need for reform in our common law.

CHAPTER 2

2.0 THEORETICAL FOUNDATIONS OF GOOD FAITH

In Ng Giap Hon v Westcomb Securities Pte Ltd[60]the Singapore Court of Appeal declared that;

> "*The doctrine of good faith continues ….. to be a fledging one in the Commonwealth. Much clarification is required, even at theoretical level. Until the theoretical foundations as well as structure of the doctrine are settled, it would be inadvisable (to say the least) to even attempt to apply it in the practical sphere*."

The accordingly refused to endorse an implied duty of good faith as a matter of law in the context of contractual performance. The refusal was on two grounds. Firstly , the court was concerned about the uncertainty linked with the theoretical foundations of the doctrine of good faith itself which it took to be a fledging one and the absence of decided cases on the area in both Singapore and United Kingdom and, secondly, the uncertainty surrounding the definition of good faith which has been defined by others in terms of the excluder theory to mean the exclusion of bad faith became a reason for its refusal by the court in order to make law more certain and predictable. This judgement has been criticized as an attempt by the Court Appeal to dodge the real matter before it which called for it to determine the proper role, nature, and function of good faith in contract law[61]. Instead of providing the much-needed clarification, the Court of Appeal decided to leave it open to a future date to decide the issue.[62]

The sentiment expressed by the Supreme Court of Singapore deserves some academic respect in form of research into the origins of good faith in contract law. The good faith principle is traceable to the very origins of trade itself. The Hon

[60] (2009) 3 S.L.R.(R.) 518 (C.A.) (Westcomb).
[61] Colin LIEW, A LEAP OF GOOD FAITH IN SINGAPORE CONTRACT LAW.
[62] Colin LIEW (note 60 above).

James Douglas[63] traced the so-called debate on good faith to trade and concluded that the problem or debate is "as old as human trade". Judge Scalia in Tymshare lnc also came to the same conclusion in reference to the modern-day doctrine of good faith which he said was "simply a rechristening of fundamental principles of contract law, well established."[64]The advent of trade marked the coming into play of good faith. There was need for a trade-off of some sort between "commercial certainty and fairness."[65]Thus, in the book, Willie's Principle of South African Law, it is written:

> "*At every stage of contracting process, from the negotiations through to the performance of obligations undertaken in the contract, parties are required to behave in a manner consistent with good faith. As an ethical value or controlling principle founded upon community standards of fairness and decency, good faith underlines and enforces the entire law of contract, shaping its content and finding concrete expression in the technical rules and doctrines. Its influence is merely indirect. However, for the courts to have recently ruled that good faith does not afford an independent basis for striking down or refusing to enforce an agreement, or any other provisions; nor is it at erm of every contract that the parties must perform their obligations in accordance with the dictates of fairness and good faith*."[66]

It is traceable to Roman law though common law limitations to the doctrine like caveat emptor, that is, let the buyer beware were common. Some authorities say" bona fides and\or aequitas also dominated relations between merchants and became a fundamental principle of the medieval and early modern lex mercatoria."[67]Good faith was seen as a prime mover and life-giving spirit of commerce mostly required by those in trade under Roman law. A classic example of its existence and recognition in Roman law is traceable to the works of Cicero on moral philosophy cited with approval by Hon James Douglas in his paper delivered at the LexisNexis

[63] Exploring the Recent Uncertainty Surrounding the Implied Duty of Good Faith in Australian Contract Law; The Duty to Act Reasonably-Its Existence, Ambit and Operation." (Paper presented to the LexisNexis Contract Law Master Class,24 August 2006).
[64] Tymshare, lnc.v. Covell,727F.2d 1145.
[65] Liew (no 60 above).
[66] Francois du Bios et al. Willie' Principles of South African law, 9th edition, page737/8.
[67] Zimmermann, Reinhard/Whittaker, Simon, Good Faith in European Contract law, Cambridge 2000.

Contract law Master Class24 August 2006[68]. Cicero wrote [69]to his son just before his death advising his son that.

"What is morally wrong can never be expedient"

And he urged his son to make this an established principle.

One characteristic of all civil law jurisdictions is that the law is codified into statutes by parliament. The role of the judge under civil law is to interpret the law and not to make it. Law making is a preserve of the legislature and the principle of separation of powers between the judiciary, parliament and the executive is strictly observed. Under the civil law, the idea of bona fides first appeared in German and French. Good faith is a running theme in these two codes and has attracted several writings on it. Suffice to note that in Germany and France, good faith has been codified.[70] Parties are obliged to act in good faith as a matter of law. The contribution of the statutory statement on good faith in these two countries did not go unnoticed as observed by Professor Schermaier;

> "*The principle of bona fides, as incorporated into the general clauses render a substantial contribution to the adaptation of the codified law to changing social values. They thus contribute…...realisation of the social ideal. Without this constant regard for fairness, justice Roman law would not have survived throughout the ages; and the modern codifications, too, would have become useless and outdated, had they not provided space for operation of bona fides.*"[71]

There is of course, in existence, an interplay between the law of contract and theory of a legal nature. This cannot be ignored in treaties of this nature, neither can it be downplayed. At the centre of legal theories are two main schools of ought, namely positivism and natural law school of thought which are opposite to each other. The opposition is extreme and revolves around acceptance of moral values into law often

[68] EXPLORING THE RECENT UNCERTAINTY SURROUNDING THE IMPLIED DUTY OF GOOD FAITH IN AUSTRALIAN CONTRACT LAW; THE DUTY TO ACT REASONABLY-ITS EXISTENCE, AMBIT AND OPERATION.
[69] De Officiis, (Obligations or Duties), Book III {50}-{53} translated by Walter Miller, Loeb Edition, Cambridge: Harvard University Press, 1913 reproduced at http://www.stoics.com/cicero-book.html.
[70] Article 1134 of the French Code Civile and section 242 of the Germany Civil Code.
[71] M.J. Schermaier, Bona fides in Roman contract law.

referred to as the battle of "is" and "ought". The law as is, is separated or distinguished from the law as its "ought" to be. One school maintains that the function of the courts is to interpret the law as is, and the courts have no business looking beyond this simple task and, an acceptance of moral values in the field of contract law will bring about uncertainty as judges will factor in their own subjective understanding of moral values quite different from what the parties to an agreement originally intended. This school of thought does not hide its hostility to the reception of subjective variants to the law of contract. Indeed, positivist theory thrives well in common law jurisdictions and this theoretical background underpins the hostility common law jurisdictions have to good faith which is viewed a subjective abstract.

As a contrast, there are those who believe otherwise, that there is a superpower responsible for the creation of everything living and non- living. They ascribe this function to the creator. They view law as a product of a social contract. law is not, to them, divorced from morals or social standards. These belong to the naturalist school of thought and to them, law is a product of society, and it contains social moral standards of what is good and what is wrong. It is from this theory that such moral standards like good faith derive authority from.

2.1 GOOD FAITH: A HISTORICAL PERSPECTIVE

The principle of good faith passed through three historical stages in its development. Namely, the Roman law period, medieval law and the nineteenth century period marked wot the first codifications. As noted above, good faith has Roman origins.

A. Roman Origins

Greek philosophical scholars played an important role in the introduction of the principle of good faith in the Roman law of contract.[72] The philosophers who played

[72] Article 6, Quebec Civil Code – Article 2 Swiss Civil Code.

that important role were Stoic' Pythagoras and Zeno whose works touched greatly on the notion of justice and equity which opened contractual works "*to the ethics of what is just and equitable, the letter according to Cicero's dream linking all men, citizens or pagans in a universal society of born Viri, of good men*."[73]

The Roman law period was characterized by a procedure of the formulae system which had the Praetor, a magistrate who would take cases from citizens an bring them before a judge. The Praetor would only accept matters with a predetermined formula and these formulas were limited in number of available rights. The Praetor could not create new formulais though after 159BC he was endowed with powers to create new Formulae. This was during the period of the expansion of the Roman Empire to cover the whole area of the Mediterranean basin. As a result of expansion, the requirement for Praetors grew as they grew too in number resulting in the creation of the Post of a magistrate who could only deal with matters related to foreigners who had nothing to do with Roman law. The expansion of the Roman Empire brought about modifications to the Roman procedural legal system which ended up borrowing from the law of foreigners when the Peregrine Praetor (foreign magistrate) adjudicated on matters involving foreigners. It is important to note that the law of foreign citizenry was nothing but a creation of the foreign magistrate. It gave birth to good faith rights of action and Bona Fides actions. The list of these rights is dependent upon each stage of development of the concept of good faith, but initially it covered such issues like guardianship, fiduciary duty, agency, rentals and sales contracts.[74] The list was later expanded by Gaius to cover Negatorium Gestorum deposits, Societas and l'actio rei uxoriae.[75] During the Justinian period the list of rights of actions was added to include pledges, claims to divide property, claims to succeed to estates held by third parties and the action for exchanges and estimation of contracts.[76]

It was initially created to solve legal relationship which did not fall within the ambit of the law as between foreigners to whom Roman law could not apply but these

[73] R. M. Rampelberg, Reperes Romains pour le droit europeen des contracts, L.G.D.G.J., Systemes, Droit, 2005. P43.
[74] De Officiis, Published in 44BC.
[75] Institutes, 143 A.D.
[76] Institutes, 533 A.D.

rights eventually found their way into the jus civille (Civil law that applied only to Roman Citizens) around the 2nd Century B.C. During that period, judges were allowed to intervene in contractual relations protected by good faith rights of action in the determination of damages and creation of obligations based on social morality. The moral obligations were determined and established by the Praetor, and they developed into legal obligations thus securing for themselves a place in the Roman legal system. They featured mostly as defences to non-performance or to compensation. It also allowed the judges to determine whether a party's conduct after contracting was in line with that of an honest man. Seen in that light, it was used during the Roman period to establish a man's actual intention at the time of contracting. Party's intentions were limited by three types of obligation namely.

A) The Essentialia.

That without which an Act cannot exist, for example the object sold and the merx paid in a contract of sale.

B) The Naturalia.

That which is included in a contract unless expressly excluded like a guarantee against attack on property rights

C) The Accidentalia.

That which is only excluded in a contract by virtue of an express clause like a liabilities guarantee.

Historians maintain that there was a split in the understanding of bona fides contractors between the fourth and fifth century A.D. During that period, contracts of good faith were either entered in ignorance of an unfavourable element or were concluded honestly and thus were free from attack.

B) Good faith in medieval law

Conclusion of contracts based on good faith became a rule rather than an exception from the 12th century onwards. Verbal contracts were prevalent until it was made a principle that no right of action is created from a bare pact. The concept of

consensus, that is of meeting of the minds was only recognised as a general principle of Roman law around the 16th century and during the same period, good faith was elevated to a general principle of both national and international commerce which saw the emergence of the principle of Exceptio Doli which became the pillar of theory of abuse of rights. The period also bore witness to the interaction between good faith (bona fides) and equity (equitas). During the reign of Constantine in Rome, good faith was proclaimed as an essential principle of the entire Roman legal system which was elevated to a supreme source of law during the Justinian times. Needless to mention that during this period there was an overlap in function of good faith and equity owing to the expansion of the principle of good faith which had received general application resulting in confusion with equity.

The contemporary problems in understanding the concept of good faith emanate from this period. To some extent, it can be argued that Roman and medieval law brought us closer to understanding the meaning of good faith in the 19th Century period.

C) Good faith in the 19th Century

This is a period marked with a lot of religious belief, where God was taken to be the originator of all things including good faith which could not be changed by man. Laws were differentiated between immutable laws and arbitrary laws. Immutable laws were those God-given laws to which there can be no derogation.[77] Good faith comes from natural law and was general recognised in commercial contracts. The natural law school came into sharp contract in the 19th century with the positivist school of thoi8ght led by Emmanuel Kant, Friedrich Von Savigny, which treated law as a science of social relationship in which experience had an essential role.

The role of judges and how to avoid a judge's arbitrary discretion became a sticky point during this period. Natural law theory suffered its greatest attack during this period and its notions were held to be totally vague to introduce uncertainty in the law. This notwithstanding, good faith continued to grow though without a definition

[77] J. Domat, Traite, Des Lois 1869.

nor consensus regarding its exact legal nature, a weakness which affects good faith in contemporary law.

We have interrogated the historical and theoretical origins of good faith. It is now important to inquire into why the term is not acceptive to one definition worldwide. Is the definitional problem, a common problem internationally?

2.2 UNIVERSAL NATURE OF THE DEFINITIONAL PROBLEM interrogated the historical and theoretical background of good faith, it becomes more clearer that the definitional problem is not limited to Zimbabwe and South Africa alone. Even courts differ in their understanding of this elusive term good faith. There is no universally acceptable definition of good faith ever handed down by the courts. It is a universal problem. In those jurisdictions like the United States of America where the law of good faith is codified,[78]a statutory definition or statement is given. 'Good faith is defined to mean "honest in fact and the observance of reasonable commercial standards of fair dealing."[79] It is interesting to note that before codification in United States, each State would apply the principle of good faith and define it according to its socio-economic and historical developments. Following codification of the principle good faith, it has now been elevated to a rule of law of contract in the States requiring every contract to be performed and enforced in good faith.[80]It is a duty imposed on all parties by operation of law.

The legal duty encompasses an objective standard or test of a reasonable man in commerce. How would a reasonable man react to a given conduct. It does not encompass the subjective test thus avoiding the threats alluded to earlier to the foundational basis of the law of contract. This approach of changing the common law hostile position to good faith through the legislative arm of the State is more commendable so is the form, nature, and content of good faith to be embraced.

However, that is not to say where the duty has been made into law by an act of parliament there is no criticism attached to it. Uncertainty continues to dodge the doctrine in several jurisdictions like Australia where the role and place of good faith

[78] The Uniform Commercial Code
[79] Section 1-120(b)(20) of the Uniform Commercial Code.
[80] Section 1-304 0f the Uniform Commercial Code.

in contracting has been described as "ambiguous"[81] and, in America, despite codification it is described as in a state of flux.[82]

Suffice to note that the good faith debate has received recognition in international instruments like the Vienna Convention on International Sale of Goods to which Zimbabwe is not a member, where good faith is a running theme.[83]It is also a running theme in the UNIDROIT principles of commercial contract.[84] It is already been noted at municipality level that good faith is used as an interpretation of contract especially in dealing with matters of ascertaining the true intention of parties at the time of contracting, it is also used at an international level as an interpretative tool to interpret legal texts in a treaty or international agreement. The real spirit of the parties at the time of contracting comes in play and a restrictive interpretation of their intention is thus avoided. Legal formalism is also put aside, and the parties maintained a clear distinction between strict law and actions considered to be bona fide. The origins of good faith need not to be overlooked, mainly that it is a social phenomenon which developed from society's moral standards of what is good and what is wrong, and it rules out bad intentions. In contemporary times, good faith appears in many international covenants and codes as a norm of interpretation, as a source of obligation and sometimes as a mistaken belief, a ground of validity of certain situations.

It is a fundamental principle of public international law and a running theme in several international treaties and conventions. The Vienna Convention on the Law of Treaties for instance has a clause on good faith expressing the binding nature of a treaty in force upon the signatories to it and stressing that such a treaty must be performed by the parties in good faith. The same treaty provides for interpretation which should be done in good faith and in accordance with the ordinary meaning assigned or ascribed to the terms of the treaty in their context considering its

[81] Mathew Harper, The Implied Duty of Good Faith in Australian Contract Law (2004) 11;3 MurUEJL 22.
[82] Howard O Hunger, "The Growing Uncertainty About Good Faith in American Contract Law" (2004) 20;1 JCL 50; Ng Giap Hon at [57].
[83] Article 7.1 of the Vienna Convention on Sale of Goods.
[84] Article 1.7 (1) of UNIDROIT.
Article 26 of the Vienna conversion of the law of treaties, 23 May 1969.
Article 31 of the Vienna Convention on the Law of Treaties.
I Article 10 of the European Treaty.
Article 5 of the Unilateral Conversion.

objectives and purpose. The European Human Rights Treaty also refers to goof faith though without using the term when it calls upon member states to take appropriate steps, be it in general or to ensure that all obligations arising out the treaty are fulfilled, and that parties must facilitate the achievement of the treaty goals and objectives the provision of the Vienna Convention thus have been road railed into the European Union Treaty.

The United Nation Convention on international trade generally referred to as UNCITRAL also stresses the need of good faith in international practice. It goes without saying that good faith has assumed international recognition because several international texts refer to good faith even at international level. Good faith has attracted international attention though without a definition. Good faith does not only feature in international agreements, but it is also a recognised principle of international arbitration which requires that agreements be applied in good faith. This approach accommodates the intention of the parties at the expense of the literal approach and has been buttressed by the sentence of 10 June 1995 delivered by President Cassin on interpretation of contacts clauses in a contextual manner which takes the contract as a whole as a means of bringing out the common intentions of the parties, and when controversy is aroused by a term there is need to interpret such a term in accordance to good faith principles which detects that the party acting in bad faith cannot claim benefit from the rigours of law when he does not uphold is part of bargain.

In countries where the law is codified, there is greater use of good faith. This is principally the case in countries like Germany, America and the Netherlands where good faith now occupies the place of a general principle in the law of contract. This of necessity changes its role or function from that of an interpretive tool to one extending the ending of the contract. In that state, it plays a regulatory role in the law of contract. Thus, good faith is applied in UNIDROIT principles where there is absence of agreement to a term of great importance to the determination of their rights and duties. There is need to add a term that defines the intention of the parties, the nature and purpose of the contract, good faith and fair dealing and reasonableness are ordinarily such terms employed to achieve this.

Earlier on and at the time of formulating the research problem, it was the writer's intention to write more on the elevation of the principal of good faith from a mere principle or norm to a rule of contract as a panacea to the good faith debate. That argument will still find relevance in this research work. For now, after considering the definitional puzzle brought about by the phrase 'good faith', it is important that its nature be interrogated.

2.3 LEGAL NATURE OF GOOD FAITH

A) Objective good faith defined

It has already been noted that good faith as a norm in the law of contract attracts several difficulties and it is a principle riddled with a lot of uncertain boundaries ranging from the definitional dilemma to what it is, that is, its legal nature. From the Court definitions formulated in several jurisdictions, it is possible to deduct two meanings and two functions of good faith which informs its nature in the law of contract. The good faith principle has a dual nature in real legal parlance. Looked at objectively, good faith encompasses both the objective and subjective elements, and this dichotomy manifests itself in several legal systems but is not enough to simply brush aside the uncertainties coming with the notion and function of good faith.[85] The real problem of good faith emanates from its lack of definition which has seen quite a number of academics defining it in the way in which it is applied and by what it is not. Some define it by the way it operates. In the objective sense, good faith is seen as a method used to introduce morality into contractual relations and to balance the scales of inequality that will result from too much reliance on the party autonomy theory in contract law, where agreements are seen as sacrosanct, and a result of parties having willingly come together and agreed on the clauses. Seen in that light, no man should temper, and good faith would have no place in the law of contract.

On the other hand, subjective good faith which is not worth the writer's attention relates to protection of a contracting party's mistaken belief and it gives effect to appearances. This other life of good faith has attracted a lot of criticism with several

[85] E. Poillot, Droit euopeen de la consummation et uniformization du droit des contracts, Pref. P. de Vareilles-Sommieres, L.G.D.J., Tome 463, 2006.
63 Ph Fouchard, E Gaillard, and B. Goldman, Traite de l'arbitrage commercial international, Litec 1996 n1470.

writers emphasising that it leads to uncertainty in the law of contract, especially where it gives individual judges the discretion to deal with a particular case in a manner, they deem fit.

Thus, in HSBC Institutional Trust Services (Singapore) Ltd Trustee of Star Hill Global Real Estates Development Trust v Toshin Development Singapore PTE Ltd 2012 SGCA 48, para 46, It was held that

> "Good faith has both a subjective and objective sense. The subjective sense requires honesty in fact, while the objective sense requires compliance with standards of fair dealing—it is without question true that the result of subjective good faith will be legal uncertainty, but it Is submitted that good faith in the law of contract has an objective nature. Most countries which have a civil code refer, in the law of contract, to good faith and rely on this norm— It would be absurd to contend that the law in these jurisdictions differ from judge to judge or from party to party. It is submitted that in all these cases (civil law) jurisdictions, the courts have, in conjunction with legal science, developed an objective norm of good faith which governs the conduct of contracting parties."[86]

In other jurisdictions apart from Europe or the Americas, it is observed that

> "The duty of good faith refers not to the abstract and fixed moment of formal contract formation in which parties are judged as contracting agents, but rather to the unfolding time that leads to and follows contract formation as experienced in the daily lives of the parties—The repersonalisation of the law looks to recover the basis of the reciprocity and trust that underlies contract relations. In principle, the contractual promise is the giving of one's word, and there is a moral basis for enforcing the promise because the other party is entitled to count on another's promise under the principle of fidelity. When the word of the promise receives the legal provision for enforcing obedience it becomes a full contract. At this time the expectation that the promise

[86] HSBC Institutional Trust Services (Singapore) Ltd Trustee of Star Hill Global Real Estates Development Trust v Toshin Development Singapore PTE Ltd 2012 SGCA 48, para 46

> generates for the other is transformed into a right, a claim enforceable by law. It is precisely here that the focus on the subjective right tends to obscure the moral roots grounded in solidarity from which the contract springs. The legal system must refuse to close in this manner and must embrace the contract relation as one of autonomous solidarity."[87]

Authorities in the United Kingdom accept that there is an objective test for good faith. This appears more clearly in the 2013 English judgment in Yam Seng PTE ltd v International Trade Corporation Limited[88] where Leggatt J. concluded that

> "*Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people… Understood in the way I have described, there is in my view nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts.. I see no objection, and some advantage, in describing the duty as one of good faith and 'fair dealing'. I see no objection, as the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in which the expression 'good faith' is used.*"[89]

English jurisprudence is entirely common law and exhibits the hostility that legal positivism has to natural law in as far as reception or good faith is concerned. Interestingly, it is to English law that even civil law jurisdictions look up to for a clear identification and distinction of the dual nature of good faith.

[87] Da Siva Filho, 2006 Penn St Int'el L Rev 431.
[88] 2013 EWHC 11 QB.
[89] Yam Seng PTE ltd v International Trade Corporation Limited 2013 EWHC 11 QB.

As stated by M. W. Hesselink[90], "good faith is therefore usually said to be an open norm, a norm the content of which cannot be established in an abstract way, but which depends on the circumstances of the case in which it must be applied, and which must be established through concretisation. Most lawyers from a place where good faith plays an important role will therefore agree that these differences in theoretical conceptions do not matter very much (--) what really matters is the way in which good faith is applied by the courts – the character of good faith is best shown by the way in which it operates. Apart from being used as a rule, it is also used as a standard or a general principle by some. Good faith attracts a lot of debate not only from its lack of definition, but also flowing from how it is used by the courts in situations it is applicable. In this regard, the theoretical difference in good faith do not matter, what matters most is its application or how it operates. Thus, it has been referred to in many instances as a rule of contract, a contractual maxim, a duty, or obligations according to others. The difference is in terminology can be traceable to the inconsistencies in the use of good faith in several jurisdictions and at an international low level. It is worth noting that good faith as a notion cannot be tamed, it exists independently. Objective good faith serves to provide judges with guidelines on how to deal with a particular commercial transaction, and the starting point is to have a reasonable bystander, or a reasonable man placed in the same circumstances and try to figure out how a reasonable man would have objectively reacted.

Objective good faith is used in civil jurisdictions to place a ban on negotiations entered without the genuine intention of concluding a contract. A M Louw points out that formulation for an objective test for good faith conduct of contracting parties is possible without taking into consideration subjective notions of good faith like honest absence of good faith. He views objective good faith as an ethical standard between parties which embraces the notions of trust, an equitable basis of enforcement of promises, reciprocity, an obligation to act fairly, regards to the legitimate expectation of the other party and not to partake of a conduct which a reasonable or honest man would not accept. This, however, is not to undermine part autonomy in contracting especially because parties are free to conclude a contract

[90] M. W. Hesselink, 'The concept of good faith, in towards a European Civil Code', Kluwer Law International, Third fully Revised and expanded edition, 2004, p. 474.

which can be prejudicial to them. Self-autonomy or the ability to regulate one's own affairs or even to one's own detriment, is one's freedom and as important as dignity. Legal convictions of community come into play when one considers objective good faith and notions of freedom cannot be used to perpetuate abuse by a certain class of society by allowing freedom to oppress the weak.

2.4 ESSENTIAL ELEMENTS OF GOOD FAITH

Good faith entails moral standard, legal and ethical principles traceable to natural law theories on law and morality. It entails honesty[91] in dealing, parties to an agreement are required to deal with each other honestly. They are also required to act reasonably [92] with fidelity or loyalty to the bargain, that is, acting consistently to and doing all that is necessary for these objectives to be achieved and to act reasonably and with fair dealing having regard to the interests of the parties.[93] Good faith again calls on the parties to co-operate in achieving contractual objectives. In South Africa, it has acquired a meaning "wider than mere honesty or the absence of subjective bad faith. According to this extended meaning, it has an objective content which include other abstract values such as reasonableness, justice, fairness[94] and equity".[95] Barkhuizen[96] is authority to pronouncement by courts that good faith entails the concept of justice, reasonableness, and fairness.

According to Sir Antony the principle embraces three elements; firstly, an obligation to cooperate in achieving their contractual objects, compliance with honesty standards of conduct and compliance with standards of conduct which are reasonable having regard to the interests of the parties.[97]

Lord Justice Bingham, in Interfoto Picture Library v Stiletto Visual Programme,[98]considered good faith to be an "overriding principle that in making and

[91] Norton Rose Fulbright 'Good Faith and Exercise of Contractual Discretion.'
[92] Jeannie Marie Paterson, "Implied Fetters on the Exercise of Discretionary Contractual Powers" (2009) 35;1 Monash U.L.Rev. 45 at 58-61.
[93] Hughes Aircraft Systems International v Air Services Australia (1997) 76 FCR 1151.

[94] Interfoto Picture Library ltd v Stiletto Visual Programs Ltd. [1989] Q.B. 433 at 439 {C.A.}, Bingham L.J
[95] Brand 2009 SAL 173.
[96] Barkhuizen v Napier 2007 5 SA 323(CC) para 80.
[97] Contract and its Relationship with Equitable Standards and the Doctrine of Good Faith, The Cambridge Lectures, 1993.
[98] [1989] QB433,439.

carrying out contracts' parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which many legal systems must recognise: its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or 'putting one's cards face upwards on the table. It is in essence a principle of fair dealing. "There is general consensus amongst academic writers and case law on the essential elements of good faith to include amongst other things, reasonableness, honesty, fairness, and equity as abstract objective values.[99]In South Africa, it has often been defined by its function where it is seen as an 'ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract…… good faith has thus a controlling, creative and legitimating explanatory function.'[100]

Having looked at the definitional dilemma of good faith, it is essential to consider how this principle has been applied by our courts to the law of contract in general from the inception of the contract running down to execution stage. It is proposed to inquire further into the proper place and role of good faith in the law of contract.

2.5 APPLICATION OF GOOD FAITH BY ZIMBABWEAN AND SOUTH AFRICAN COURTS

The general view of good faith by courts is that it is seen as a "basic principle, which generally underpinned the law of contract."[101]According to some commentators, the Supreme Court of Appeal in Brisley did not abandon the principle of good faith. The courts trade with caution when it comes to application of good faith exhibiting such a conservative approach in its application. The reluctance by the courts to fully embrace good faith as a principle of the law of contract is historical and can be traced to common law hostility to the principle of good faith as part of the law of contract.

The explanation for this hostile reception of good faith as a principle of the law of contract has been eloquently captured by Leggatt J in the celebrated English case of Yam Seng PTE ltd[102] a case where the parties had entered a contract which gave

[99] Brand 2009 SALJ 73.
[100] Nappier (no 35 above).
[101] Hawthorne 2003SAMLJ 275
[102] Yam Seng PTE Ltd v International Trade Corporation ltd 2013 EWHC 111 (QB)

the claimant exclusive rights to distribute the defendant's fragrance in the Middle East, Asia, and Australia. The claimant alleges several breaches of the contract by the defendant ranging from late delivery, refusal to avail agreed products, attempting to cancel the contract etc. The parties' relationship soured resulting in the claimant cancelling the contract and suing for amongst other things, damages for breach of contract, or alternatively rescission of the contract and damages for misrepresentation.

The defendant denied the claim arguing that the claimant had wrongfully cancelled the contract and that there was no repudiatory breach and that they had no duty to perform the contract in good faith.

The issues which fall for determination by the court were:

(a) Whether there was a repudiatory breach committed by the defendant and,
(b) Whether the claimant had affirmed the contract after repudiatory breach.

Interestingly, the English court made a finding that the contract contained a duty to act in good faith which was breached by the defendant by giving the claimant false information knowing it to be false and that the claimant would rely on it.

The judgment is interesting, and a must read in the sense that English law has been known for its hostility to the principle of good faith and, despite this hostility, an English Judge comes up with such sweet legal news which broke up the barriers.

It even went further to note that developments worldwide were towards embracing the principle of good faith as a principle of the law of contract and for English law to remain cocooned in the past where application of the principle of good faith was viewed as foreign to English law was akin to "swimming against the tide". According to the learned judge, most civil and common law jurisdictions now recognise and apply the duty of good faith. The court went on to cite instances where English law recognised the duty of good faith in contracts of Agency and in consumer rights legislation. In all these instances the test to be applied is that of a reasonable man, reasonable test.

If a reasonable person would understand the parties to have intended a duty of good faith, therefore there will be an implied contract.

The courts, interesting apply it as a duty implied by law and not always in the parties' agreement. That the parties' agreement is silent on the duty is neither here nor there, the court will apply it if it meets the requirements of the reasonable man test by operation of law. Its application becomes a question of law and not the will of the parties in line with the will theory. Party autonomy is somewhat put aside, and the law will come in to imply a term in the contract of the parties that they intended, by entering into an agreement, to act in good faith and to be so bound. So, what then is the place and role of good faith in the law of contract? Common law jurisprudence starts with a denial of any role played by good faith in the law of contract. Its existence is denied in toto implying it occupies no space and plays no role in the law of contract.

As noted by Leggatt J," the general view among commentators appears to be that in English contract law there is no legal principle of good faith of general application. Three main reasons have been given for what [has been called] the traditional English hostility towards the doctrine of good faith…The first is…that the preferred method of English law is to procced incrementally by fashioning particular solutions in response to problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby parties are free to pursue their own self-interests not only in negotiating but also in performing contracts provided they do not act in breach of a term of contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective and thus its adoption would undermine the goal of contractual certainty to which English law has always attached great weight. In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide…"

Courts have devalued the role of good faith in contract law preferring the classical liberal theory approach to contracting which is characterised by capitalistic notions of individualism as opposed to a community-based approach.

In Ashanti Goldfields, the Supreme Court Zimbabwe did not hide its position regarding the reception and place of good faith principle in Zimbabwe. It came out guns blazing that the principle was not part of our law and will not be applied in Zimbabwe when it held that:

> "*It is an accepted principle of our law that courts are not at liberty to create contracts on behalf of the parties, neither can they purport to extend or create obligations, whether mandatory or prohibitory, from contracts that come before them. The role of the court is to interpret the contracts and to uphold the intention of the parties when they entered into their agreement provided always that the agreements meet all the elements of a valid contract.*"[103]

Implying a term in a contract of the parties where such a contract did not provide expressly for such an implied term is, in the eyes of the court, a creation of a contract for the parties and is impermissible for the court to do. Such judicial interference in the parties' affairs be it by way of review or what, is not allowed. The prohibition against judicial interference in the affairs of the parties runs from inception to execution of the contract, the courts in Zimbabwe simply would not enforce such a contract as a matter of judicial policy. Emphasis is placed on the role of judges in civil law jurisdictions which is to interpret the law only and, on the caveat subscripto principle where parties are bound by what they had agreed to and appended their signatures to.[104]This is often referred to as the golden rule of interpretation[105] but how far the Natal Joint Municipality Pension Fund v Endumeni Municipality[106]which has been applied even by Zimbabwean courts [107]and is held to be revolutionary per approach in that it buried the golden rule[108]affect this position regarding the golden rule.

The brief facts in Endumeni case were as follows,

[103] Ashanti Goldfields Zimbabwe Limited v Jafati Mdala SC 60/17.
[104] Sheisam Consulting (Pvt) ltd and Anor Energy and Information logistics (Pvt) ltd
[105] See also Nhundu v Chihota 2007(2) ZLR 163
[106] 2012 (4) SA 593 (SCA)
[107] Metro International Pvt ltd v The Old Mutual Property Investments Corporation (Pvt) Ltd and Anor
[108] Zimbabwe National Family Planning v Mabaya HH632-18, Zambezi Gas v N Barber Pvt Ltd

The appellant wanted to recover adjusted pensions from employees of the respondent and the issue revolved on the interpretation of the pension's regulations, that is, whether in terms of the regulations it was possible to recover adjusted pensions. It of necessity invited the court to consider the proper approach to interpretation of documents. This case marks a shift from the literal interpretation of contracts and statutes to one where both the text and context have a role to play in interpretation. The case literally buried the golden rule of interpretation both in South Africa and Zimbabwe.[109]The same position obtains in the United Kingdom which was the first to arrive at that position in Prenn v Simmons,[110]which considered the both the literal and textual meaning.

The eloquent exposition of the law by Guvava JA accepts that, good faith, in as far as it is a duty implied by law and not contained in the agreement of the parties is, on the face of it, of no application in Zimbabwean legal context. It occupies no space in Zimbabwean law. Courts are unwilling or reluctant to embrace it as a principle of the law of contract. This expose by the Supreme court betrays the practical reality that good faith to the contrary shapes the law of contract and occupies a special place in contract law. The seeming denial of what exists explains the somewhat conservative approach by both Zimbabwe and South African courts to the reception and development of good faith as an integral component of the law if contract. It is a reluctance borrowed from English law.

Needless mention, even Guvava JA could not resist application of the doctrine of good faith totally in the Ashanti Goldfields case where she was tempted to apply it in the negative sense to interpretation of the contract between the parties when she finally opined that if Ashanti were to continue arguing that there was no contract then it can be held not to have negotiated in good faith. This, on the face of it, appears to be an irreconcilable contraction in the judgement. At one breath the court is saying the principle is no application but on the other hand it says it can find application should one continue to deny the obvious. This is a clear case of 'denial and acknowledgment" of the principle of good faith by the court once alluded to earlier on. Thus far, the principle is used by courts as an aide to

[109] See Metro International Pvt ltd (note 104 above}.
[110] [1971] 3 AII ER 237(HL).

interpretation of the contract and in asserting the true intention of the parties and not the court's, at the time of contracting. World over, the tide is the general acceptance of the principle of good faith as a controlling principle of the law of contract and even die-hard common-law jurisdiction like England embrace it in their laws of contract. As noted already and for avoidance of any doubt in relation to place and role of good faith in American jurisprudence, same find itself in American statute books, cleared codified through legislative intervention. The same position obtains in Germany and France as noted elsewhere in this article. There is always a general assumption that parties to an agreement contract in good faith, hence its being implied by law.

Prior to the abolition of the Exceptio Doli generalis,[111] good faith was used by courts as a defence to an action in contract law. The English case of Yang is a classic example of the use of good faith but courts as a defence to an action founded in contract. In South Africa we have many such cases clothed under public policy umbrella term where good faith was used as a fashionable defence until the Chief Justice of the Supreme Court of Transvaal set up a three-member bench to inquire into good faith as a defence to actions founded in contract.[112]It suffices to note that good faith cannot be a cause of action, it is a principle not a rule of contract and it is not independent or free floating concept. It can be generally accepted that good faith is used as a rule of broader reach as noted by the Australian Chief Justice Griffith in Butt v McDonald[113]where the learned Chief Justice stated that.

> "It is a general rule applicable to every contract that each party agrees by implication, to do all such things as are necessary on his party to enable the other to have full benefits of all the contract."

It is a general rule of implication which places a negative covenant or duty on all parties to the contract not to hinder or prevent the fulfilment of the purpose of the bargain or covenant. Seen in this sense, good faith is nothing but a contractual duty

[111] Bank of Lisbon case (no. 39 above).
[112] Natal Joint Municipality Pension Fund v Endumeni Municipality [2012] ZASCA 13.
[113] (1896) 7 QLJ 68 at 70-71.

to co-operate imposed on all parties by implication and is used as a tool to construction as noted by Macon J where the learned Judge stated that.

> "The question arises whether a contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party of a benefit. In such a case, the correct interpretation of the contract depends, it seems to me, not so much on the application of a general rule of construction as on the intention of the parties as manifested by the contract itself."[114]

This takes me to the next inquiry, Is there any inter-action between good faith and public policy? It is worth noting that one of the gateways used by courts by our courts to introduce the standard principle of boma fides or good faith to modern contract law is through pushing or advocating for due regard to be heard to public policy considerations. The seed for use of public policy to introduce moral values into contract law appear to have been sown in the Bank of Lisbon case when Jansen JA, delivering a minority judgement recognized in dissent, the Exceptio doli as setting out a defence predicated upon the sense of community justice. The Learned judge of appeal went on to acknowledge that the defence is closely connected to the defence based on public policy and that there is enough space for the two defences to overlap as defences in the sense that if one where to enforce a grossly unreasonable contract that may be against public policy. This material intersection between public policy and bad faith does not to a disconnect between public policy and good faith, instead, bad faith is simply being used by our courts as a tool of construction transferring good faith into the contract on grounds of public policy. It is used as a negative tool of construction to marry good faith to public policy. The Ashanti Goldfields case continue to hog the limelight in this regard especially where the Learned Judge stated that it will be contrary to public policy to enforce an agreement rooted in bad faith. Negative bad faith thus provides the missing link, the bridge connecting good faith to unpublic policy or vice versa when it is used an interpretive tool in ascertaining the true intention of the parties at the time of

[114] Secured Income Real Estate (Australia) ltd v St. Martins Investments Pty limited [1979 ltd HCA 51;144 CLR 596.

concluding the agreement. It is the conduct of the parties during and after the conclusion of the contract that provides the connecting thread linking good faith to public policy in our law of contract. The courts cannot enforce an agreement where one party to it takes conscious and desperate steps to frustrate the other from realising fruits flowing from that which has been bargained for and agreed to by the parties and then approaches the courts seeking to be relieved from his contractual obligations owing to his bad conduct anchored on bad faith. The Supreme Court of Zimbabwe employed negative bad faith to interpret the agreement of the parties in Ashanti Goldfields resulting in it holding that if Ashanti were to continue arguing that there was no contract then that can only go a long way to demonstrate that they contracted in bad faith. They [ASHANTI] would not expect the court to come to their aid. Negotiations rooted in bad faith are illegal and contrary to public policy and therefore not enforceable. As a principle of our law of contract, the agreement ought to be legal for it to be enforceable and this position obtains in many jurisdictions England and South Africa included. An agreement which ills against public policy is unenforceable. This general rule is not cast in stone, it has exceptions and if applied strictly it can result in judges introducing their own subjective understanding of public policy hence the reason why courts were first to place a rider against arbitrary use and application of public policy by courts in striking down contracts based on public policy.

CHAPTER 3

3.0 INTERACTION BETWEEN PUBLIC POLICY AND GOOD FAITH

Several scholars have questioned whether good faith connotes the same value elements as public policy? Some have even queried whether, by referring to good faith we are talking about public policy, is public policy the same as good faith? The principle of good faith presents definitional problems and up to now it's not clear what one will be talking about when he/she refers to good faith because of the absence of a universally accepted definition of the principle. What then is meant by the term public policy, what is public policy, what does it entail and how does it

interact with the principle of good faith in our law of contract? Can it (public policy} be used as a vehicle for the development of the law of good faith in our jurisdiction?

> Just like good faith principle, public policy is a term often loosely used without a precise definition. It does not have a single universally accepted definition. It is too slippery and controversial term to use and, over time different courts have attempted to frame a judicial definition for it.

To inquire of the interaction between public policy and good faith is simply a competition of moral values and standards. Public policy is a moral value same as good faith. They all emanate from a community sense of what is wrong and what is morally right. Courts in Zimbabwe and South Africa have attempted to fuse the two concepts together and to use them interchangeably as if public policy and good faith are one and the same thing. Where the application of good faith is contentious, courts seem to have found a gateway to the use of such equitable standards like good faith through employment of yet another moral value, public policy. The principle of public policy is used against unquestionable contracts as a one in sasine case. In Chaduka v Mandizvidza[115] which involved a third-year student teacher at Morgenster Teachers college in Masvingo, Zimbabwe, who fell pregnant after signing an admission form which contained a clause to the effect that she understood that she would be withdrawn from the college if she falls pregnant. Mandizvidza fell pregnant in her third year in the hands of a person who was not a student. The authorities at the college asked her to withdraw as per clause in her admission form. Mandizvidza approached the court challenging the constitutionality of that clause and she lost in the high court. Aggrieved by the decision of the high court, she approached the supreme court of Zimbabwe seeking a declare latter that the policy of expelling students was unconstitutional in that it contravened Section 23 of the constitution where McNally held that the clause was a contract contra bonis mores or contract to public policy. Of note is the fact that the phrase 'contra bonis mores' which means against good faith was used interchangeably with public policy. McNally held that by making female student teachers sign for such a clause, the conduct of the college was discriminatory against female students and that lack of child care facilities at the college cannot be recognised to discriminate against female

[115] 2002 (1) ZLR 72 (S).

students, and lastly that in the instant case, the principle partonomy to enter into a contract to one's detriment was outweighed by the principle of fairness and that if the courts were to enforce such a discriminatory clause, that will be contrary to public policy.

In Olsen vs Standaloft 1983[116], the court took the cautious approach that even though the courts have powers to invalidate contracts of parties on grounds of public policy, the transaction complained of should be convincingly established to be contract to public policy to justify the exercise of such power. It was further noted that public policy itself generally favours the outmost freedom of contract and that commercial transactions should not be inconvenienced by transactions of that freedom. The face of the case was that a lady Olsten ran an introduction agency for people looking for partners which could lead to marriage. Such people would pay for registration fee and match making. Mr. Peter Standaloft registered and was matched to six to seven women, and he consequently married one of them, and in terms of the agreement which he entered freely and voluntarily, he was to pay Ms. Olsten for the services rendered but he refused to pay. Mrs. Olsten approached the court, and the question was whether this was an enforceable contract to public policy. A split decision was reached two as to one. Most of the bench concluded that there was nothing contract to public policy and that people that offer such type of service should be rewarded. The dissenting minority held that the notion of good morals as per community standards were violated, hence the agreement was unenforceable and contract to public policy.

It is important to note that the minority decision in this case was influenced by the decision in Beadica 231CC and others versus Oregon Trustees[117], a landmark decision dealing with the question of whether the proper constitutional court to enforcement of contractual terms and the ground upon which the court could refuse to enforce the terms for being unfair, unreasonable, or unduly harsh was called into play. Before this case, there was a blanket of uncertainty regarding the extent to which such moral values like fairness and reasonableness could serve as separate, self-standing grounds upon which a court could refuse to enforce valid contractual terms.

[116] (2SA668) (S) at 673G.
[117] (CCT 109/19).

The case involved a dispute on whether a lease agreement should be renewed. The parties entered into an agreement to operate a business traction for ten years which they operated from a premises leased by Oregon Trust. The lease agreement contained a clause that the parties were to operate from the premises approved by the trust and sells higher at the election to terminate the agreement if the franchise were ejected from the approved or if the lease were terminated.

Initially, the lease was of a period of five years subject to renewal for a further five years and the option to renew could only be exercised by notice in writing to the trust given some six months prior to termination of lease. The franchise failed to renew the lease six months before the expiry of the first five years prescribed by the agreement and only attempted to do so at a later stage. The trustees for the time being of Oregon Trust maintained that the option for renewal had lapsed due to fluctuation of time and wanted the applicants to vacant the premises. The applicants approached the high court seeking for an order that they were still within their right to exercise renewal option and they sought to interdict the respondents from evicting them. The high court granted them the relief sought. Aggrieved by this decision, the trustees appealed to the supreme court against the high court's ruling, and the Supreme Court came to the conclusion that the enforcement can only be declined by a court in contractual terms where it is clear that enforcement of such terms would ill against public policy and in the current case, it was a finding of the Court of Appeal that they were no public policy consideration at play to render the renewal clauses unenforceable.

The appellants were not happy with the decision of the Supreme Court of Appeal and sought leave of appeal to the Constitutional Court on the grounds that the enforcement of the renewal will be contract to the constitution in particular their right and result to the collapse of their business. On the other hand, the respondents relied heavily on Barkhuizen versus Napier which placed the owners of the party which places the onus seeking to avoid the enforcement of a contractual term on basis of public policy to explain their failure to complain with the term. They further argued that the applicants have failed to apply its onus. The constitutional court of South Africa concluded that it was not up to the court to refuse to enforce contractual terms on the basis that enforcement would, in the courts subjective

view be unfair, unreasonable, or unduly harsh in the circumstances abstract values such as fairness and reasonableness have not been accorded self-standing status as required for the validity of a contract.

Rather, these values form important considerations, alongside the principle of contractual autonomy and pacta sunt servanda which means honouring contracts feely and voluntarily entered, in determining whether enforcement of contractual term is contract to public policy. Accordingly, it is only the enforcement of a contractual term would be so unfair, so unreasonable, or so unjust to be contract to public policy that a court may refuse to enforce it. Public policy refers to those principles, social policies and normative values behind our laws informing their interpretation and content. Today, our public policy is rooted primarily in constitutional values (freedom, equality, dignity and so on).

Classical contract law theories took precedence over enforcement of public policy and a huge burden of proof was pressed on those who ascent that a contractual provision was contrary to public policy.

The Zimbabwe supreme court decision in ZESA v Maphosa[118] case which is an arbitration case brought by an employee of ZESA who was suspended from duty awaiting investigation into a disciplinary charge. At the conclusion of investigations, Maphosa was opted to resign from ZESA. Maphosa refused to do so arguing that ZESA's board was not competent to conduct a hearing as it has already found me guilty before the disciplinary hearing. He proposed that an independent arbitrator be appointed to hear his matter. ZESA subsequently suspended him without pay pending a disciplinary hearing to be conducted in terms of ZESA code of conduct. When ZESA was about to conduct such a hearing, Maphosa approached the high court to compel ZESA to appoint an independent arbitrator and the order as granted by consent and the arbitrator was appointed to hear the matter.

The issue about the arbitrator was that whether the was unlawfully suspended. The arbitrator concluded that the suspension was a nullity because ZESA had failed to determine the dispute in relation to their code of conduct. He ordered ZESA to pay

[118] 1999 (2) ZLR 452 (S).

his salary benefits for the date of offer for the opportunity to resign. Maphosa sought to register the order to persuade the Article 35 of the model law and ZESA sought to set aside their article 34 of the model law, and in a surprise tur of events, both applications were dismissed which made in essence that the arbitral award could not be enforced without its recognition of the high court in terms of article 35. The award was in other words rendered a brutum fulmen following the dismissal. There is no enforcement of law without recognition, and this was a stalemate to Maphosa. ZESA's challenge of the award was also thrown out which meant that both parties were faced with an award which was not capable of enforcement.

They all appealed to the supreme court. For an award to be set aside under the model law, it should be shown to be contrary to public policy of Zimbabwe and this should be given a restrictive construction to preserve and recognise the principle of finality and arbitration. The defence is only upheld in instances where the fundamental principle of the law or morality or justice is violated. It is not contract to public policy on the basis thus substantive fairness is absent, it must go beyond mere faultiness or incorrectness and must constitute or induce a sense of shock and outrage in its defiance of logic or accepted moral standards that a sensible and fair-minded person would come to the conclusion that justice in Zimbabwe would be intolerably injure by the award, only them the award will be said to be contrary to the public policy. The award was consequently set aside.

Again, public policies being used by the judiciary as a vehicle to introduce moral standards into the law of contact. The genealogy or the use of public policy to introduce moral standards into the law of contract is traceable to the decision of the bank of Lisbon case which pronounced a dead man to the Exceptio Doli principle. This principle is precisely a good faith principle and when the court pronounced it dead, it by implication pronounced a death sentence to the good faith doctrine, and this left the court in a predicament of having other means of bringing moral standards in the law of contract. The only such means at the courts disposal was using public policy.

It is interesting to note that the concept of public policy is used several in international instruments, national legislations, and constitutions without definition. In south Africa for example, its use as a defence to contractual

transactions became so fashionable resulting in one of the chief justice's setting up a bench of more than three judges to determine the real place and application of public policy in South African law resulting in the landmark decision oh Barkhuizen referred to above which came up with some clips on the application of the public policy doctrine in our law. It has already been stated that Zimbabwe is likely to follow, and follows the approach taken by South African courts legal, jurisprudential, and historical ties between the two countries. The whole issue relates to the question whether courts should be given powers to remedy contracts or contractual terms that are unjust or unquestionable or to modify some contractual terms to avoid injustices. How the courts approach such terms in a contract is of crucial importance.

The first approach by the courts was to take a positivist conservative approach which favours non-interference by courts in the agreement of the parties preferring to uphold the common law principle of freedom of the parties to contract and sanctity of the contracts. The liberal classical theory in the law of contract weas preferred where any tampering with the parties' agreement will annihilate legal and commercial certainty in the law of contract as parties would not know exactly the effect of their agreement, that is whether it will be modified or not and will have to wait until such a time the terms of the agreement are brought to test in court. It was maintained that judicial intervention in the law of contract will overburden the court with a multiplicity (plethora) of litigation seeking to cancel hard earned bargains and this will be counterproductive to those perceived to be weak and poor in that the strong like the banks and building societies will be forced to stop dealing with them for fear of judicial interference with their contractual undertakings. It was also argued that interference is unnecessary since the law already provides for some principles which can cater for the moral standards sought to be protected by such interference like party autonomy to contract, freedom of contract, pact sunt servanda etc. This has led to professor Halbo writing that if 'one is not a minor or a lunatic and his consent is not initiated by fraud, mistake or duress, his contractual undertaking will be enforced".

The statement by Prof Halbo is one of tough luck to those parties with signatures appended to an agreement in the hope that the courts will come to their aid. The

golden rule f interpretation which favours the caveat subscripto principle will, be upheld and a written document will be taken as evidence of the party's agreement.

But does this statement which is quite debatable reflects the position in South African law. This takes one to the case of Sasfin versus Beukes (1989)[119] were Sasfin was carrying out a business as a financier. Beukes was a specialised anatheist. The parties concluded an agreement in terms of which Beukes offered to sell to Sasfin any books he wishes to sell and the purchase of such books was to be governed by a deed of session in favour of Sasfin where books would ceded to the creditors of Sasfin jointly and severally, all rights of action and receivables which are now and which may at any time hereafter become due to Beukes by all persons hereafter referred to as debtors without exception from any cause of indebtedness whatsoever to Sasfin. A dispute arose between the parties. Sasfin alleged that Beukes had breached some warranties in the agreement which led Sasfin to cancel the agreement. Sasfin contended that Beukes was indebted to it in the sum of ZAR 108575-180 and sought to enforce its rights under the deeds of cession. This was disputed by Mr Beukes who denied any breach on his part and consequently Sasfin's right to cancel or terminate the contract. He countered that it was Sasfin in fact that was in breach of the terms of the agreement. Sasfin sued Mr Beukes claiming for an order declaring the deed of Cession executable, interdicting, and restraining Mr Beukes from collecting any debts from his patients and from all medical aids or any person who owed him. It also claimed a statement of account from Mr Beukes.

The court relied heavily in the celebratory case of Magna Alloys and Research (Pty) Ltd v Ellis 1984[120] where it was held that the south African common law does not recognise contracts that are contrary to public policy. That mere pronouncement provokes into action one crucial question pertaining to public policy, what exactly is meant by public policy and when can an agreement be said to be contrary to public policy

[119] 1OSA347 (A).
[120] (4) SA 874 (a).

3.1 DEFINITION OF PUBLIC POLICY

Black's law dictionary defines public policy to mean "the policies that have been declared by the state that covers the state's citizens. These laws and policies allow the government to stop any action that is against public interest, or the name given to the goals and aims of a law that promotes the general welfare of the people at large, or a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a government entity or its representative, or that which the law encourages for public good."

Public policy, as concept exists in all legal systems, but it is the most elusive concept owing to the confused literature around it and contradictory case law.[121]As noted by Ghodoosi, it is a principle in daily use in courts and in arbitration and in several international treaties but nowhere is the term defined with certainty. It did not exist under the common until the eighteenth century with reference being made not to public policy but to something prejudicial to community or 'encounter commonly. It came into use for the first time in the case of Dyer which was about a [122]non-complete clause in a contract in which John Dyer undertook not to employ his art to any other party for two years or the other party could forfeit Dyer's deposit bond. The court held that the arrangement was contrary to the policy of the law and therefore unenforceable. Traditionally, it is a concept intended to safeguard community values and mores against violation. In Mitchel v Reynolds[123], a case which involve restraint of trade where Reynolds leased a bakery to Mitchell for a period of five years. It was a term of the lease agreement that Reynolds would not compete with Mitchell in the baking business during the life term of the lease and within the town of St Andrews Holborn. In the event of Andrews carrying out bakery business in this town, he was obliged to pay on a bond of 50 pounds to Mitchell. A dispute arose with Mitchell alleging that Reynolds had breached the contract by carrying on bakery business in the town. Reynolds pleaded that the clause in the agreement restraining him from carrying on business in the town constituted an unlawful restraint on his trade and was therefore unenforceable. The court found for Mitchell

[121] Farshad Ghodoosi*The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements.
[122] Farshad Ghadoosi (note 99 above).
[123] Robert F. Brachtenbach, Public Policy in Judicial decisions, 21 Gonz. L. Rev. 1,4 (1985).

holding that reasonable restraints on trade, unlike unreasonable restraints of trade are permissible. It was from this case that the doctrine of public policy evolved. Agreements in violation of public policy are of no effect not because one of the parties has been deceived but because the wrong the public's sense of what is morally good or morally just.

The question as to what it is that constitute public policy has been a subject of debate in Law Union and Rock Insurance Company Ltd versus Carmichael Executors 1917 AD 593 @ 598 where in Innes CJ held the concept of public policy to be an 'expression of vague import' and that what the requirements of public policy are a difficult and contentious matter. Wessels, 'Law of Contract in south Africa Second ed vol 1. 480 describes when an act is said to be contrary to public policy not what public policy is. His negative definition of public policy that is, by describing what it is not as follows, 'An act which is contrary to the interests of the community is said be an act contrary to public policy. This definition takes us back to the historical development of the concept of public policy in Roman law and it brings nothing new but a mere rephrasal of public policy as it has always been understood to be.

He expands his definition to include acts contrary to contract law and to community's moral sense of justice. This definitional stance is traceable back to the founders of the natural law theory of law and morality and Aquilius who wrote in one of his articles 'Morality and Illegality In contract" 1941, 1942 and 1943 SALJ, that a contract is against public policy is when 'stipulating performance which is not per se illegal or immoral but one which the courts on the basis of expediency will not enforce because performance will detrimentally affect the interests of the community.'

Several authors have attempted to define public policy in the negative sense by defining when an act is said to be contrary to public policy and not what it is. Wille Principles of South African Law[124] is not an exception to this as he holds that if an agreement 'is opposed to the interests of the state of justice or of the public', it is against public policy. Subjective values which found expression in the interests of the community or public hold centre stage in public policy. It is interwoven with the

[124] 7th Ed @324.

notion of illegality. That which is illegal cannot be enforced by our courts because public policy does not allow a person whose conduct ills against public sense of what is good to benefit from his own bad conduct. It is the public or the community through several stages of development which determine from time to time what is morally just or what is morally wrong. The public sense of justice is pinned on good faith, if an act is made in bad faith, then such an act is not morally just but morally wrong and thus contrary to public policy. This established the link between public policy, legality and good faith as moral values or standards of contracts cannot be denied in the commercial world. Seen in this light, the two principles are interrelated and there is an interplay which can lead one to use them interchangeably.

There is a serious legal relationship between contra bonos mores, and this overlapping appears even in the use of the terms in court were the term public policy and contra bonos mores are used interchangeably. Ismail v Ismail[125] which was concerned with the question of whether a second wife in an Islamic marriage the right has to approach the court seeking for an interdict, stopping the other parties from disposing of the house.

Apart from those who are anti judicial intervention, there are others who propagate for judicial contractual review, and they support the enactment of legislation that introduce the striking down of unconscionable contracts by the courts and thus give judicial contractual powers of review to the court. These powers need to be over sweeping but ought to be limited by an Act of parliament and should be used in interpretation of contracts which favours good faith, and all unconscionable contracts clauses should be struck down by the courts for lack of good faith. According to them, it matters not whether unconscionability or good faith is employed to interpretation of contracts since they all lead to the same results, but the most important thing is that courts should not be given blank cheque powers, their powers ought to be limited by law. A parameter needs to be drawn as to when the courts should intervene in an agreement of the parties to sever a portion or portions of it as unconscionable and contrary to good faith. The legislator ought to reform the law in this regard and recognise good faith as a rule of contract law,

[125] 1983(1) SA 1006 (A).

thereby giving courts limited powers of review of agreements of the parties which extends to all contracts. This has been the position in other jurisdictions especially in civil jurisdictions where the law has been codified through an Act of Parliament like France and Germany. The same position obtains in countries like America where there is a statutory statement of good faith which limits the powers of the court to application of objective good faith only to the law of contract as opposed to subjective good faith.

Whilst in Zimbabwe and South Africa the courts have been slow to embrace good faith and recognise it as a rule of contract, the constitutions in those two countries have constitutionalised bona mores by insisting on courts to take note of the spirit of "ubuntu" in South Africa and "equity" in Zimbabwe 'contractual provisions. It is therefore important to see how the constitution can be used as a weapon to advance moral values like good faith, public policy fairness and bona mores into our law of contract without legislative intervention as proposed earlier. But before that, it is important to understand the theoretical foundations underpinning public policy.

3.2 THEORETICAL FOUNDATIONS OF PUBLIC POLICY

From a classical theory of law perspective, based on open market principles which foster individual values of self-determination and self-reliance centred on freedom of contract and sanctity of contracts where individuals decide what is in their best interest and are endowed with freedom to contract based on what is in their best interests, state intervention in that area of law is very limited as parties are their own legislators. The ideal free market system allows for self-regulation as opposed to intervention by the state. State intervention is only allowed on grounds of public policy. The proper role and function of the courts is that of a referee to the exercise by the parties of their individual autonomy and a court cannot strike down a contract clause based on unfairness or unreasonableness. Thus far, courts concern themselves more with formalism, that is, with formal validity of contracts which is often referred to as procedural fairness instead of substantive fairness by applying established rules of common law. The principle of public policy is given a restricted

or narrow meaning. Under it, contracts are invalidated as contrary to public policy on the basis that the terms are grossly unfair.

A. HISTORICAL DEVELOPMENT

According to historians, the term public policy only appeared in common law after the 19th century and before that, reference was only made to "encounter commane ley" which refers to something that is prejudicial to the community or something against the benefits derived from social goods. Historians like Knight maintain that one of the earliest cases to refer to prejudice to community was the case of Dyer's case. It was also employed in Michelle versus Reynolds which involved a restraint of strained clothes. The facts of the case were that Reynolds was a baker who elected to rent out his bakery business to Michelle for a period of five years. Reynolds undertook note to carry out any bakery business within the location for the next five years and he gave mention a bond of 50 pounds as an assurer that he would not do bakery business. Reynolds started the same bakery business in the same location resulting in Michelle suing for the bond. Reynolds defended the notion arguing that the bond was a restraint on trade which was per se illegal since it prevented him from carrying out his business as a baker. The court found for Michelle on the basis that the restraint of trade was reasonable and lawful. It emphasised the general rule that restraints of trade were prima facie lawful though subject to exceptions. The decision was held in the United States as a rule of reason test. Such contracts are said to ill against the public sense of what is good which is a social standard derived from natural law.

With the development of society, some judges came to question the applicability of public policy doctrine referring to it as "a very unruly horse". It was seen as a departure from legal reasoning which does not fall from the exception of a contract but from the results of a contract. In the eyes of history, contracts have well always been decided on one issue, that is, whether they were illegal or not without any public exception in existence. It later emerged that public policy became a stand-alone exception quite different from illegality used to refuse enforcement of contract. Thus, Lord Denning described a contract contrary to public policy as one "which is not void but only unenforceable." Such contracts can exist, and the parties can validly enter such contracts, but they cannot enjoy the benefit of enforcements

from the courts, “they are not “illegal” in the sense that of a contract to do a prohibited or immoral act is illegal. They are not “unenforceable” in the sense that a contract they wrong public sense of what is just. They are invalid and unenforceable.

Public policy has an external origin, as an exception to the law of contract. It is imposed by external forces on the law of contract and does not properly fit in the tradition of illegality doctrine in contract. It’s a concept of public law imposed on private contract which makes enforcement of private agreements subject to public notions of justice, fairness, and morality. In this sense, it is argued that justice delivery seized to be a private affair but a matter for the public good and the public determines when public resources should be used on execution of agreements that impair public sense of dignity and morality. In Crawford & Murray v Wick, the opined that “it is the duty of all courts of justice to keep their eye steadily upon the interests of the public even in the administration of community justice and when they find an action is predicated upon a claim injurious to public”. Public policy is therefore essentially an exertion of public force and control in private contracts. This control is itself not part of a contract but foreign to it. It is exerted by community on private law of contract based on notions of fairness and justice. It is because of this that there is no universally acceptable definition of public policy. As an external force, it remains to be seen whether public policy can be used to infuse notions of fairness and good faith in our law of contract. Suffice to say that so far, such duty has been discharged exceptionally in both Zimbabwe and South Africa. It is also interesting as noted above that the courts have attempted over the years to use an external factor as public policy to introduce another external factor centred on social morals of good faith into the law of contact. Good faith and public policy are external factors to the law of contract with their origin rooted in public law. They work hand in hand with constitutions in several jurisdictions and in most cases, anything that goes against the constitution is viewed as unenforceable on public policy considerations. This takes me to the next level of this inquiry, that is, the dichotomy between public policy and constitution in the law of contract. Of particular importance will be to inquire whether there is any interplay between public policy and the constitution, and whether the constitution can be used to

introduce notions of community sense of justice like fairness and good faith into the law of contract using the constitution under the guise of public policy.

CHAPTER 4

4.0 ZIMBABWE'S CONSTITUTIONAL FRAMEWORK

(A) CONSTITUTIONAL SUPREMACY

In 2013, and through amendment 13 of 2013, a new Constitution came into force in Zimbabwe to replace the Lancaster House Constitution which ushered Zimbabwean independence. The constitution had suffered several amendments to the extent by 2013, it was no longer existing in its original state but in an amended state. It would be safe to say that the original constitution had been replaced by amendments and what Amendment 13 of 2013 did was to replace these amendments (amended constitution) with a new one.

The new constitution is quite different from the Lancaster House Constitution as amended in that whilst the Lancaster House constitution left it to the court to tell us what it was, the current constitution speaks to what it is and to its application that is, how it should be applied by courts. It is also directory in that it directs the legislator on what to do instances to give effect to constitutional provisions. It also tells the court how it should be applied making it totally different from the amended Lancaster House constitution.

It discharges one of these functions in Section 2 of the Zimbabwean Constitution which makes Zimbabwe a constitutional democracy which respect the supremacy of the constitution. The constitution is the supreme law of Zimbabwe, and all laws should conform to it. Section 1 clearly states this point. It provides that, "This constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency."

The declaration of invalidity is a very strong weapon at the hands of the judiciary used to render a nullity anything inconsistent with the constitution. The declaration of invalidity takes effect from the date of inconsistency with the constitution and an aggrieved party can approach the court in terms of section 175 (1) of the

constitution seeking for a declaration of invalidity of any law or conduct of the President or Parliament.

Any court is competent to deal with the declaration of invalidity, but such declaration should be of no force and effect until confirmed by a competent court.

Section 175 (1) of the constitution provides that "were a court makes an order concerning the constitutional invalidity of any law or any conduct of the president or parliament, the order has no force unless it is confirmed by the constitutional court". Section 175 (1) is complimented by Section 167 (3) of the constitution which makes the constitutional court the final decision maker on whether an act of parliament is constitutional and must confirm an order of invalidity made by another court. The constitutional court thus plays an oversight role over orders of constitutional invalidity of legislation made by other courts.

This section is quite revolutionary in that, unlike the previous constitution were constitutional matters could only be heard in the Supreme Court, this section gives any court the power to deal with a constitutional matter subject to one rider, the rider being that the decision (order) of that court ought to be confirmed by the constitutional court.

It provides as follows, "the constitutional court makes the final decision whether an act of parliament or conduct of the President or Parliament is constitutional and must confirm any order of constitutional invalidity made by another court before that order has any force."

The constitutional court however is not just there to rubber-stamp a constitutional invalidity order made by any court. It can refuse in certain circumstances to confirm such an order as was the case in Willmore Makumire versus Minister of Public Service, Labour, and Social Welfare and Another [126]CCZ of 2019. Any act that is inconsistent with the constitutional is suspectable to be declared invalid by the Constitutional Court, thus the Constitution is the supreme law of the land.

(B) PLACE OF MORAL VALUES IN THE CONSTITUTION

[126] CCZ of 2019.

The same Constitution empowers the courts in Section 46 (1) (b) to "give full effect to the rights and freedom enshrined in this chapter" when interpreting this chapter. It further provides in Section 46 (1) (b) "when interpreting this chapter, a court, tribunal, forum, or body must promote the values and principles that underly a democratic society based on openness, justice, human dignity, equality, and freedom, and in particular, the values and principles set out in section 3.

Section 46 as read of Section 3 of the Constitution introduces what are called constitutional values in our law in general and, to the law of contract as a department of private law. It introduces equality as a constitutional value, it introduces the principle of fairness as a constitutional value, and it acknowledges traditional and religious values which are promoted to constitutional values.

All these constitutional values ought to be considered when a court, tribunal, forum, or body is interpreting this chapter without exception that forum, tribunal, body, or court might be dealing with matters to do with private or public law but its interpretation of whatever matter ought into consideration those constitutional values when interpreting an enactment and when developing the common law and customary law in terms of section 46 (2) of the constitution. Those constitutional values of equity, fairness, traditional and religious values are moral standards which could have possibly suffered extinction at the hands of the court like what happened in the Bank of Lisbon case where the exceptio doli was said not to be part of roman law and accordingly buried.

Same with the lesio enormis doctrine which was buried by legislation[127] as not part of our law but the constitution through amendment 20 of 2013 breathes life to these moral values and social abstracts compelling all Courts to take moral values into consideration when interpreting a provision. This trend is often referred to as the constitutionalisation of the private law of contract in other jurisdictions for courts are bound to consider constitutional provision in the interpretation of contracts failing which they risk orders being declared inconsistent of the constitution and therefore invalid. Anything that is inconsistent with the constitution cannot be enforced by Zimbabwean courts because same will be contrary to public policy.

[127] Section 8 of the General Laws Amendment Act [Chapter 8:07]

Fairness and equity are running themes in the constitution which makes them very important constitutional values. Apart from being constitutional values, these are moral values which now find a place in the constitution and constitutional recognition as supreme values. There are running themes in the constitution, and they appear together with the principle of honesty, transparency, and dignity in several sections in the constitution.

The concept of fairness as a constitutional value appears in Section 3 (2) (b) (ii), Section 9 (2), Section 18, Section 58 (5), Section 65 (1), Section 67 (1) (a), Section 68 (1), Section 69 (1), Section 71 (2) (c) (ii), Section 191, Section 194 (1) (d), Section 298 (1) (b) (i), Section 315 (1) of the Zimbabwe constitution.

Equity is also a running theme in the constitution appearing under a number of sections in the constitution notably Section 3 (1) (f), Section 3 (2) (b), Section 3 (2) (g), Section 17 (1) (b) (i) Section 18 (2), Section 65 (4) and many others. The same applies to tradition values, they appear in a number of sections in the constitution. It can only be said that these values find a place in the constitution of Zimbabwe signifying their importance.

That constitutional importance comes at a time when other social abstracts like lesio enormis and exceptio doli are not only under threat in our law of contract but have been safely buried either through legislation or through judicial pronouncements respectively. The net effect of this constitutionalisation of the law of contract is to bring back these moral standards of good faith through the constitution.

(C) APPLICATION OF CONSTITUTIONAL VALUES

The constitution of Zimbabwe is quite explicit on how some of these constitutional values of moral standards are to be applied in practice. Section 46 (2) of the constitution binds all courts to, “when interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this chapter”.

Basically, when interpreting an enactment, the courts are bound to take into consideration those constitutional values like fairness, transparency, equity etc which are enshrined in the Bill of Rights. The values applied in terms of Section 46

of the Constitution to interpretation of an enactment and during the exercise of the powers of the court to develop the common law and customary law. This is how constitutional values are applied.

Further, there are instances when a particular provision of the constitution detects the path to be taken when applying constitutional values. Section 62 (1) of the Constitution provides for the right of access to information across all Zimbabwean citizens and permanent residents, including juristic persons and media houses as long as that information is required in the interests of public accountability. What constitutes public accountability is not defined. But suffice to say that public accountability is a social value.

Under Section 62 (2), the right of access to information should be required for the exercise or protection of a right. The constitution clearly provides under Section 62 (4) hoe this right find application in practice. It states that for the right to be of any effect, the legislator must pass an act of Parliament to give effect to that right in practice, thus, in this particular instance, such value judgement "public accountability" are given effect or application by the Freedom of Information, Act 1 of 2020 which has as one of its objectives to, provide for the constitutional rights of expression, freedom of the media, to provide further for the right to access to information held by entities in the interest of public accountability…

The same applies to government procurement which is to be effected in a transparent, fair, honest, cost effective and competitive manner, the constitution directs that there be an act of Parliament to bring effect or bring those constitutional values into application the right to a fair and public trial in Section 315 of the Constitution.

Surprisingly, Section 46 (2) has not been utilised by the Zimbabwean judiciary either in the development of common law and customary law or in the interpretation of enactments despite coming into force some seven years ago. Maybe this lack of use of such an important section can be explained based on the nature of our society namely that the Zimbabwean society is not potentially litigious. Value principles of equity, fairness and transparency have not been involved into our law despite them

having found a place in the constitution and in the mandatory, new constitutional rule of interpretation.

The lack of application of Section 46 (2) of the constitution could also extend to councils representing parties in different cases. Any opportunity for Section 46 (2) of the constitution to be involve presented itself in the case of NMBCA Bank versus ZIMRA, a case involving a registered bank and a subsidiary of NMBCA Holdings Private Limited versus ZIMRA, an authority established in terms of the Zimbabwe Revenue Authority Act. In that case, the appellant filed its tax self-assessment form with the respondent for the tax year ending 31 November 2011. Appellant was asked to pay $944 614.80 with additional tax and penalties amounting to that figure. They appellant raised an objection to the assessment of the tax year ending 31 December 2011. The objection was dismissed by the respondent. The appellant applied in terms of the law against the respondent's dismissal of the objection to the Special Court for Income Tax Appeals and the Special Court upheld the quotation by ZIMRA and dismiss the appeal. Dissatisfied with the findings of the Special Court, the appellant appealed to the Supreme Court. In arriving at a decision, Uchena J was not referred to Section 46 (2) of the constitution by either council. That section introduces constitutional values of equity and fairness in our law. Rather, he relied on the old English case of Pattington which held that there is no equity about tax in the law of taxation and that there are no presuppositions to be implied. One can only look fairly at the language used. As noted already, this case explains the hostility which English common laws has to such value concepts like good faith, fairness, and equity.

Now that Section 46 (2) introduces a new constitutional interpretation of statutes, it is argued that that Section be taken into consideration at the time of the hearing. Uchena J would have reached a different conclusion NMBCA case. The constitution makes fairness and equity constitutional values to be taken into account when interpreting an enactment like the Income Tax Act to the extent that the English common law position that there is nothing equitable about tax find no application in Zimbabwe from the date of coming into force of the new constitution. It is submitted with respect that the learned judge would not have arrived at the conclusion that," as I understand, the principle of a fiscal legislation, it is this. If a

party which sort to be taxed comes within the latter of the law, he must be taxed however great the hardship may happen to a judicial mind to be…"

The term "hardship" has something to do with fairness and equity if the application of the law brings about greater hardship than perceived by a reasonable person, that law becomes unjust, unfair, and unequitable. It renders itself contrary to the ethos of the constitution. It will ill against constitutional values enshrined in the Bill of Rights and its application will be inconsistent with the constitution which may trigger a declaration of invalidity of such act or conduct.

As alluded to earlier on, as at the time of writing, no case involving application of these constitutional values in terms of Section 46 (2) has reached the constitutional court of Zimbabwe. There is little or no hope that reforms to the principle of good faith and its elevation to a rule of law will come through judicial intervention in Zimbabwe. There is just no litigation around that area which could soon see the principle of good faith being elevated into a law of contract. As seen already, even the constitution itself does not recognise the right to contract as a fundamental value, any changes therefore can only be hoped to come through legislative intervention.

However, in South Africa, the situation is a little bit different in that cases involving the proper role and place of good faith in the South African law of contract has spoiled to the constitutional court and some of them have been dismissed on the technical basis that they were raised for the first time in the court of appeal as a court of first instance, or in some instances, the court would take a policy decision to deal with the issue of good faith by bit dealing with them our bet expressing hope in the near future, the court will be prepared to deal with those principles.

CHAPTER 5
CONCLUSION

This research has been confined mainly to the question of what it is that constitutes good faith in our law of contract, what good faith entails and the position of good faith in the Zimbabwean law of contract. It also sought to address, the relationship, if any between good faith and public policy and the recent constitutional approach

to interpretation of contracts and statutes ushered in by section 46 (2) of the Constitution of Zimbabwe in the development of the common law of contract.

Definitions framed by the courts (judiciary) in several countries and those framed by authorities in the field of law have failed to yield a single definition of universal application. This only goes to show how slippery the term 'good faith' is in its application.

Its application or place in the common law of contract differs from country to country and in those countries with civil codes, the application of good faith has been reduced into a statutory statement trough an Act of Parliament. This is particularly true of several civil jurisdictions which define what good faith is through an Act of Parliament, defines its scope and application by the courts again through a statutory statement making it easier for judges not to cross the line by introducing their own subjective notions of good faith into the law pf contract. If such notions were to be allowed, there would be chaos characterised by uncertainty in the application of good faith as a principle of contract law. The role of judges in those jurisdictions remains restricted to interpretation of the law and they cannot exercise their powers to intervene in contractual matters where such intervention is not prescribed by statute. Good faith in such systems like the Franco-Germanic systems and to some extent the United States works perfectly well.

As noted already, in Zimbabwe and South Africa, good faith does not occupy a defined role neither is it understood in what it means and what it entails. As shall be demonstrated later, the courts in Zimbabwe and South Africa have left the door open for future development of the common law of contract through judicial intervention. The need to have a proper definition of good faith and its place and role in the law of contract is long overdue and in South Africa the question of the place, role, and meaning of good faith has reached the apex court, that is the Constitutional Court of South Africa on more than two occasions and on each occasion the apex court will find a technical excuse of dealing with the matter by not dealing with it. In Zimbabwe, this question has not yet been tested by the Constitutional Court as at the time of writing.

The research addressed all questions forming the basis of the legal problem and has noted with concern that despite its use at both international and national level, there is no attempt to define it or to find an internationally acceptable definition of what it is. Both the judiciary and authorities are so fast to give a negative definition of good faith by defining it referring to what it is not. Only those jurisdictions with a statutory statement on good faith, have it defined by their legislative arm of state for application at national level according to how good faith is understood within the national jurisdiction.

One thing that comes out from the research is that there is a certain minimum conduct of behaviour expected by the community from parties to a contract. That minimum standard pf behaviour is not at all agreed upon but constitutes societal values at every stage of development. It should be noted that whilst the agreement (contract) itself is between the parties to it, enforcement of the agreement becomes an issue for the community, for community resources such as courts managed through the states are employed for its enforcement. In the process, the community imposes certain obligations on every contracting party that if they were to conduct themselves in a particular manner, then they would be held not to have entered into an agreement ion good faith and enforcement of such agreements would ill against the community's sense of what is good and therefore unenforceable. Thy are unenforceable not because one of the parties has acted unlawfully (illegally) but because the community's sense of justice and fairness would have been wronged. Such agreements are therefore contrary to public policy and are unenforceable. The test to be applied is always an objective one being namely, that of a reasonable merchant; how would a reasonable merchant have behaved if faced with such facts?

It is argued here that this research has managed to a greater extent to address the research question and to come up with recommendations as detailed herein under.

A. THE NEED FOR REFORMS

There is need for an urgent overhaul of the whole law of contract to place the principle of good faith in its proper place and to establish its role in the law of contract. The constitution of Zimbabwe has now opened the doors for the courts to do that by introducing or recognising and promoting moral values of fairness, equity,

and transparency into constitutional values of application by each and every court, forum or tribunal when interpreting an enactment or when developing common law or customary law. This process however has been slow due to lack of litigation in Zimbabwe involving Section 46 (2) of the Constitution. Any hope for such judicial reform is now far-fetched and if were to come that will not be in the near distant future given the general impression created by the courts, with all due respects, of wanting to keep their lane in terms of the doctrine of separation of powers, thus leaving law making to the legislative arm of the state.

B. MUNICIPAL STATUTES AND GOOD FAITH-ROAD TOWARDS REFORMS

It is thus imperative to look at how other jurisdictions have achieved this through legislation. At the nation level, Zimbabwe started at a good trajectory with some statutes pointing towards promotion of good faith from a mere principle/norm of contract law thus, the Labour Act is full of sections making reference to good faith and its observance in labour contracts. Contracts in good faith feature a lot in labour law and they are predicted on other social values like fair and reasonable wages.

You will also find contracts based on good faith in the Zimbabwe law of insurance and it is important to note that a party to ensure its contract is obliged to always observe the concept of utmost good faith failing which one would lose out.

Again, legislation on consumer contracts in Zimbabwe recognise the existence of good faith in consumer contacts. By providing relief to parties to consumer contracts where the contracts are unfair or contain unfair provisions or non-exercise of a power, right or discretion under such a contract is or would be unfair. In such instances, courts are given the power to intervene in contractual transactions involving consumers to cancel the whole or any part of the consumer contract or varying the consumer contract, or enforcing part only of the consumer contract, or declaring the consumer contract to be enforceable for a particular purpose only, or ordering restitution or awarding compensation to a party or reducing any amount payable under the consumer contract or annulling the exercise of any power, right or discretion under the consumer contract or directing that any such power, right or discretion should be exercised in a particular way. The courts are empowered to cancel unconscionable contract or contract clauses in consumer contracts. The

extent of their intervention does not at all cause friction in Zimbabwe and the Labour Act has been applied in several instances and the general being always that courts are mandated to strike out unfair contract clauses.

The court further provides under Section 5 of the Act for what it is or when is a contract said to contain an unfair clause for purposes of the Act to mean instances where the contract results in an unfair or unreasonable unequal exchange of values or benefits. In this instance, the Labour Act is clearly seen resurrecting from the dead, the laessio enormis doctrine which was once abolished by Section 8 of the General Law Amendment Act.

The Act further defines scenarios where the court may find a contract to be unfair to include an unreasonably oppressive consumer contract in all circumstances. What Section 5 (1) (b) does is to disregard the English common law position of giving precedence to part autonomy preferring rather to uphold communal or moral values. Parties are no longer free in terms of the Act to exercise their freedom to oppress the other or to be oppressed.

The same Act also refers to a consumer contract as being unfair if the consumer contract is contrary to commonly accepted standards of fair dealing which is good faith.

Clearly, other pieces of legislation in Zimbabwe have cleared the road for the reception of the principle of good faith as a rule of our law of contract which can be safely recognised through legislative reforms.

Even the Zimbabwe Arbitration Act (Chapter 7:15) refers to the principle of fairness and good faith in arbitration which principle is also recognised under the UNCITRAIL of Arbitration. The principles are used without definition. It is therefore proposed that the legislature should intervene to define the proper role and place of good faith in our law of contract.

C. GOOD FAITH IN CIVIL JURISDICTIONS

In other civil jurisdictions where the law has been codified, the place, role and application of good faith has been prescribed by an act of Parliament. This is the case with such countries like France and Germany which have civil codes. The place and role of good faith in the law of contract is prescribed by parliament. Its application is again prescribed by parliament and the function of a court or judge in those jurisdictions is to simply apply the law as is. These jurisdictions do not apply the principle of good faith in general, they do separate the principle into two namely: the objective principle of good faith and the subjective principle of good faith which are used for two different purposes.

Reforming the law through legislative intervention is not only peculiar to France and Germany alone, but the United States has also embarked on the same process culminating on the passing of the Uniform Commercial Code whose primary objective is to achieve consistency, uniformity, and efficiency across all United States. The Uniform Commercial Code regulates sales of personal property and several other transactions. Prior to the introduction of the Uniform Commercial Code in the United States, there was no uniformity in the application of the law because of separate individual existence of set laws and the non-existence of federal common law applicable to all states. It is the Uniform Commercial Code and the Reinstatement of the various branches of law including the law of contracts which brought uniformity in the application of the law of contracts across all states. The United States now contains a statutory statement on good faith and a statutory definition of what constitutes good faith. As noted by Professor Steven Bruton, "with rear exception, the courts use the Uniform Commercial Code good faith duty requirement in aid and furtherance of the parties' agreement, not to override the parties' agreement, for reasons of fairness, policy or morality. It can be said that good faith is used in the United States to determine the justified expectations of the parties and it is not used to enforce an independent duty divorced from the specific clauses of the contract. The dual nature of good faith is accepted in the United States and the legislature saw it wise to employ the concept of subjective good faith as law in its statutory statement.

The same approach has been taken even in the United Kingdom with the codification of the Sale of Goods Act which leans closely in favour of the use of good faith in

contract of sale of goods. The general trend worldwide is to determine though legislation the place of good faith in the law of contract. In Australia for instance, Lord Shaw stated that, "a rule that leaves loss to lie were it falls works better or well among tricksters, gamblers and thieves."

D. PLACE OF GOOD FAITH AT INTERNATIONAL LEVEL

At the international level, the United Nations Convention on Contracts for the International Sale of Goods signed on 11 April 1980 embraces good faith as a principle of international contract law, it is also embraced as a principle of law in thew international Sale of Goods Act (Chapter 1:06). The World Trade Organisation (WTO) recognises and accepts good faith as a principle of international contract law through its statutes. Good faith occupies a place and has a role to play in international transactions.

Considering the goings on at an international level, the writer proposes for legislative reform to be carried out or introduced to our law of contract. In those countries where legislative reforms were effected in the law of contract to acknowledge ad receive good faith as a law of contract, no uncertainty was suffered neither was the law of contract in any way disturbed by such legislative reforms. It is proposed that legislative reforms should be carried out and that such reforms are long overdue and will bring about certainty to the place and role of good faith in the law of contract. Such legislative intervention would unravel the problems associated with good faith in our law of contract. Legislative intervention will end "the unending good faith dilemma in the law of contract." It will define a place, role, and application of good faith by the courts and pronounce a statutory definition to the concept of good faith thus bringing the definitional confusion surrounding the concept to an end. Likewise, statutory intervention will result in judges being given directives by the legislature on how and when to apply the principle of good faith.

The future of good faith in the law of contract is quite promising both in South Africa and Zimbabwe. The case of Everfresh Market Virginia v Shoprite Checkers[128]is the torch bearer to this interesting development yet to come. The brief facts were that

[128] 2012 1 SA 256(CC).

Everfresh challenged ejectment proceedings under a commercial lease agreement relating to premises in a shopping centre, where Shoprite as lessor had refused to negotiate the renewal of the lease in terms of the provision in the agreement which provided for a renewal of lease on notice by the lease upon a rental amount to be agreed between the parties. In the Constitutional Court Everfresh confined its argument to Shoprite's claim that the terms of the agreement precluded Shoprite from frustrating Everfresh's qualified right to renew the lease by refusing to negotiate in good faith and that its right to renew the lease will fall away if negotiations in good faith did not result in an agreement. Yacoob J, writing the minority judgment summarised the position of the parties as follows:

> "*Everfresh contests that the common law should be developed in terms of the constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith. The contention of Shoprite is that a provision of this kind should not be enforceable because the concept of good faith is too vague*."

Yacoob J. went on to state that good faith is great principle in our law of contract and the courts should make a pronouncement on whether the spirit and objective of the new constitution (South African) requires good faith considerations when it comes to enforcement. The learned judge went on to emphasise the urgency of this matter stating that judicial pronouncement on this issue should be made sooner rather than later.

It is important to note that the constitutional court refused to deal with Everfresh's argument as a court of first instance. Had Everfresh raised this argument in the High Court and the Supreme Court, the Constitutional Court would have been at liberty to consider the issue of developing common law position on the law of contract.

Moseneke J. writing the majority judgment concluded that it was highly desirable and necessary to infuse the law of contract with constitutional values, including values of Ubuntu. The majority judgment further agreed that the constitutional considerations may tilt the argument in favour of Everfresh, there is need for contracting parties to relate to each other in good faith especially when it comes to such cases involving agreements to agree.

The Everfresh case leaves the door open for the Constitutional Court of South Africa to deal with the proper role of good faith in the law of contract in South Africa. It is ready again to infuse the law of contract into these constitutional values. Seen in this light, Constitutional values are likely to be used by the South African Courts as a vehicle for reform, that is, as a means of developing the common law to place good faith at its proper place in the law of contract.

It has already been stated that Zimbabwean Courts are most likely to follow the South African position, and this has always been the case dating back from the Magna Alloys case[129] which was said to form part of our law by the Supreme Court of Zimbabwe in Book v Davidson[130]. It is important to note that in the Book v Davidson case the Supreme Court of Zimbabwe simply departed from its previously known position to follow the decision arrived at in Magna Alloys case without giving reasons for the departure.

Suffice to note that the constitution will play a very important role into the infusion of constitutional values into the role of contract. It is further argued that fears of uncertainty are just misplaced and what is often referred to as the constitutionalisation of common law[131] should be allowed to take precedent in determining the place and role of the principle of good faith in our law of contract. That constitutionalisation of common law is in fact a building ground for the development of the doctrine of good faith through foundational constitutional values enshrined in the bill of rights. It is quite transformative and developmental in extent.

In south Africa, the most important constitutional value regarding good faith as a principle of contract law is 'Ubuntu' and under the Zimbabwean constitution, good faith comes through the equity and fairness principle.

The hope for reforms in the common law does not only lie within the judicial arm of the state, through judicial intervention but also lies in legislative intervention which will define what good faith is, its place, and role in our law of contract. It was given expression through existing rules and statutes like the Labour law, consumer

[129] Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874(A).
[130] 1988 (1) ZLR 365 (S) @385D.
[131] Jordaan 2004 De Jure 58.

protection laws etc. The road for legislative intervention has been cleared through some of these Statutes, what's left is for Parliament to walk past it with a measure of reform to our common law regarding good faith. Instances of judicial intervention can be prescribed by Parliament thus avoiding judges' personal subjective understanding of good faith from encroaching into the law of contract.

The conservative approach by our courts to good faith is counter progressive and can no longer any useful purpose. That stance cannot be defended in this present day and age, fear of uncertainty is self-manufactured. The Constitutional values used as aids to interpretation supports this development of common law. It is indeed in favour of reforms.

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