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COMPARATIVE PRIVATE LAW

PRE-CONTRACTUAL JUSTICE IN A COMPARATIVE PERSPECTIVE: STRIKING THE RIGHT BALANCE

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Pre-contractual justice in a comparative perspective: striking the right balance

I. Introduction

One of the most important reasons for doing comparative work in the field of law is to get a better understanding of the legal jurisdictions of other countries. Studying the law of another country also enables one to understand one's own legal jurisdiction better. It helps one to see well-established principles in a new light and to ask questions about the continued applicability of such principles.

In making a study of justice in the field of contract law, it goes without saying that one will make a study of freedom of contract as well, since these are two inseperable concepts. Simply speaking, one can say that furthering justice in contract law implies an intrusion on the principles of freedom of contract, an intrusion that is necessary for the continued application of a healthy contract theory. All jurisdictions have to gurantee freedom of contract. Taking away freedom of contract would result in the death of contract. If a person knew that he could not regulate his private and commercial life by contracting on a free basis, he would simply leave to enter into contracts. I believe that the death of contract would mean the collapse of a society itself. An untouchable freedom of contract, however, is just as dangerous. A person would also abstain from contracting if he knew he was exposed to the uncontrolled, unconscionable conduct of his co-contractants. The answer lies in striking the right balance.

In this comparative work relating to justice in the stage that precedes the formation of a contract, I will deal with three jurisdictions; namely South Africa, England and Israel. As a result of the forces of history, these three countries have in common English common law, with England, of course, as the common denominator.

In England, or more accurately, in the common law world in general, pre-contractual justice does not receive the recognition it requires. Although justice in the pre-contractual stage is protected by the South African law of contract, this protection is

not sufficient. I believe this is a direct result of the common law values introduced to South Africa through the adoption of English law as part of South Africa's common law. Considered only from the viewpoint of pre-contractual justice, South Africa needs to free itself from the yoke of English law.

Israel is a perfect example of a jurisdiction that succeeded in freeing itself from English law influence. In so doing, the State of Israel developed an independent legal system that now provides an almost perfect balance between the principles of justice in the pre-contractual stage and freedom of contract.

This paper focuses on South African contact law, the way in which it protects justice in the pre-contractual stage, the extent to which this protection is sufficient, and the manner in which this protection can be bettered.

II. Pre-contractual justice in the South-African law of contract

A. Introduction: Freedom of contract in the South African law

„There appears to be good reason to assume that the South African law of contract not only recognises the sanctity of contracts but also protects the reasonable expectations of contractants, whether by holding one contractant to the expectations of the other (as in the case of estoppel or were the reliance theory is applied), or by allowing...the latter to withdraw from a contract in which his expectations have been affected in an unreasonable way."[1]

This quotation contains in essence what I propose to discuss in this chapter, namely the extent to which justice is achieved in the pre-contractual stage in the South African law of contract.

It has been said that in South African law of contract, the principle of sanctity of contract is to be preferred.[2] In the case of *Roffey versus Catterall, Edwards and Goudré,*[3] the court gave one of the clearest and most extensive expositions in South Africa to date that relates to freedom of contract as a principle of public policy. After referring with approval to the well-known quotation in the English case of *Printing and Numerical Registering Co versus Sampson,*[4] the learned judge said the following: „I am satisfied that South African law prefers the sanctity of contracts. That principle is firmly entrenched in our system, where it shows its head in so many places...The

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[1] Van der Merwe and Van Huyssteen "Improperly obtained consensus." (1981) 50 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 78 at 81 - 82.

[2] See for instance Eiselen "Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme" (1989) 52 *THRHR* 516 at 517.

[3] 1977 (4) SA 494 (N) at 504 C - 505 H.

[4] (1875) LR 19 Ea 462, 465. Sir George Jessel MR said the following: "If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have the paramount public policy to consider that you are not lightly to interfere with this freedom of contract."

principle has a moral dimension too, which gives it a durability and universality beyond the norms of the market place. That appeal to honour surely transcends all else of present relevance."

From this and other similar decisions by the South African courts,[5] it appears that any attempt to put general restrictions on freedom of contract, need to be justified. This point of view expresses „a freedom of contract" still under the influence of the liberal thoughts of the nineteenth century. This absolute view of freedom of contract is no longer appropriate for late twentieth century. Today, contractual freedom is certainly not absolute anymore. The principle of contractual justice is only upheld in cases where it seems as if an absolute application of freedom of contract would lead to an unjust outcome.

In order to have a better understanding of contractual justice, a good understanding of freedom of contract and how it developed is necessary. Freedom of contract can take any one of the following forms:[6]

1. Formal freedom of contract. This means that, in principle, no formalities are required for the formation of a contract. *Consensus* between the parties is all that is required.

2. Freedom of content. According to this, parties can put any provision in their contract as long as it is legal.[7]

3. Freedom to conclude. A person should be free to decide whether he wants to conclude a contract, and when he does conclude one, with whom.

4. Freedom from intervention. According to this, a contract should be enforced strictly according to what the parties have agreed upon. There should be no *ex post facto* intrusion with a contractual relationship.[8]

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[5] For example *SA Sentrale Ko-op Graanmaatskappy Bpk versus Shifren* 1964 (4) SA 760 (A) 766 C - 767 A and *Magna Alloys and Research (SA) Pty Ltd versus Ellis* 1984 (4) SA 874 (A) 893 H - 894 A.
[6] Eiselen *op.cit.* 518.
[7] *Roffey versus Catterall, Edwards and Goudré (Pty) Ltd* 1977 (4) SA 494 (N) at 502 F.

5. Freedom of contract in a comprehensive sense. According to this, it is undesirable for a government to intervene in any of the forms of freedom of contract. Thus, a legislative provision enabling the courts to control the content of a standard clause would infringe comprehensive freedom of contract, because it infringes freedom from intervention.

The idea of freedom of contract in a comprehensive sense is mostly a product of the late eighteenth and nineteenth century classic schools of economics.[9] Their emphasis on freedom of trade, of which freedom of contract is, of course, an important element, influenced the law to a great extent.[10] The classical economists[11] contended that government intervention should be kept to an absolute minimum, because ultimately freedom to trade and the market mechanism would create the greatest advantages for everybody. Emphasis was placed, and this was also the crux of the idea, on an individual's inherent striving towards a "natural order" after his initial concern for his own interests. This striving would lead him to serve the commonwealth. They concluded their argument by indicating the necessity for a high degree of freedom of trade in order to effectivly apply the market mechanism. This, of course, meant that freedom to conclude contracts, freedom from intervention in concluded contracts, and also freedom of contract in a comprehensive sense were pre-requisites for the effective application of their theory.

Against this background of individualism, personal freedom and the freedom to trade, the principle of contractual freedom was also established in the court. This view of contract was not unique to France and England, but spread to most European countries and also to other countries under their sphere of influence,[12] of which South Africa was one.

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[8] Rakoff "Contracts of adhesion: an essay in reconstruction" 1983 *Harvard Law Review (Harvard LR)* 1236.
[9] Atiyah, *The Rise and Fall of Freedom of Contract* (1979) at 294 and following.
[10] Atiyah, *The Rise and Fall of Freedom of Contract* at 293.
[11] The leaders of whom were Divid Hume (1741 - 1776), Adam Smith (1723 - 1790) and David Ricardo (1772 - 1823).
[12] Eiselen *op.cit.*529.

A brief discussion at the end of this chapter will demonstrate that the South African common law is not a static concept. It is available to influence and one of the legal systems that influences it is English law. Therefore, the idea of absolutism of contractual freedom of English law was also accepted in South African law. In the case of *Wells versus SA Alumenite Co,*[13] the Appellate Division referred with approval to the quotation in *Printing and Numerical Registering Co versus Sampson*[14] and accepted it as part of South African law.

In South African law, it appears that in certain instances the child has outgrown its mother. In English law, one clear exception to the principle of contractual freedom exists, namely in the case of restraint of trade clauses. As illustrated in *Nordenfeldt versus Maxim Nordenfeldt Guns and Ammunition Co Ltd,*[15] such clauses are *prima facie* unenforceable in English law because they are against public interest.[16] The party wanting to enforce the provision will thus have to prove that the provision will not operate unreasonable in the given circumstances. South African law departed from this restraint of trade exception. Although this rule was initially taken over in its exact form from English law, in *Roffey versus Catterall, Edwards and Goudré (Pty) Ltd*[17] the court reversed the rule. The Natal Provincial Division held that all restraint of trade clauses would, in principle, be enforceable unless it proved to be against public policy. This reversion, that has been justified on the basis of contractual freedom,[18] was later affirmed by the Appelate Division in the case of *Magna Alloys and Research (SA) (Pty) Ltd versus Ellis.*[19] The fact that the court was prepared to reverse a well-established rule on the basis of contractual freedom, illustrates the great importance that is still attached to this principle in modern South African law.

As the idea of freedom of contract developed at the end of the eighteenth century, more emphasis was also put on the freedom of an individual to look after his own

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[13] 1927 AD 69 at 73.
[14] See note 4 above.
[15] 1984 AC 535 (HL) at 565.
[16] Christie *The law of contract in South Africa* (1989) at 434 f.
[17] 1977 (4) SA 494 (N) at 505 H.
[18] See the quotation from the case earlier, in note 4.
[19] 1984 (4) SA 874 (A) at 892 E - 893 A.

interests.[20] It was accepted that parties to a contract had an equal opportunity to work towards the creation of the contract. No *ex post facto* intervention in the contract was thus needed, because the contract was percieved to contain the wishes of both parties.[21] Negotiations would thus have made it impossible for unfair terms to apply to any party to a contract. The mechanism of negotiations was thus seen as something of a guarantee for contractual justice.[22] In other words, at this time contractual freedom was only a means towards the goal, namely the guarantee of contractual justice. But from the nineteenth century onwards, the means became a goal in itself. Freedom of contract became the cardinal principle, with contractual justice shifted to the background.[23]

If this absolute idea of contractual freedom were to be applied in modern South African law, it would mean first of all that a party would never be held contractually liable if he did not subjectively consent to the contract.[24] Secondly, it would mean that all contractual terms a party consented to would be binding upon him, no matter how harsh or unreasonable they might be. However, as appears in the opening quotation, this is not the position in South African law. Nineteenth century perceptions regarding the rights and obligation of individuals, community interest, contractual freedom and contractual justice, are perceived as outdated in a modern society. Contracts that follow from negotiations between two equal individuals with the utmost freedom of will are almost non-existent. They have been replaced by mass-scale contracting, where very few or no negotiations take place. The false image of contractual freedom in South African law must therefore be rectified.

How South African law protects the reasonable expectations of contractants must be investigated, i.e. how has the absolute idea of sancity of contract been tempered to make room for justice in the pre-contractual stage?

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[20] Atiyah *The Rise and Fall of Freedom of Contract* at 256 f.
[21] Atiyah *The Rise and Fall of Fredom of Contract* at 402.
[22] Atiyah *The Rise and Fall of Freedom of Contract* at 300.
[23] See note 21 above.
[24] Christie *The law of contract in South Africa* at 11.

B. *Justice and the pre-contractual stage*

In South African law, true *consensus* is accepted as the basis of contractual liability. This is true for both leading academics in contract law,[25] as well as for the courts of law.[26] This basis of contractual liability has been variously labelled, for instance, as the *will theory*, the *subjective theory*, the *consensual theory* or the *intention theory*.[27] According to the will theory, a contractant is bound to a contract because, and to the extent that, there is an actual meeting of minds. Intentions between a contractant and his co-contractant must therefore coincide.

Van der Merwe and his co-authors[28] give more substance to the term *consensus* by indicating what the elements of *consensus* are.[29] They are:

1. the contractants must agree on the consequences they wish to create; and
2. they must intend to bind themselves legally; and
3. they must be aware of their *consensus* or agreement

Clearly, if a will theory serves as the absolute or only basis for contractual liability, situations of injustice will result. For example, in the case of *reservatio mentalis* it is clear that if a party says he intended something different from what he did or said he will not be bound by a contract, because the second element of *consensus* would be lacking. However, a more common case that can lead to unjustice is the phenomen of

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[25] See for example Christie *The law of contract in South Africa* at 13 - 14; Kerr *The principles of the law of contract* (1980) at 1 ff; Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract: General Principles* (1993) at 13 - 16; Lubbe and Murray *Farlam and Hathaway: Contract cases, materials and commentary* (1988) at 96; Hutchison, "Contract Formation" in Zimmermann and Vissier (eds.) *Southern Cross, Civil Law and Common Law in South Africa* (1996) 165 at 180.

[26] See for example *Saambou Nasionale Bouvereniging versus Friedman* 1973 (3) SA 978 (A) at 992 E; *Spes Bona Bank Ltd versus Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 948 D-H; *Sonap Petroleum (SA) (Pty) Ltd versus Pappadogianis* 1992 (3) SA 234 (A) and *Steyn versus LSA Motors Ltd* 1994 (1) SA 49 (A).

[27] Sharrock "More on the Spes Bona Case and Theories of Contract (1984) 101 *The South African Law Journal (SALJ)* 1 at 3.

[28] See note 25 above.

[29] Van der Merwe et al. *Contract* at 14 - 16.

material mistake. Material mistake is generally diveded into different categories,[30] such as *error in corpore*,[31] *error in persona*[32] and *error in negotio*[33]. This classification may help identify particular instances of mistakes as material mistakes, but it is not a *numerus clausus*. Any mistake that relates to the content of the obligations could be a material mistake which would, according to the will theory, lead to *dissensus*.

So, when one of the parties in contractual negotiations is under a mistaken belief regarding the content of a contractual obligation, there can be no contract according to the will theory. This exclusively subjective approach might lead to injustice because it ignores other factors. For instance, the other party in the contractual negotiations might not have known of his co-contractant`s mistaken belief. In the absence of real *consensus*,. could the law, thus, hold a party to a contractual obligation? In other words, does South African law look at the conduct of the mistaken party in the pre-contractual stage as an alternative basis for contractual liability? The question can be answered affirmatively. Therefore, justice is achieved by looking *ex post facto* at conduct during the pre-contractual stage.[34]

A diversity of opinions exist as to what approach should be followed to hold a party contractually liable in the absence of a true meeting of minds. It should, however, be clear that whatever approach is followed, should be an objective one. Whenever a contractant subjectively chooses not to work towards the creation of a contract, the courts should be able to look at objective factors to hold that party liable to a contract. In South African law the courts are empowered to take objective factors into account through applying either estoppel by representation or some form of the reliance theory.

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[30] Van der Merwe et al. *Contract* at 17.
[31] A mistake relating to the object of performance.
[32] A mistake relating to the person between whom the obligation exists.
[33] A mistake relating to the nature of the juristic act in question. See also Kerr "Mistake in Communication of Which a Reasonable Man Would be Aware: Contract or no contract? Error in Negotio? (1985) 102 *SALJ* 5 at 6 - 7.
[34] Van der Merwe and Van Huyssteen "Dissensus, reasonableness and contractual liability" (1981) 50 *THRHR* 445 at 445 - 446. Cockrell "Substance and Form in the South African law of Contract" (1992) 109 *SALJ* 40 at 48. In this article the learned author describes the will theory in terms of a "choice theory". The law will only justify the enforcement of contractual liability on the basis that a promisor is bound to do what he or she voluntarily undertook or chose to do.

Under „some form of the reliance theory", I propose to discuss the reliance theory and also the concept of *iustus error*. First, a brief discussion of estoppel by representation is required.

1. Estoppel by representation

The notion of estoppel by representation in South African law originates from English law.[35] Briefly, it denotes the following: if A brings B in under an incorrect impression, and by relying on that impression B has acted to his detriment, then B can estop (prevent) A from relying on the correct state of affairs before a court of law. Thus, if estoppel is successfully raised, the incorrect impression appears to be maintained as if it were correct. Many proponents of the will theory regard estoppel by representation as the best solution for solving the problem of mistake and *dissensus*.[36] In contractual terminology, estoppel will thus operate as follows: A party to an agreement who makes a representation that he subjectively agrees to a contract but in fact has no such intention, may, depending on the circumstances, be estopped by the other party from relying on his lack of intention and the consequent lack of *consensus*. When the elements of estoppel are applied to the situation of mistaken belief during the negotiation or conclusion of a contract, the party relying on estoppel (in other words the party asserting the existance of a contract) has to prove the following:[37]

1. that the party denying the existence of the contract made certain factual representations from which he, the contract-assertor, drew the conclusion that there was a true meeting of the minds;
2. fault on the part of the party making the mispresentation. Fault can be in the form of either *dolus* or negligence;

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[35] See in general De Wet *"Estoppel by representation" in die Suid-Africaanse reg* (1939) at 10 - 15 and *Connock's (SA) Motor Co Ltd versus Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) at 49.
[36] See De Vos "Mistake in Contract" in De Vos, Dean and Leeman (eds.) *Essays in honour of Ben Beinart* (1976) at 177.
[37] Van der Merwe et al *Contract* at 25.

3. that he, the contract-assertor, relied on the representation and, as a consequence, acted to his prejudice;
4. that a causal connection existed between the representation and the prejudice;
5. that the maintaining of the fictional contract[38] would not be improper before the law.

When estoppel is applied in this manner, it certainly helps qualify the will theory and somewhat alleviates the harsh consequences that consistently adhering to this theory incurs. Indeed, estoppel has been applied by the South African courts on more than one occasion. For instance, the Transvaal Provincial Division, relying on the English case of *Smith versus Hughes*,[39] in the cases of *Van Rijn Wine and Spirit Co versus Chandos Bar*[40] and *Peri-Urban Areas Health Board versus Breedt*,[41] accepted estoppel as qualification of the will theory.

A considerable amount of criticism can be made against the application of estoppel. First, and most importantly, it only serves as a defence and not as a direct cause of action for a contract-assertor. This is indeed a considerable limitation for a contract party and one which could also lead to a prolonged and more costly litigation process.The contract-assertor could allege in his writ of summons that a contract has been formed between him and another party on the basis of true *consensus*. In his written defence, the contract-denier would then raise the issue that he has not consented to the contract. The contract-assertor then has to prepare a rejoinder in which he sketches the factual situation as to why the other party should be estopped from raising his lack of *consensus*. Possibly, using the reliance theory as a one-step procedure to hold a contract party bound to a contract is more effective, because with the reliance theory, the contract-assertor can plea in his writ of summons that a contract has been formed on *consensus*, and, alternatively, on the reasonable reliance of *consensus*.

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[38] See later in the text why the term "fictional contract" is used.
[39] (1871) LR 6 QB 597. At 607 Blackburn J. said the following: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."
[40] 1928 TPD at 417.
[41] 1958 (3) SA 783 (T) at 790.

The second point of criticism is that estoppel operates as a legal fiction. Estoppel by representation is based on the premise that a contract can only be formed as a consequence of true *consensus*. Where there is a lack of *consensus*, but the contract-assertor is successful with the defence of estoppel, there would be no real contract but only a fictional contract.[42] The contract-denier would not be bound on *consensus*, only as if he had consented to the contract. The intrinsic limitations that such fictional contracts would have on commerce should be apparent. No real contract with rights and obligations is produced. The party succeeding in estopping the other party from denying that he is bound, does not acquire contractual rights that can be ceded to third parties. The protection is provided only for the estoppel-raiser; in other words, for the contract-assertor. Nevertheless should the estoppel-raiser purport to transfer his „rights" from the contract to a third party, when attempting to enforce these „rights", this third party would be met by a defence from the representor that there were no rights open to cession. The third party would also not be able to rely on estoppel against the party denying a contract, because this party made no representation to him. It is conceivable that many of the hire-purchase agreements and leasing agreements that are discounted to financial institutions operate on the basis of such a fiction. No financial institution would acquire any rights from such a relationship between a contract-assertor and a contract-denier.

Thirdly, in order to succeed with the defence of estoppel, the contract-assertor must acquit himself of an unreasonably heavy burden of proof.[43]

Whether the English case of *Smith versus Hughes*[44] serves as a source of authority for estoppel is arguable, unlike the findings in both the *Van Rijn Wine* case and the *Peri-Urban* case. Christie argues that *Smith versus Hughes* is authority for the reliance theory and not for estoppel by representation.[45] The case of *Smith versus Hughes* was

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[42] Van der Merwe et al. *Contract* at 25 - 26.
[43] For the elements the contract-assertor has to prove, see page 12f. of the text.
[44] (1871) LR 6 QB 597.
[45] Christie *The law of contract* at 19.

based on another estoppel case of English law, namely *Freeman versus Cooke*.[46] In the *Hughes* case, Blackburn J. reworded the last portion of Park B`s *dictum* from: „ ...the party making the representation would be equally precluded from contesting its truth" to „...the man thus conducting himself would be equally bound as if he had intended to agree to the other party`s terms." It is argued that Blackburn J., by altering the wording, must have intended to advance the law one step further and to give the misled party something more than the defence of estoppel. In fact, to give him a cause of action whereby he could enforce the contract in terms of the reliance theory.[47] Christie concludes his argument with: „To describe the doctrine in *Smith versus Hughes* as estoppel is therefore to underestimate the constructive work of Blackburn J., and the Appellate Division`s disapproval of such a description is clearly stated in *Saambou Nasionale Bouvereniging versus Friedman* 1979 (3) SA 978 (A) 1002 D. The doctrine is better described, so as to mark its advance beyond estoppel, as quasi-mutual assent".[48]

Apart from *Saambou Nasionale Bouvereniging versus Friedman,* other Appellate and Provincial Division cases decided that *Smith versus Hughes* is authority for the reliance theory rather than estoppel.[49] Two Provincial Division cases worn mentioning are *Usher versus AWS Louw Elektriese Kontrakteurs*[50] and the recent *Kok versus Osborne and another*.[51] The Appellate Division, in the cases of *Sonap Petroleum (SA) (Pty) Ltd versus Pappadogianis*[52] and *Steyn versus LSA Motor Ltd*[53] quoted the passage[54] from *Smith versus Hughes* and then went on to apply the reliance theory to the facts of the case. It is clear from this that the Appellate Division used *Smith versus Hughes* as a basis for applying the reliance theory.

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[46] (1948) 2 Ex 654.
[47] Note however that Christie, in his work on South African contract law, refers to the reliance theory as quasi-mutual assent.
[48] See note 47 above.
[49] Van der Merwe and Van Huyssteen "Reasonable reliance on consensus, iustus error and the creation of contractual obligations" (1994) 111 *SALJ* 679 at 682.
[50] 1979 (2) SA 1059 (O).
[51] 1993 (4) SA 788 (SE) at 806 C.
[52] 1992 (3) SA 234 (A).
[53] 1994 (1) SA 49 (A).
[54] See note 39 above.

Despite all the criticism against estoppel by representation, and despite the fact that there is no more judical authority for the application thereof,[55] it is submitted that the defence of estoppel is still open for application in South African law.[56] The negative comments made by the Appellate Division in the *Sonapcase*,[57] regarding the application of estoppel are unlikely to be interpreted to mean that estoppel is not available at all. *Saambou Nasionale Bouvereniging versus Friedman* [58] should, however, make clear that a party who can prove all the elements of estoppel has the opportunity to rely on estoppel in order to establish a contractual *nexus* between himself and another party. At page 1002 D-E of this case, the Appellate Division did consider an attempt to rely on estoppel by representation, although it was not upheld on the facts.[59]

A contracting party faced with the situation where his co-contractant denies the existance of real *consensus*, should not rely on the defence of estoppel by representation. He should rather depend on the reliance theory as a direct cause of action in order to prove that a contract exists.

2. The reliance theory and iustus error

South African contract law, as part of a larger family of private law, is not always easy to understand. This is partly because private law is a mixed system, drawing principles from both English common law and also, to a limited extent, from modern civil law. However, the greater part of South African private law is based on Roman Dutch

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[55] this is true, because as indicated, the Appellate Division has said *Smith versus Hughes* is rather authority for the reliance theory.

[56] See for instance Van der Merwe and Van Huyssteen "Dissensus, Reasonableness and Contractual Liability" (1987) 50 THRHR 445 at 448.

[57] *Sonap Petroleum (SA) (Pty) Ltd versus Pappadogianis* 1992 (3) SA 234 A at 240 D. See also Floyd and Pretorius "A reconciliation of the different approaches to contractual liability in the absence of consensus" (1992) *THRHR* 668 at 670.

[58] 1979 (3) SA 978 (A).

[59] For a further discussion on estoppel by representation see also Kritzinger "Approach to Contract: a Reconciliation" (1983) 100 *SALJ* 47 at 60 - 67.

law.[60] The dual application of the reliance theory[61] and *iustus error*,[62] in cases trying to establish contractual liability in the absence of real *consensus*, has led to great confusion in the past amongst students and teachers of law, and also the courts. Analysis of the two latest judgments of the Appellate Division, namely *Sonap Petroleum (SA) Pty Ltd* (formely known as *Sonarep (SA) (Pty) (Ltd) versus Pappadogianis* 1992 (3) SA 234 (A) and *Steyn versus LSA Motors* 1994 (1) SA 49 (A), should remove all future confusion.[63]

Briefly, the facts in the *Sonap Petroleum* case were as follows.[64] As a supplier of petroleum products, *Sonap Petroleum* used a functional operating system whereby they lent money to property owners. These owners used the money to erect garages, and then let these garages to *Sonap Petroleum*. *Sonap Petroleum*, as lessee, would then sublet to operators who sold its products. Although not spelled out by the court, I assume that the advantage for the property owners lay in the difference between the rent money received and the interest paid on the loan.

One such property owner in Randfontein, a suburb of Johannesburg, was *Pappadogianis*. He leased his property to the appellant for a period of twenty years. Clause 4 of the contract provided that the twenty year period would commence „on the date to be specified in terms of a certificate to be issued by *Sonarep*" (the earlier name of appellant).[65] Two years after the garage had been erected, it was realized that

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[60] See the discussion on South African common law that follows later in this part of pages 43 - 47.

[61] In the South African common law the courts,when working with the reliance theory, directly fall back on English law in the form of the *dictum* of Blackburn J. in the case of *Smith versus Hughes* (1871) LR 6 QB 597 at 607. For the quotation of this *dictum* see note 39 above.

[62] The principle of *iustus error* was based on text in the Corpus Iuris Civilis (see D 4.12, D 22.6 and C 1.18). It was introduced in South African law at the end of the nineteenth century and beginning of the present century. See for instance *Logan versus Beit* (1890) 7 SC 197, *Maritz versus Pratley* (1894) 11 SC 345 and *Van Rensburg versus Rice* 1914 EDL 217. From the following discussion it will be clear that it is now firmly established in South African contract law.

[63] At page 679 Van der Merwe and Van Huyssteen "Reasonable reliance on consensus, iustus error and the creation of contractual obligations" (1994) 111 *SALJ* say the following: "The principles and rules relating to contractual liability in South African law have had a chequered and often troubled development ...More recently this development seems to have gained both in simplicity and, not surprisingly, in clarity." See also Hutchison "Contract Formation" in Zimmermann and Vissier (eds) *Southern Cross - Civil Law and Common Law in South Africa* 165 at 192: "...the Appellate Division has at last placed its approval on the aforegoing line of reasoning and has thereby effected the long-sought reconciliation of the two approaches to mistake."

[64] See the judgement at 235 J - 237 E.

[65] At 236 E of the judgement.

this certificate was never issued. The appellant's attorney then drew up a notarial *addendum* which was signed by both the appellant and the respondent. The problem, however was that this second contract provided that the lease would be for a period of fifteen years and not twenty years as was initially agreed upon.

Because the defendant wanted to be bound by a shorter lease, he asserted that he was only obliged to lease to the appellant for the period of fifteen years, as specified in their second contract. The appellant pleaded rectification in the main, but did plead in the alternative that inserting a fifteen year period in the contract was the result of his mistake, and that the *addendum* should therefore be null and void. Had he succeeded the effective leasing period would have been a term of twenty years, as reflected in the initial agreement.

These real circumstances provide an excellent scenario to assess applying the reliance theory and the *iustus error* approach. The appellant asserted that there was *dissensus* regarding a material term of the contract, namely the period of the lease. According to *Sonap Petroleum*, its real intention was to create a contract for a twenty year lease period. When the appellant realized that the will theory is tempered in South African law on objective grounds, he also asserted that, despite the ostensible contract, a reasonable mistake[66] was made in writing "fifteen" instead of "twenty". The defendant, on the other hand, asserted that he reasonably believed *Sonap Petroleum's* real intention correlated to its declared intention. Thus the defendant claimed a contract should be upheld on the reasonable reliance of *consensus* on his part.

The court dealt briefly with the issue of rectification. *Pappadogianis* had the intention to amend the leasing period from twenty years to fifteen years. Therefore, as the court rightly pointed out, rectification was not possible. For a successful application to rectify, the party claiming rectification must prove that as a result of an *error* the document does not contain a correct reflection of their common intention, and also

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[66] In other words a *iustus error*.

what the true intention of the parties was.[67] In casu, there was no common intention that was incorrectly reflected in the document. Harms A.J.A., thus concluded that: „rectification cannot follow because there was no common intention not to amend."[68]

Harms A.J.A. went on to deal with the alternative claim based on mistake.[69] Having started with an explanation of what a *iustus error* is, the court gave the quotation of *Smith versus Hughes* (1871) LR 6 QB 597[70] and then dealt with the facts with reference to the reliance theory.[71] The way in which the court dealt with *iustus error* and the reliance theory clearly indicates a definite inter-relationship between these two concepts. This is the only point of critique I have against this judgement. The court did not seize the opportunity to make it clear enough how *iustus error* and reliance operate in correlation to each other. The correlation between these two concepts needs explanation.

A party wanting to escape from an ostensible contract, as was the case in the *Sonap Petroleum* case, has to prove the elements of an *iustus error*. First of all, he has to prove that his mistake was material.[72] However, this is insufficient to escape contractual liability. The contract-denier also has to prove that his mistake was reasonable. In a case where the contract-denier cannot prove the materiality of the mistake, the second leg of the two-fold test does not even come into play. Consequently, in *Diedericks versus Minister of Lands,*[73] after the court had decided that the mistake in issue was not material, it did not investigate the reasonableness of the mistake. Thus, non-liability is only achieved by proving both the materiality and the reasonableness of a mistake.[74] In a case of proving only the materiality of the mistake

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[67] Van der Merwe et al. *Contract* at 130. See also *Von Ziegler versus Superior Furniture Manifactures (Pty) Ltd* 1962 (3) SA 399 (A) at 410 and *Mouton versus Hanekom* 1959 (3) SA 35 (A) at 38.

[68] See the judgement at 238 F.

[69] See page 238 G of the judgement.

[70] See note 39 above.

[71] At page 239 I - J Harms A.J.A. said the following: "In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?"

[72] See page 11 of the text for the definition of a material mistake.

[73] 1964 (1) SA 49 (N).

[74] For selected extracts of this case see Lubbe and Murray *Contract* at 126 - 130.

and not the reasonableness, there contractual liability occurs. The question then arises on what the contractual liability will be based? It clearly cannot be based on *consensus*, because a material mistake leads to the exclusion of *consensus*. The simple answer to the question is that liability will be based on the objective ground of a reasonable reliance.

The *iustus error* approach is, in fact, nothing more than an indirect application of the reliance theory. The first step in applying the reliance theory directly is to ask whether true *consensus* exists. If the answer is no, the contract-assertor will have to prove that he reasonably relied on *consensus*. The *iustus error* approach is the exact mirror immage of this. The contract-denier will bear the onus of proving that, despite the existence of an ostensible contract, he made a reasonable mistake. This simply means that if his mistake was reasonable, the reliance of his opposing party was unreasonable. Inversely, if his mistake was not reasonable, it means that the reliance of the contract-assertor was. One can typify this as an „either or approach". It is not a „both and approach". Either the reliance or the mistake will be reasonable, but both the mistake and the reliance cannot ever be reasonable.

Harms A.J.A. thus made it clear, although in a round-about way, that the *iustus error* approach is not an indirect application of the declaration theory.[75] In the past, this was the greatest source of confusion relating to the *iustus error* approach: it was seen as embodying the declaration theory.[76] As a result of this confusion, the *iustus error* approach has also been viewed as bad law. Why does the confusion occur? The answer is that the *iustus error* approach applies in cases where there an ostensible agreement exists. Such an agreement will be upheld as indicative of a true, subjective agreement, until the contract-denier can prove the contrary. Hence *iustus error* has been seen to take the declaration theory as a point of departure. Were the approach to use the

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[75] Van der Merwe et al. Contract at 28, defines the decleration theory as follows: "According to the declaration theory contractants are bound to their contract not on the basis of their subjective, coinciding intentions but on the basis of their objective, coinciding declerations of will. Although the declaration theory as a qualification of the will theory accepts that in principle the will of the parties underlies their contract, the existence of consensus is determined without further recourse to their actual intention but simply by interpreting their declared or expressed will."

[76] Van der Merwe et al. *Contract* at 34 and also Lubbe and Murray *Contract* at 164.

declaration theory as a point of departure, the danger might arise that contractual liability was upheld on the basis of coinciding declarations of will, without there being any reasonable reliance or *consensus*.[77] In the South African law of contract, are some indications of support for the declaration theory.[78] However, cases such as *Saambou Nasionale Bouvereniging versus Friedman*,[79] should make it clear that there is no room for the declaration theory as an alternative basis of contractual liability in the absence of true *consensus*.

In the *Sonap Petroleum* case, Harms A.J.A. also implicitly rejected the declaration theory.[80] In order to reconfirm its point of view, the Appellate Division took the opportunity of re-burying the declaration theory in *Steyn versus LSA Motors Ltd*,[81] this time in more explicit terms.[82] The Appellate Division has thus finally buried the declaration theory.

One can thus conclude so far, that although it is theoretically possible to see the *iustus error* approach as an indirect application of the declaration theory, it should not be seen in this way. This is one of the reasons for the earlier claim that the *Sonap Petroleum* case clarified the situation relating to *iustus error* and reliance. This

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[77] See Kritzinger *op.cit.* 47.

[78] In *South African Railways and Harbours versus National Bank of South Africa Ltd* 1924 AD 704 at 715 - 716 Wessels J.A. said the following: " The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestations of their minds. Even therefore from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of a contract".

[79] 1979 (3) SA 978 (A).

[80] At 238 I - 239 A the court said the following: "The law as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract. However, in the case of an alleged dissensus the law does have regard to other considerations: it is said that, in order to determine whether a contract has come into being, result must be had to the reliance theory."

[81] 1994 (1) SA 49 (A).

[82] At 61 B - D Botha J.A: said the following: "Where it is shown that the offeror's true intention differed from his expressed intention, the outward appearance flowing from the offeree's acceptance of the offer as it stands does not in itself or necessarily result in contractual liability. Nor is it in itself decisive that the offeree accepted the offer in reliance upon the offeror's implicit representation that the offer correctly reflected his intention. Remaining for consideration is the further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in the belief that it represented the true intention of the offeror...Only if this test is satisfied can the offeror be held contractually liable."

judgement also made it clear that the *iustus error* approach is not an alternative theory for contractual liability. Essentially, the approach is just an indirect application of the subjective will theory as supplemented by the objective reliance theory. However, as should be clear by now, the application of the *iustus error* approach results in a shift of the burden of proof. The contract-denier has to proof that his *error* was reasonable. If he can prove that the reliance the contractor-assertor made was unreasonable, his mistake will be proven reasonable. *Steyn versus LSA Motors Ltd* made a further contribution to clarity on this point, because after this case no more doubt remains that the basis of contractual liability in South African law is the will theory as supplemented by the reliance theory.[83]

However, these two judgements raise the question of whether the *iustus error* approach still applies in South African law. Does this mean that a contractual party relies directly on his mistake if he feels he can prove that it was both a material and a reasonable mistake? In the *Sonap Petroleum* case the contract-denier pleaded in terms of *iustus error* and the court, after referring to the *iustus error* approach, decided the case with reference to a direct application of the reliance theory. In *Steyn versus LSA Motors Ltd,* the court did not even mention the *iustus error* approach. The case was simply decided on a direct application of the reliance theory, even though it could well have been decided on the basis of a reasonable mistake. It is submitted that the *iustus error* approach should not be jettisoned from South African law.[84] Even though it appears that the Appellate Division has opted for a direct application of the reliance theory, as theoretical explanation for the basis of a contract, it should not abstain from applying the *iustus error* approach if this seems more practicable to reach liability in a given factual situation. As long as the will theory, supplemented by the reliance theory, is accepted as basis of contractual liability, parties should have the option of claiming or pleading in terms of reasonable reliance, thus relying directly on the reliance theory. In cases of a reasonable mistake, they would rely indirectly on the reliance theory. The

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[83] See for instance Van der Merwe et al. *Contract* at 34.

[84] Lubbe and Murray *Contract* at 180 - 181 and also Van der Merwe et al *Contract* at 40 where the learned authors say the following: "However the *iustus error* approach has the decided advantage that it meets an often-occuring situation head-on: if someone apparently consents and then raises a material mistake, objective policy considerations are directly attached to the issue he has raised, and it is not left to the other party to raise an alternative basis for a contract between them."

facts of a particular case may thus dictate the most practical and expedient way of determining whether a party should or should not be held contractually bound despite *dissensus*.[85] In this way the courts, in applying the *iustus error approach*, could shorten a potentially protacted process by expecting a party who raises a material mistake to prove that his mistake was also reasonable in the given circumstances.

A case such as *George versus Fairmead (Pty) Ltd*[86] that was decided on the basis of the *iustus error* approach, should be decided on the same basis should a similar factual situation come before a court of law. In this case, *George* rented a hotel room on a monthly basis in one of the the hotels owned by *Fairmead*. When he signed the lease contract, *George* did not read *Fairmead*'s clause at the back of the contract that stated that *Fairmead* did not accept responsibility for anything stolen from the hotel rooms. When something was in fact stolen, *George* wanted to hold *Fairmead* responsible. He contended that he was not contractually bound to the clause excluding *Fairmead*'s liability, because he had committed a *iustus error*. He reasonably believed that he signed only the hotel register and not a contract. The Appellate Division can be commended because it decided this case in terms of the *iustus error* approach. *George* contended that he had made a reasonable mistake and that the court was right in placing on him the burden of proving his reasonable mistake.

It is hoped that the Appellate Division would continue to apply the *iustus error* approach if the facts of a given case require such an application.

Before discussing a further manifestation of pre-contractual justice, I briefly want to deal with two issues. Firstly, what a litigant has to do to prove successful in his reliance on the reliance theory. Secondly, I wish to show what the legal consequences are of a successful reliance on the reliance theory.

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[85] With respect I thus find the objection of Floyd and Pretorius *op.cit.* 671 unacceptable. The learned authors, in their discussion of the *Sonap Petroleum* case, say that the reconciliation that Harms A.J.A. made between the reliance theory and the *iustus error* approach, leads to legal uncertainty. According to them the legal uncertainty lies in the fact that "the back door is left open for the application of the *iustus error* approach should the facts of a case warrant this." Legal certainty should not override the principles such as practicability and expediency.

[86] 1958 (2) SA 465 (A).

With the first issue, the question is whether the contract-assertor has not only to prove a reasonable reliance on *consensus* on his part, but also has to prove fault on the part of the contract-denier and prejudice on his own. In the matter of fault, although there are some indications of support for the fault requirement, to prove clearly this is not an additional requirement that the contract-assertor has.[87] In the case of *Spes Bona Bank Ltd versus Portals Water Treatment SA (Pty) Ltd,*[88] the Appellate Division dealt with the reliance theory without even referring to whether fault is a requirement or not. Van der Merwe et al.[89] contend that not referring to fault does not necessarily mean that the court finally discussed it as a requirement, because in the *Spes Bona* case, the court found the reliance to have been clearly unreasonable. Therefore, the court may not have considered an inquiry into the requirement of fault as necessary. *Sonap Petroleum (SA) (Pty) Ltd* (formely known as *Sonarep (SA) (Pty) Ltd) versus Pappadogianis,*[90] however, is illustrative again and should place the issue beyond the realm of controversy. The decision was explicit; that proving fault by the contract-denier is not an additional requirement.[91]

I disagree with Van der Merwe et al.'s reference to prejudice. They contend that there uncertainty exists over whether the contract-assertor has to prove that he acted on the reliance to his detriment.[92] The two latest Appellate Division cases dealing with the reliance theory made no mention of this additional requirement. I submit, therefore, that prejudice is not an additional requirement that the contract-assertor has to prove.[93] This reconfirms the point made earlier that the *Sonap Petroleum* case and the *LSA Motors* case brought a great deal of certainty to the field of reliance theory.

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[87] Sharrock "More on the *Spes Bona* case and theories of contract" (1984) 101 *SALJ*1 at 4-5; Christie *The law of contract* at 18; Kerr "Fault and Iustus Error" (1985) 102 *SALJ* 1 at 4.
[88] 1983 (1) SA 978 (A).
[89] Van der Merwe et al. *Contract* at 31.
[90] 1992 (3) SA 234 (A).
[91] At 240 G Harms A.J.A. said the following regarding the fault requirement: " However, apart from anything else, it appears to be unnecessary."
[92] Van der Merwe et al. *Contract* at 31.
[93] See also Lubbe and Murray *Contract* at 167 -168.

Misunderstanding as to the legal consequences of a successful reliance on the reliance theory has occurred. Some authors[94] have said that the reliance theory operates to create a „deemed contract". This is, however, far from the truth. If all the elements of the reasonable reliance have been proven, a real contract comes into being.[95] This means that both parties would acquire full contractual rights instead of fictious rights. Thus, a contract stemming from the reliance theory is as good as one stemming from true agreement.[96]

In concluding this part of the discussion, I feel it fair to say that the South African law of contract has developed to a stage where the reasonable expectations of negotiating parties are more satisfactorily protected in the pre-contractual process. Estoppel, with its very demanding requirements of proof, has been shifted to the background by the South African courts. Simultanoeusly, the reliance theory has been accepted as the operational manner in which to establish contractual liability in the absence of true agreement. In order for a claim based on the reliance theory to be successful, neither does fault on the part of the contract-denier have to be proved, nor is it necessary to prove prejudicial action on the part of the contract-assertor. Therefore, in practice, it should not be too difficult to attain pre-contractual justice by means of the reliance theory. "The South African law of contract seems to have reached the point where, on the basic assumption that a contract is primarily an expression of the actual intention of the participants, the objective considerations which serve to recognise and protect the reasonable expectations of those participants, and which have over many decades been expressed in various alternatives, are being assimilated into a unitary qualification of consensus. Such a development in itself need not run contrary to the values of individual autonomy and freedom of contract and consensuality. It is confirmable with a process of setting the parameters of such values against other values such as good faith in human relations and the interests of society in general."[97] The parameters of freedom of contract have to be set against the parameters of pre-contractual justice.

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[94] McLennan "Reliance and iustus error: theories of contract" (1994) 111 *SALJ* 232 at 233.
[95] Van der Merwe et al *Contract* at 31.
[96] This has been recognized from a very early stage in the South African courts. In *Pieters and Co versus Solomon* 1911 AD 121 Innes C.J. said that in the case of the reliance theory "...there is a concluded contract."
[97] Van der Merwe et al *Contract* at 41.

The application of the reliance theory makes a valuable contribution towards pre-contractual justice in the South African law of contract.

3. Relations of parties in contrahendo: breaking down of negotiations

The question arises whether at any stage a party has complete freedom to withdraw from negotiations without incurring liability to the other party, who may well have incurred considerable expense or forgone other business opportunities in the confident expectation that a contract would materialise. The issue, however, is not whether the parties may break off negotiations, but whether they may always do so without incurring liability. The only Southern African case in point is a Rhodesian one, *Murray versus Mc Lean NO*.[98] It involves a delictual claim for damages brought against a government official for negligently misrepresenting that the necessary public funds would be made available so he could conclude the contract with the plaintiff. The plaintiff was a manufacturer of pre-fabricated houses who had been negotiating with government officials for the sale of 52 houses to the Rhodesian Government. When the negotiations fell through, he sued the Minister of Health on the grounds that he had incurred expenses and forgone other work by relying on the now negligent misrepresentations by government officials that the necessary public funds were or would be available for the transaction.

Applying freedom of contract in its pure form, one concludes that the defendant (the Rhodesian Government) had complete freedom to decide not to contract.[99] They were therefore not accountable for the losses of the plaintiff. However, freedom of contract is no longer absolute: it should be interpreted with reference to the needs of modern society, one of which is justice between negotiating parties. The question thus arises as

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[98] 1970 (1) SA 133 (R).

[99] As stated earlier in this chapter, one of the elements of contractual freedom is the freedom to decide whether to contract or not. See page 6 of the text.

to whether a path exists in South African law that can ensure justice in the pre-contractual stage.

South African law is not very clear in this regard. Essentially, the uncertainty relates to whether there is a general duty to act in good faith *in contrahendo*. If this general duty existed, one could say that a contractual claim lies against the party that broke down the negotiations in a way that runs contrary to the notion of good faith. South African courts have expressed opinions both in favour and against recognising such a general duty to act in good faith *in contrahendo*. In *Meskin versus Anglo-American Corporation of SA Ltd.*,[100] Jansen J. at 802 A said the following about negotiating in good faith: "This involves good faith (*bona fides*) as a criterion in interpreting a contract and in evaluating the conduct of parties both in respect of its performance and its antecedent negotiation." The learned judge then stated clearly: "The answer to the question whether in respect of a concluded contract there existed a duty to disclose *in contrahendo* is to be found, as pointed out, in the dictates of good faith."[101] Although Jansen`s statement concerns a situation where a contract actually follows from the tained negotiations, I believe it`s scope is broad enough to serve as authority for a general duty not to break down negotiations in a manner contrary to good faith.

Recognising this general duty to negotiate in good faith comes close to the doctrine of *culpa in contrahendo*, created by the famous German jurist, Rudolf von Jhering.[102] The aim of the doctrine was to impose liability on a party whose negligence during contractual negotiations rendered it invalid or prevented its perfection.[103] Damages would then be awarded against the blameworthy party to the extent that the innocent party suffered loss through placing reasonable reliance on the assurance or representation of the former.

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[100] 1968 (4) SA 793 (W).
[101] At 802 D.
[102] The doctine goes back to a famous article by Jhering, published in 1861, entitled "*Culpa in Contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Vertraegen*" in 4 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts I (1861), reprinted in I von Jhering *Gesammelte Aufsätze* 327 (1881).
[103] Kessler and Fine "Culpa in contrahendo" 1964 *Harvard LR* 401.

Some support has been shown for recognising the doctrine of *culpa in contrahendo* in South African law of contract. One such voice is that of J.M. Zieff.[104] This author correctly points out that the modern doctrine of *culpa in contrahendo* leads to liability either on the grounds of good faith or on the grounds of reliance.[105] In his argument that *culpa in contrahendo* in South African law of contract should be based on the concept of good faith, the author predictably finds support Jansen J.'s reasoning in *Meskin versus Anglo-American Corporation of SA Ltd.*[106] *Sonap Petroleum SA (Pty) Ltd versus Pappadogianis*[107] has been argued as authority for recognising a general duty to negotiate in good faith.[108] I cannot agree with this line of argument. If contractual claims for restitution damages for the breach of a general duty to negotiate in good faith were recognised, serious consequences in the South African law of contract would occur. It is submitted that if the Appellate Division thought that developing South African contract law in that direction would be beneficial, it would have done so more explicitly. However, since the court did not refer to the judgement of the Witwatersrand Local Division in the *Meskin* case, it appears that the only authority for a general duty to negotiate in good faith is a judgement of one of the Provincial Divisions of the South African Supreme Court. Until the Appellate Division gives its support for this, no general duty to negotiate in good faith exists in the South African law of contract. In fact, referring to the judgement of *Mutual and Federal Insurance Co Ltd versus Oudtshoorn Municipality*,[109] the Appellate Division does not seem to favour recognising a general duty to negotiate in good faith. The *Oudtshoorn*

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[104] Zieff "*Culpa in contrahendo* - a prescription for the ills of the South African law of contract" (1989) 52 *THRHR* 348. The learned author dealt with a situation where an offer is to remain open and subsequently as a result, of the negligence of the offeror, the offeree is unable to accept the offer. This of course results in the offer lapsing and as a consequence thereof no contract would come into being. According to the author *culpa in contrahendo* should apply, whereby the offeree would obtain restitutional damages for the expences he incurred in the expectation that a contract would be concluded. I assume that the author would also be in favour of *culpa in contrahendo* covering the situation under discussion.

[105] See Zieff *op.cit.* 361.

[106] 1968 (4) SA 793 (W).

[107] 1992 (2) SA 234 (A).

[108] Kerr "Good faith in negotiating a contract. The duty to enquire if there is a percieved apparent mistake in communication" (1993) 56 *THRHR* 296. Although the learned author does not say it in so many words that the *Sonap Petroleum* case is authority for the recognition of a general duty to negotiate in good faith, this is the only logical conclusion I am able to derive from his line of reasoning. I say this especially because of the strong reliance the author makes on the already quoted wording of Jansen J. in the case of *Meskin versus Anglo-American Corporation of SA Ltd.* For the quotation see page 27 of the text.

[109] 1985 (1) SA 419 (A).

Municipality case dealt with failure to disclose certain information during the negotiation of an insurance contract.[110] At 433 A-C, Jouber J. said; "The duty of disclosure is imposed *ex lege*. It is not based upon an implied term of the contract of insurance. Nor does it flow from the requirement of *bona fides*." He also stated: "Yet the duty of disclosure is not common to all types of contract. It is restricted to those contracts, such as contracts of insurance, where it is required *ex lege*."

Thus, it is not surprising that in 1970 the judgement of Lewis J. in *Murray versus McLean NO* did not deal with the question of a general duty to act in good faith *in contrahendo*. If a case like *Murray*`s came before the courts today, it is highly unlikely that the defendant would be held accountable for the plaintiff s losses, on the basis of a breach of a general duty to negotiate in good faith.

Despite this, it is submitted that liability would lie in delict and not in contract. In 1970, when the case was decided, Lewis J. dismissed the plaintiff s delictual claim for damages. According to the learned judge, "To my mind it would be a startling innovation in the field of commercial affairs if, as a general proposition, an action in delict lay at the suit of a prospective seller who, in the course of negotiations with the representatives of the prospective purchuaser, incurred expenses or forwent the opportunity of doing other business in anticipation that the negotiations would successfully culminate in a contract of sale, and acting on the faith of a negligent though *bona fide* representation that the prospective purchaser had set aside the necessary finances for the purchase."[111] As Lewis J. pointed out, either negotiating party, be he a private individual or not, is free to withdraw from negotiations prior to the actual conclusion of the contract. Lewis J.`s judgement confirms the indications contained in the *obiter dicta* in *Hamman versus Moolman*;[112] i.e. that South African

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[110] For the facts of the case see the judgement of Miller J.A. at 436 H - 442 F.

[111] At 137 H.

[112] 1968 (4) SA 340 at 348 C Wessels JA stated in an *obiter dictum* that a party to whom a misrepresentation is made, is adeaquately protected by the existing law, since he can safeguard himself by requiring the presentor to gurantee the truth of his representation. The judge continued by saying that to grant a remedy for negligent misrepresentation which caused pure economic loss would result in more ills than the one it was intended to remedy - namely the failure of the unwary representee to have a proper regard to his own interests in the field of contract.The negative comments of Wessels JA in *Hamman*`s case at 348 C were quoted and relied upon by Lewis J. in *Murray versus McLean NO* at 139 B-E.

courts will only grant an action in delict for an innocent, though negligent, misrepresentation with the greatest reluctance. At the time of the decision claims for economic loss caused by negligent misstatements were highly unlikely to succeed, particularly where the misstatement was made while negotiating a contract.[113] In dismissing the plaintiff's claim for damages, the judge relied principally upon the judgments of Schreiner and Van den Heever JJ.A. in *Herschel versus Mrupe*,[114] the decision of the House of Lords in *Hedley Byrne & Co Ltd versus Heller & Partne Ltd*[115] and *Hamman*'s case.[116]

Today, such claims are freely entertained, with liability controlled through a judicious manipulation of the elements of wrongfulness[117] and causation.[118] The party that sufferes damages is able to reclaim these, if he is able to prove that the break down of negotiations, on the part of the other party, amounted to a wrongful act. In *Murray*'s case the plaintiff would be placed under a strenuous burden of proof. He would have to prove that the defendant (the Rhodesian Government) acted either by means of an *omissio* or a *comissio*. Furthermore, proof is needed of wrongfulness or fault (as either *dolus* or *culpa*), damage and causability between the act and the party suffering damages. Is it reasonable to place the burden of proof on a party like *Murray*? I believe not. In circumstances which show that the defendant negotiated in bad faith by stringing the plaintiff along without any intention of ever reaching an agreement, the requirement of wrongfulness is very likely to be satisfiied. Additionaly, not only in the absence of bad faith, a more equitable route should be in place to attain justice when pre-contractual negotiations are broken.

The solution lies in a cause of action already in existence; the reliance theory. Zieff questioned whether the reliance theory could be relied upon for claiming damages

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[113] See note 112.
[114] 1954 (3) SA 464 (A).
[115] (1964) AC 465.
[116] See note 112.
[117] Boberg *The Law of Delict I: Aquilian Liability* at 30 -34. The elements of wrongfulness in Aquilian liability corresponds with that of "duty of care" in the tort of negligence. It is said to be determined by the legal convictions of the community, and essentially involves a value judgement, as to whether it is fair, just and reasonable to impose liability for negligence in the circumstances.
[118] Hutchison "Good Faith in the South African Law of Contract" in Brownsword, Hird and Howells (eds.) *Good faith in Contract: Concept and Context* at 28.

resulting from the break down of negotiations.[119] He negated this question simply; "He cannot, for no representations relating to the potential acceptance have been made by the offeror. " Although I do not understand the full implications of this statement, I assume the author`s intention is that no misrepresentation has been made to the party wanting to form a contract. The lack of a misrepresentation would exclude the applicability of the reliance theory, as should be clear from the judgements in *Sonap Petroleum (SA) (Pty) Ltd versus Pappadogianis*[120] and *Steyn versus LSA Motors Ltd.*[121] Why should a misrepresentation in this context not be possible? For a long time in South African law uncertain opinion was as to whether an opinion was actionable. Actually, an expressed opinion is not usually regarded as actionable.[122] However, after the judgement in *Kern Trust (Edns) Bpk versus Hurter,*[123] the actionability of an opinion was no longer excluded. In this case, the seller of a business expressed certain opinions as to the financial soundness of the business amongst other things. After the sales contract was signed, these opinions appeared to have been wrong. When the purchaser claimed damages on the ground of negligent misrepresentations, the court held that anyone who expressed an opinion, albeit in the honest belief of its correctness, would be negligent, on the premise that a reasonable man in his position might have realised that the other party would rely on his expressed opinion. The court could possibly have decided the case just as well from the perspective of the party to whom the opinions had been made. Should a reasonable man in the plaintiff`s position have relied on the opinions, he would have been awarded damages resulting from the other party`s misrepresentation.

Possibly, the only objection to the non-recognition of a misrepresentation might lie in the fact that normally opinions and not factual representations would be made during the pre-contractual negotiations. However, as I indicate above, this objection is not justified. In the present case, the action was not based on the allegation that the

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[119] See Zieff *op. cit.* 356. The learrned author refers to the reliance theory as "the remedy enunciated in *Smith versusHughes*".
[120] 1992 (3) SA 234 (A).
[121] 1994 (1) SA 49 (A). At 61 F-H Botha J.A. reconfirmed the words of Harms A.J.A. in the *Sonap Petroleum* case. For present purposes the important part of the quotation is the following:"...was there a misrepresentation as to one party`s intention".
[122] Van der Merwe et al. *Contract* at 79; Christie *The law of contract* at 276 - 278.
[123] 1981 (3) SA 601 (C).

Minister had gone back on his undertaking to enter into a contract, but on the fact that, through his officers, he had made a misrepresentation about an existing fact, namely, that adequate funds were available.

Returning to the main argument, it must be borne in mind that the scope of the application of the reliance theory has traditionally been limited to situations where both parties expressed the will to be contractually bound towards the other, although on different terms. Tradition should, however, not stand in the way of the equitable development of the South African law of contract.

It is highly likely that in the future government officials, as in *Murray*`s case, might express opinions as to the likelihood of a contract being concluded. When the government then acts contrary to these expressed opinions by breaking down negotiations, the court should award the other party damages for out of pocket expenses. This would depend on if the latter could convince the court on a balance of probalities, that he had a reasonable reliance on the government to conclude a contract with him in future. This, of course, involves an immense intrusion on the will theory and its underlying value, namely freedom of contract. But, as already indicated in this chapter, the South African courts apply the reliance theory as a corrective measure for those situations where strict application of the will theory would lead to injustice. What difference exists between reliance that another`s expressed intention corresponds to ones own, and reliance that another will express a corresponding intention? It is submitted that there is no difference. The reliance theory therefore should also be used to achieve pre-contractual justice in situations where negotiations have unreasonably broken down.

What remedies should be open to the party who thought he would have a contract in future? A party that successfully relied on the reliance theory would be granted the remedy of specific performance, because the other party would be obliged to perform in accordance with the reasonable reliance created. This is a considerable intrusion into the principle of freedom of contract, but it can be justified *in casu* , because the party creating the reasonable reliance at least expressed the will to be contractually bound to

his counter-part, even though on different conditions. However, a successful claim in terms of the reliance theory should not lead to granting specific performance. The very reason why a party broke down negotiations is that he did not want to be contractually bound to the other party involved in the negotiations. Freedom of contract demands that a person be free to decide with whom he wants to contract. Specific performance would be too big an intrusion on the principle of freedom of contract. This is equally true for the granting of *positive interesse* damages. *Positive interesse* damages are calculated on the basis of the position the innocent party would have been in, had the contract been performed according to its terms.[124]

Obliging the negotiation-breaking party to pay damages as if he had concluded the contract would be as unjust as allowing him to walk away without paying anything. Furthermore, trade and commerce would be hampered if a negotiating party knew he stood liable to pay another full positive interest if he broke down negotiations. He would simply not enter into negotiations of this sort.

A court, applying the reliance theory, should thus award only the *negative interesse* damage to the party with the reasonable expectation that a contract would be concluded. Within the context under discussion, this means that damages should be awarded on the basis of placing the aggrieved party in the position he would have been in, had he not be misled into thinking that he would have a contract.[125] However, this remains a contractual action, based on the reliance theory whereby *negative interesse* damage would be awarded.

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[124] Van der Merwe et al. *Contract* at 301 - 302; Lubbe and Murray *Contract* at 804. Positive interest has also been defined by the Appellate Division. See for instance *Isep Structural Engineering and Plating (Pty) Ltd versus Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) where Jansen J.A. at 8 said the following: "The basic principle in the assessment of damages for breach of an obligation arising from contract was formulated as follows by Innes C.J. more than 65 years ago: ` The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed...` (*Victoria Falls and Transvaal Power Co Ltd versus Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22)". (Italics added by current author)

[125] Zieff *op.cit.* 358. See also Fuller and Eisenberg *Basic Contract Law* at 182 - 350 where they make the distinction between three interests being awarded in a contractual context. These three interests, namely the expectation interest, the reliance interest and the restriction interest, have already been identified by Lon L. Fuller in 1936. The *expectation interest* amount either to specific performances or damages to the value of the contract, in other words *positive interesse* damages. The *reliance interest* amounts to *negative interesse* damages being awarded. The *restitution* interest amounts to the benefit itself or the value of the benefit.

Although the aggrieved party has a delictual claim in South African law. Why then recognise a contractual action that awards similar relief? The answer is simply that in terms of the reliance theory the aggrieved party would only be required to prove that a misrepresentation which he relied upon had been made to him, and one which any reasonable man in his position would have relied on. He is not burdened with the additional difficulty of proving that fault by his counter-party broke down the negotiations.[126] As stated earlier, he would be required to prove this in terms of a delictual claim. If a contractual action in terms of the reliance theory were recognised, greater justice in the pre-contractual stage would occur.

In concluding this section, it should be clear that I do not recommend that the doctrine of *culpa in contrahendo* be introduced into South African law. I realize that my proposed cause of action resembles to a great extent the modern doctrine of *culpa in contrahendo*, because in terms of this doctrine one of the bases of liability is reliance.[127] Furthermore, *culpa in contrahendo* encompasses a contractual claim, whereby in *negative interesse* damages are claimed. The same result can be achieved in the South African law of contract. The broader application of an already existing cause of action, namely the reliance theory is required. South African courts are more likely to give a broader application to a cause of action already in place, than to introduce a foreign doctrine, of which *culpa in contrahendo* is one.

4. Consensus obtained in an improper manner

Two parties often agree on the same conditions without any misunderstanding or mistake,but, because of the conduct of one of the parties in the stage preceding the formation of the contract, the other party was not in a position to form his consent in

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[126] See page 26 of the text.
[127] See Zieff *op.cit.* 361.

an unimpeded manner. In these circumstances it is important not to speak of a lack of will, but rather of an impeded will. To speak of a lack of will creates the impression that no contract was formed. In reality, a contract based on true *consensus* was formed. Justice, however, requires that a party should not be held liable in terms of a contract he was unable to consent to freely. By choice, he should be able to terminate such a contract.

Since a contract is formed, rescission from such a contract is seen as a part of pre-contractual liability or pre-contractual justice. Although a contract has been formed, a „spill over" of pre-contractual liability into the subsequent contract can be claimed.[128] After the formation of the contract, the court will next look at the stage preceding the formation of the contract. When the court concludes that, as a result of the conduct of one of the negotiating parties, a party could not form his consent freely, the court ought to recognise that the pre-contractual stage spills over into the contractual stage and a remedy should be granted on these grounds.

Before 1986 three grounds were recognised in South African contract law in terms of which a contractual party could have claimed termination of his contract. These three grounds were equated with wrongful conduct on the part of one of the negotiating parties that led the other party to form the consent in an impeded manner. These grounds were misrepresentation,[129] duress[130] and undue influence.[131] In a situation where a contractual party was unable to file his plea in terms of one of these acts committed *in contrahendo* he did not have a remedy. Furthermore, from close reading of the relevant cases, it is apparent that, as regards to misrepresentation and duress,

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[128] E.H. Hondius (ed.) *Precontractual Liability: Report to the XIIIth Congress of International Academy of Comparative Law* (1991) at 6.

[129] See for instance *Feinstein versus Niggli* 1981 (2) SA 684 (A); *Orban versus Stead* 1978 (2) SA 713 (W); *Kern Trust (Edms) Bpk versus Hurter* 1981 (3) SA 607 and *Phame (Pty) Ltd versus Paizes* 1973 (3) SA 397 (A).

[130] See for instance *Broodyk versus Smuts* 1942 TPD 47; *Arend versus Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Machanick Steel and Fencing (Pty) Ltd versus Wesrhodan (Pty) Ltd, Machanick Steel and Fencing (Pty) Ltd versus Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 265 (W).

[131] See for instance *Savides versus Savides* 1986 (2) SA 325 (T); *Preller versus Jordaan* 1956 (1) SA 483 (A); *Patel versus Grobbelaar* 1974 (1) SA 532 (A).

South African courts treat these two situations as delicts *in contrahendo.*[132] Even though South African courts have never explicitly decided that undue influence is also to be treated as an unlawful act, it is submitted that this is actually the case. In the case *Preller versus Jordaan,*[133] the Appellate Division laid down the elements that had to be proved before a contractant could rescind from a contract on the grounds of undue influence.[134] The leading writers in contemporary contract law argue, and have argued in the past, that these elements are open to interpretation in terms of the normal requirements of delict.[135]

The power of the courts to terminate the operation of a contract based on *consensus* clearly amounts to an intrusion on the principle of freedom of contract. But this is a necessary power in order to attain justice in negotiating a contract and to protect the reasonable expectations of a party entering into a contract. I have doubts, however, whether the termination of a contract on the basis of delict is desirable. Putting the burden of proof on the aggrieved party is unreasonably stringent. Also, since a contract could only be terminated on a *numerus clausus* of grounds, I suggest that the South African law of contract did not, and still does not, provide for an adequate level of justice in the pre-contractual stage in cases where *consensus* was obtained in an improper manner.

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[132] As authority for this statement relating to misrepresentation see for instance *Novick versus Comair Holdings Ltd* 1979 (2) SA 116 (W) at 149 - 150 and also *Ranger versus Wykerd* 1977 (2) SA 976 (A). Concerning duress, the Transvaal Provincial Provision in the case of *Broodryk versus Smuts* 1942 TPD 47 laid down the elements necessary to set aside a contract on the ground of duress. Although not formulated in traditional delictual terminology Van der Merwe et al. *Contract* at 86 - 91 indicates convincingly that the requirements of *Broodryk versus Smuts* are nothing else than the normal requirements for a successful claim in delict.

[133] 1956 (1) SA 483 (A).

[134] These requirements were stated at 492 G - H by Fagan J.A.; Van der Merwe et al. *Contract* at 92 - 95 translate and systematise this statement by saying that "a contractant who wishes to rescind a contract on the ground of undue influence must prove

1) that the other contractant obtained an influence over him;

2) that this influence weakened his powers of resistance and made his will pliable;

3) that the other contractant used this influence in an unconscionable manner to persuade him to agree to a transaction which (a) was to his detriment and (b) he would not have concluded if he had enjoyed normal freedom of will."

[135] See for example Van der Merwe et al. *Contract* at 93 - 96; Christie *The law of contract in South Africa* at 311 and also Lubbe and Murray *Contract* at 377.

Did the judgement of *Plaaslike Boeredienste (Edms) Bpk versus Chemfos Bpk*[136] bring about any change to this unsatisfactory state of affairs? In this case, the owner of *Plaaslike Boerdienste (Edms) Bpk* approached an employee of *Chemfos* with a bribe. *Plaaslike Boeredienste* granted the employee an option to buy twenty-five percent of its shares. *Plaaslike Boeredienste* then undertook to buy this option back from the employee for a considerable amount of money. In order to benefit from this scheme, the employee had to use his influence to try and pursuade *Chemfos* to conclude a contract with *Plaaslike Boeredienste*, in terms of which the latter would have acquired the sole rights, to sell and distribute *Chemfos*' products within a certain geographical region. This contract was subsequently concluded,[137] but when *Chemfos* came to know about the bribe, they claimed termination of the contract on the grounds of fraudulent conduct by *Plaaslike Boeredienste*. *Chemfos* contended that were it not for this conduct, they would never have concluded the contract.

Bribing a person to get him to use his influence to persuade his principal to conclude a contract is clearly neither misrepresentation, nor duress, nor undue influence. Fortunately, the Appellate Division held that the contract could be set aside on the grounds that the *consensus* had been obtained by improper means or in an improper manner.[138] This judicial activism on the part of the Appellate Division will certainly lead to more equitable solutions in future. Any conduct that results in *consensus* being obtained in an improper manner will lead to an agreement being set aside.

There is no longer a *numerus clausus* for grounds of rescission.[139] Subsequently, the grounds of misrepresentation, duress and undue influence should be percieved as manifestations of the general grounds of rescission, namely *consensus* obtained in an improper manner.[140] Furthermore, when a given situation like this occurs a party

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[136] 1986 (1) SA 819 (A).
[137] For the facts of this case see the judgement at 826 G - 832 A.
[138] See Rabie HR at 848 C.
[139] Van der Merwe and Van Huyssteen "Improperly Obtained Consensus" (1987) 50 *THRHR* 78. See also Van der Merwe et al. *Contract* at 96 - 99.
[140] Lubbe and Murray *Contract* at 377.

should still plead in terms of misrepresentation, duress and undue influence, since the elements of these grounds have been clearly set down by court judgements.

In order to prove that *consensus* was obtained in an improper manner, a party will have to prove that the other party to the negotiations acted in a manner which, according to the generally recognised norms of conduct, is not acceptable and reasonable.[141] This ensures nothing other than proving the delictual requirement of wrongfulness.[142] Thus, even though the *Chemfos* case was a big step forward, in fact it did not contribute very much to the pre-contractual stage. The claim for rescission of the contract will still have to be filed in delictual terms and, consequently, all the elements of a delict will still have to be proven.

The availability of the *exceptio doli generalis* would make the law relating to this situation more equitable. This *exceptio*, originating from Roman Law,[143] can be described as an equitable defence. It provides a court with the discretion not to enforce a contractual obligation if it appears that enforcing of such an obligation would result in inequity. Thus, in a case where a contractant could be faced with an action for enforcement, he could raise the defence that in the negotiating stage the other contractant acted unreasonably or unconscionably in an attempt to obtain his consent. The court convincde by this defence, would not enforce the contract. The aggrieved party is, therefore, not left with the burden of proving the delictual requirements, especially the difficult and technical ones of fault and wrongfulness.

In terms of the *exceptio doli generais* in Roman law, a contractant who was faced with an action on the contract was allowed in defence to raise facts which could not be entertained in terms of the strict civil law. Through the *exceptio*, as an instrument of

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[141] Van der Merwe and Van Huyssteen *op.cit.* 79.

[142] In the South African law of delict wrongfullness may be construed either as infringement of a subjective right or acting contrary to a legal norm.

[143] *Bank of Lisbon and South Africa Ltd versus De Ornelas* 1988 (3) SA 580 (A). For a good description of the operation of the *exceptio doli generalis* in Roman Law see especially the judgement of Joubert J.A. at 592 G - 601 C.

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Praetorean law, it eventually became possible to ameliorate the strictness of civil law by means of the introduction of equitable principles.[144]

Although there were some signs a willingness on the part of the South African courts to accept this equitable remedy as part of the law,[145] in *Bank of Lisbon and South Africa versus De Ornlas*[146] the Appellate Division decided that the *exceptio doli generalis* was not available in South African law.[147] However, only three years later, the same Appellate Division provoked a great deal of legal uncertainty. In the case of *Van der Merwe versus Meads,*[148] the Appellate Division reconfirmed the existence of the *replicatio doli generalis.* So, it can be argued that if the *replicatio doli generalis* is available in the South African law, the *exceptio doli generalis* has to be available as well.[149] The problem is that the Appellate Division did not reject its previous judgement in *Bank of Lisbon and South Africa versus De Ornelas.*[150] In effect, the South African law has been left in the position where one Appellate Division judgement says the *exceptio doli generalis* is available and another says it is not.[151] One's sense of justice requires one to say that the judgement of the 1991 case should

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[144] Van der Merwe, Lubbe and Van Huyssteen "The exceptio doli generalis: requiescat in pace - Vivat aequitas" (1989) 106 *SALJ* 235 at 237.

[145] See the judgement of both De Villiers J.A. and Wessels J.A. in *Weinerlein versus Goch Buildings Ltd* 1925 AD 282. At 544 of *Zuurbekom Ltd versus Union Corporation Ltd* 1947 (1) SA 514 (A) Shreiner J.A., after an explanation of the *exceptio doli generalis* said the following: "Upon the facts of this case... I agree that consideration of fairness to *Zuurbekom* do not require that the interdict should be withheld." This is a clear application of the *exceptio doli generalis.* See also *Paddock Motors Ltd versus Igesund* 1976 (3) SA 16 (A) at 27 H where Jansen J.A. accepts that the *exceptio doli generalis* is still available in the modern law of South Africa.

[146] 1988 (3) SA 580 (A).

.[147] At 606 D - 607 A Joubert J.A., expressing the majority judgement of the court, analysed the judgements cited in note 143 above and at 607 A - B reached the following conclusions: "It is clear from the aforegoing that the *dicta* in these judgements are not binding on this Court for the existence of the *exceptio doli generalis* in our law. All things considered, the time has now arrived, in my judgement, once and for all, to bury the *exceptio doli generalis* as a superflous, defunct anachronism *Requiescat in pace.*" In view of his judgement in *Paddock Motors (Pty) Ltd versus Igesund* 1976 (3) SA 16 (A) the minority judgement of Jansen J.A. in the *Bank of Lisbon* case, accepting the *exceptio doli generalis* still to be part of the modern law in South Africa, did not come as surprise. See also Zimmermann "Good faith and equity" in Zimmermann and Vissier (eds.) *Southern Cross - Civil Law and Common Law in South Africa* 217 at 235.

[148] 1991 (2) SA 1 (A).

[149] See for example Kerr "The replicatio doli reaffirmed. The exceptio doli available in our law" (1991) 108 *SALJ* 583 - 584.

[150] 1988 (3) SA 580 (A).

[151] See Kerr *op. cit.* 585. See also Kerr "Good faith in negotiating a contract. The duty to enquire if there is a perceived or apparent mistake in communication" (1993) 56 *THRHR* 296 at 301.

be followed by both the Provincial Division and the Appellate Division, should the question as to the existence of the *exceptio doli generalis* ever arise again in future.[152]

Despite the confidence on the part of some leading acadmics in South African contract law, I believe that at present it would be inadvisable for a contractual party to plead in terms of the *exceptio doli generalis* in a situation where his consent had been obtained in an improper manner. When faced with a defence based on the *exceptio doli generalis* a court, even though it might be very clear that *consensus* had been obtained in an unreasonable or unconscionable manner, might decide that the Appellate Division judgement of *Bank of Lisbon and South Africa Ltd versus De Ornelas* must prevail. This would mean the failure of the defence and the success of the claim. When faced with a claim on a contract that a party believes he did not consent freely to, it is advisable to file a counter-claim within the ambit of *Plaaslike Boeredienste (Edms) Bpk versus Chemfos Bpk.*[153] Wrongfulness in the delictual sense then needs to be proven.[154] Although this route is clearly less equitable than relying on the *exceptio doli generalis*, it is preferable in the present state of the South African law of contract, because I believe that it is better to take on a heavy burden of proof and the possibility of success than to have no burden of proof but risk losing everything.

It has been suggested that misrepresentation, duress and undue influence would be better understood if they were explained in the language of good faith: they are all "instances of bad faith conduct from which the law will not allow the promisee to benefit."[155] But as explained earlier, there is no general duty in the South African law of contract to negotiate in good faith.[156] The fact that good faith operates indirectly, through other more technical doctrines,[157] tends to obscure its omnipresent existence.

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[152] See Kerr *op.cit.* 586 and Kerr *op.cit.* 301.
[153] 1986 (1) SA 819 (A).
[154] See page 38 of the text.
[155] Cockrell "Substance and Form in the South African Law of Contract" (1992) 109 *SALJ* 40 at 56.
[156] See page 27f. of the text. See especially *Mutual and Federal Insurance Co Ltd versus Oudshoorn Municipality* 1985 (1) SA 419 (A) at 433 A - C.
[157] such as the *exceptio doli* and the doctrines of estoppel, waiver and fictional fulfilment of conditions. See Hutchison "Good faith in the South African Law of Contract" in Brownsword, Hird and Howells (eds.) *Good Faith in Contract: Concept and Context* at 20, and also Zimmermann "Good

The South African courts, therefore, do not have a general power to decide that a contract brought about by misrepresentation, duress, undue influence or by any other improper means, can be set aside, because this is conduct in contravention of a general duty to negotiate in good faith. It is submitted that only when the South African courts enjoy this power to set a contract aside on the basis that good faith is required before and after the formation of the contract, can it be said that freedom of contract is sufficiently counter-balanced by justice.[158]

Reform is necessary, but how should reform come about? Should it be left to the South African Supreme Court to introduce a general duty to negotiate in good faith and to perform contract in good faith, or should the South African legislator take the initiative? The latter route is to be preferred. The South African courts appear hesistant to introduce the principle for all contracts. One needs to look further than the case of *Bank of Lisbon and South Africa versus De Ornelas.*

In 1983, many years prior to the decision in *Bank of Lisbon*, the South African Law Commission agreed to undertake an investigation into the question of unfairness in contracts.[159] An `investigation team' was appointed to conduct the necessary background research and report back to the Commission. This it did in 1989. A `Working Committee' of the Commission thereafter considered and made adaptions to the report before publishing it in 1994 as a working paper for general comment.[160] A number of important recommendations were made by the the investigating team, but

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faith and Equity" in Zimmermann and Vissier, *Southern Cross - Civil Law in South Africa* 218 at 242.

[158] Cockrell *op. cit.* 56.

[159] Project 47 of the South African Law Commission: Unreasonable Stipulations in Contracts and the Rectification of Contracts.

[160] Working Paper 54 (1994), see p. (iii) para. 2. "In this Working Paper attention is given to unfair contractual terms, in other words, terms that are considered to be unconscionable, harsh, unreasonable, unjust or extreme. No general equity jurisdiction exists in South African law in terms of which a party to a contract may rely on the law for relief merely because a term is unfair, unreasonable or oppressive to him. The question is posed in this Working Paper whether, in the South African law of contract, there should not be a criterion of fairness to be met by all contracts. A further question posed is: What action may be taken concerning contractual terms that are contrary to the principle of fairness on which the conclusion of contracts ought to be based, in order to prevent the execution of contracts causing any contracting party unreasonable disadvantage or unreasonable prejudice?"

not all of these were accepted by the Working Commitee. On the key issues, however, the two groups found themselves in complete agreement: the courts should be given a power to rescind, vary or refuse to enforce any contract or term that in its creation, content or manner of operation contravened the principle of good faith. This power should extend to commercial as well as to consumer contracts. It should not be subject to exclusion or limitation by agreement of the parties. However, the formal reaction to the proposals in the Working Paper was disappointingly limited. Nineteen respondents were opposed to the proposals, seven respondents supported them, and a further eight gave qualified support.[161] The Working Commitee`s Proposed Unfair Contractual Terms Bill as contained in Discussion Paper 65 provides in its key provision 1(1) as follows:

"If a court, having regard to all relevant circumstances, including the relative bargaining positions which parties to a contract hold in relation to one another and the type of contract concerned, is of the opinion that the way in which the contract between the parties came into being or the form or content of the contract or any terms thereof or the execution or enforcement thereof is unreasonable, unconscionable or oppresssive, the court may rescind or amend the contract any terms thereof or make such other order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties, notwithstanding the principle that effect shall be given to the contractual terms agreed upon by the parties."

It remains to be seen, whether, when or in what form the proposals of the Law Commission will finally be enacted. It is hoped that this will happen in the not too distant future. Before discussing English law, I will deal with South African common

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[161] See Discussion Paper 65 of the South African Law Commission (1996) para. 1 - 26. The opponents argued that the proposed legislation would be dangerous, in that legal and commercial certainty in contracts would be undermined. Moreover, the legislation was unnecessary, in that such persons are already adequately protected by the laws relating to mistake, misrepresentation, duress, undue influence, usury, credit arrangements, and so on, see papas 1.6 - 1.28. The proponents of the legislation relied on the experience in other countries to support their view that modern social philosophy requires that courts should exercise control over unfair contracts, see paras 1.29 - 1.48. However, some of them argued that if a proper balance was to be struck between the competing principles of fairness and certainty, the courts` power to review contracts should be more closely defined, see paras 1.29 - 1.48.

law. South Africa has a mixed legal system, the inheritance of Roman-Dutch and English law. The question then arising is whether South Africa needs to free itself from the yoke of English law.

C. *The South African common law*

In *Bank of Lisbon and South Africa Ltd versus De Ornelas,*[162] Joubert J.A. said. "The law of the Province of Holland constitutes the common law of South Africa."[163] The same idea is expressed in *Tjollo Ateljees (Edms) Bpk versus Small,*[164] where Van den Heever J.A. stated: "Since we observe the law of Holland we must exclude the Romanists of other countries as well as the pragmatists from neighbouring regions." This is what I would label the "classical view" of South African common law. However, this is far from a true reflection of South African common law. Taking this history into acount, South African common law clearly has to compromise more than just the law of the Province of Holland which the arrival of the Dutch colonists brought in 1652 with.[165] South Africa experienced British colonisation as well. The British did not only introduce tea, cricket and English to the Cape Colony, but also their legal principles. The attitude of the English judges acting in the Cape Colony, is reflected in the words of Sir John Wylde, the first Chief Justice appointed to the newly created supreme court of the Cape Colony under the First Charter of Justice.[166] In the 1849 case of *Letterstedt versus Morgan,*[167] he responded to the attorney-general's quotation from Roman-Dutch authorities in support of a request that judges should rescuse themselves: "Quote what Dutch or Roman looks you please - musty or

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[162] 1988 (3) SA 580 (A).
[163] See at 604 F - G.
[164] 1949 (1) SA 856 (A).
[165] Van Reenen "The relevance of the Roman (-Dutch) law for legal integration in South Africa: With some lessons to be learnt from the African and European experiences" (1995) *SALJ* 276 at 278.
[166] Vissier "Daedalus in the supreme court - the common law today" (1986) 49 *THRHR* 127 at 129.
[167] (1849) 5 Searle 373.

otherwise - and they must be musty if they lay down such doctrines. I belong to a higher court than they refer to - a court not paralysed by their authority, much less by the maxims of philosophers dozing over the midnight lamp in their solitary chambers. My Queen has sent me here to administer justice under the Royal Charter and the practices of the Courts of Flanders, Batavia or Trinidad are no authority to me."[168]

Although not as absolutist, this attitude of English judges was carried on into the twentieth century. In 1920 Sir John Wessels[169] created the impression that Roman-Dutch Law was dying a slow death by saying: "It is so much easier to find your law in an English text book or in English reports than to wade through a sea of Latin or to puzzle your head over old Dutch writers and black letter consulations." In order to save Roman-Dutch law from dying, he proposed that its principles as they had come down from Rome and Leiden be codified.[170]

The nineteen-sixties there saw a definite backlash against English influence in South African common law. With reference to English law, Holmes J. said in *Ex parte De Winnaar*:[171] "The original sources of the Roman-Dutch law are important, but exclusive preoccupation with them is like trying to return an oak tree to its acorn." Boberg reacted to this and pleaded for the abandonment of English influence in the Roman-Dutch common law of South Africa. In rather poetic terms he pleaded "for the retention of the oak tree which is our modern heritage, and the abandonment of a hankering after the acron whence it sprang."[172] This reaction against English law culiminated in the judgement of *Trust Bank van Afrika Bpk versus Eksteen*[173] where

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[168] After conceding that there are "some great principles in Roman - Dutch law which like all great principles reflect their own light" he continued: "But when you speak of the Institutions of Holland and of binding myself down by the practice of Dutch Courts - I absolve myself from that bondage, I look to my Charter, to my duty...I therefore say that they are no authority for us, and although my pen laboured to follow the scrutinity of my learned friend, as I put them down in my book, I have them like visions, like mere spectral shadows in my mind."

[169] Wessels "The future of Roman-Dutch law in South Africa" (1920) 37 *SALJ* 265 at 276.

[170] See Zimmeermann "Synthesis in South African Private Law: Civil law, common law and Usus Hoediernus Pandectarum" (1986) 103 *SALJ* 259 at 259.

[171] 1959 (1) SA 837 (N) at 839.

[172] Boberg in (1996) 83 SALJ 150 at 173.

[173] 1964 (3) SA 402 (A).

Steyn C.J. said: "Die beskouning dat ons eie outoriteite deur hierdie en dergelike uitsprake regtens of vir alle praktiese doeleindes vervang is deur Engelese gewysdes, met die meegaande implikasied dat ons howe, en ook hierdie Hof aan Engelese gewysdes gebonde is, sou ek as klaarblyklik en gehell en al ongegrond moet verwerp. Geen Hof, ook nie hierdie Hof nie, besit die bevoegdheid om ons gemene reg met die reg van enige ander land te vervang nie. Dit kan alleen die wetgewer doen."[174]

The approach of Steyn C.J. is clearly out of touch with reality. South African common law simply can not close its eyes to the English influence. The reality is that in certain areas of South African law, the Roman-Dutch common law has been replaced by English law. English law is as much part of the South African common law as Roman-Dutch law. Certain areas of the South African law[175] are controlled by enactments based firmly in English law. It should be clear that when these acts are applied, the courts tend to rely on English judgements as if they were South African decisions.

Other areas of law, although not exclusively based on English law, are clearly influenced by English law. South African contract law is one such area. Contract law, like many other areas of the law, clearly illustrates how Roman-Dutch law and English law stand along-side each other as the common law of South Africa.It also illustrates how, on a constant basis, established principles of Roman-Dutch law are replaced by English law and *vice versa*. In South Africa, a contract is based on agreement, clearly a heritage from Roman-Dutch law. This principle was further influenced by English law, both for bad and for good. Towards the end of the previous century, there were attempts to introduce the English doctrine of consideration into the South African law of contract.[176] In 1874, in the case of *Alexander versus Perry,*[177] the court decided that consideration was necessary to enforce a contract. Although this decision was,

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[174] At 410 - 411 of the judgement. See Vissier *op.cit.* 130.
[175] For example company law, bills of exchange, and the various devisions of intellectual property law. The same was true for insurance law until the recent decision *of Mutual and Federal Insurance Co Ltd versus Municipality of Oudshoorn* 1985 (1) SA 419 (A) where the Appellate Division held that South African insurance law ought to be regulated by Roman-Dutch law alone.
[176] See Christie *The law of contract in South Africa* at 9. For consideration see the text at 48f.
[177] (1874) 4 Buch 59.

unsatisfactorily, followed in subsequent cases,[178] the Appellate Division over-ruled it in 1919. Here in *Conradie versus Rossouw*,[179] the court unanimously rejected the notion that the English doctrine of consideration formed part of South African contract law. Another English influence, one without which the South African contract law would be in a sorry state, [180] is the reliance theory. Through a process of judicial interpretation, inspired by academic reasoning, the case *Smith versus Hughes*[181] has come to occupy a position where the South African courts regard it as authority for the reliance theory.[182]

The inverse could also be said to hold true. English law is often replaced by Roman-Dutch law. This is clearly illustrated in the area of agreements in restraint of trade. In *Magna Alloys and Research (SA) (Pty) Ltd versus Ellis*,[183] the Appellate Division rejected the English approach to such agreements, namely that they are *prima facie* invalid until proven reasonable. The court said that the rule of Roman-Dutch law has to be reaffirmed; i.e. in accordance with the principle of *pacta servand sunt*, contracts in restraint of trade are valid until grounds for their avoidance are proved.[184]

It is thus clear that South African common law comprises both English law and Roman-Dutch law. Furthermore, as indicated, these two systems of law replace each other on a constant basis as the common law in a given area of South African law. It is indeed a very complex situation, a complexity possibly enhanced by the fact that the Roman-Dutch component of South African common law does not only include the "law of the Province of Holland."[185] South African Roman-Dutch law should be

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[178] *Hansen and Schader versus Quirk* 1885 (5) EDC 35, *Midgley versus Tarrant* 1885 (5) EDC 57 and *Malan and Van der Merwe versus Secretar, Boon and Co* 1880 F 94.
[179] 1919 AD 279.
[180] See Christie *The law of contract in South Africa* at 12.
[181] (1871) LR 6 QB 597.
[182] See the discussion on page 13f. of the text.
[183] 1984 (4) SA 874 (A).
[184] See Vissier "The principle pacta servanda sunt in Roman and Roman-Dutch law, with specific reference to contracts in restraint of trade" (1984) *SALJ* 641 at 641. See also Schoombee "Agreements in Restaint of Trade: The Appellate Division Confirms New Principles" (1985) 48 *THRHR* 127.
[185] *Bank of Lisbon and South Africa Ltd versus De Ornelas* 1988 (3) SA 580 (A) at 604 F-G.

understood to include the entire European *ius commune*.[186] Although this should probably be the case, there is no certainty on this point. In the Appellate Division these are *dicta* both in favour[187] of and against[188] such a wide interpretation of the South African Roman-Dutch law.

"Daedalus was eventually trapped in the very maze that he designed. We need to draw a new map, a new theoretical model of sources, to cater for the practical realities of South African law, lest we too become lost in a maze of our own."[189] Does the answer lie in codification?

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[186] See for instance Zimmermann *op. cit.* 288.
[187] See for example *Braun versus Blann and Botha* 1984 (2) SA 850 (A).
[188] See for example *Gerber versus Wolson* 1955 (1) SA 158 (A).
[189] See Vissier *op.cit.* 138.

III. English law: a synopsis of justice in the pre-contractual stage

A. Consideration

In the English law of contract, not all promises are legally enforceable and therefore binding. Only those promises which are supported by a legal consideration are legally binding. Any promise without consideration is not binding, even if the promisor intends to bind himself by the promise he seriously made.The idea underlying consideration is that each party to a transaction must promise to give up, or actually give up, some kind of right or liberty specified by the other party as the price of his reciprocal undertaking. For example in the simple transaction for the sale of goods, the requirement of consideration is satisfied by one party promising to deliver the goods in return for the requested prices, and the other party promising to pay the price in return for the delivery of the specified goods.[190]

Therefore, before a plaintiff can enforce a promise made to him he has to prove the existence of consideration. During the nineteenth century it was frequently said that the presence of consideration could be established in one of two ways.The plaintiff had to prove that he had conferred a benefit upon the defendant in return for which the defendant gave his promise, or that he himself had incurred a detriment for which the promise of the defendant served as compensation.[191]

In *Central London Property Trust versus High Trees Houses Ltd*[192] the plaintiffs leased a block of flats to the defendants in 1939 at 2.500 pounds per annum. Due to the war, the demand for flats decreased, with a consequential drop in the price of flats. Consequently, the plaintiff agreed in writing to reduce the rent to 1.250 pounds per annum. In 1945, when the war ended, the demand for flats in London increased again

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[190] See for example Collins *The Law of Contract* at 52.
[191] See for example Downes *Contract* at 104f.
[192] (1947) KB 130 (KB).

and the plaintiff company then claimed the full rent of 2.500 pounds, both retrospectively and for the future. The claim for the rent in arrears poses a problem. It is clear that the defendant did not give any consideration to the promise of the plaintiff to reduce the rent, therefore on a strict application of the doctrine of consideration no contractual relationship ensued. It was therefore, not open for *High Trees House Ltd* to raise the promise as defence.Furthermore, if *High Trees House Ltd,* had contemplated sueing in terms of the promise they would have failed, since promise is without legal consequence.

This situation has been typified as a "gap" in the English law of contract.[193] If one party made a promise without requesting any promise or act in exchange, but the promisee still acted detrimentally in relying on the promise, it seems that such an act would not be regarded as a valid consideration, and therefore the promise would not be enforceable. Were the doctrine of consideration to be applied strictly, such a "gap" would be a reality in English law of contract.

Just as a strict application of the will theory[194] would lead to great injustice in South Africa, so I believe, a strict application of the consideration doctrine would lead to injustice in England. Leaving a party in the position of *High Trees* without a defence would clearly be inequitable.

It has been indicated that, for the sake of justice, the South African law of contract recognizes that the will theory is not absolute, and that alternative grounds to achieve contractual liability exist, namely reasonable reliance.[195] Does a similar "route towards justice" exist in English law of contract?

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[193] Harris and Tallon (eds.) *Contract Law Today: Anglo-French Comparisons* (1989) at 23 - 24.
[194] See the text at 10f.
[195] See the text at 16 - 26.

B. *Promissory-estoppel - cause of action?*

The "gap" in English law came to be filled by the doctrine of promissory estoppel, the invention of which can be traced to the decision of Lord Denning in the *High Trees* case. Here it will be remembered that one party to negotiations relied on a promise by the other party that the latter would act in a certain way in future. The problem is how to protect one party from the effects of the other going back on his seriously intended promise. The answer does not lie in estoppel,[196] since the House of Lords decided in *Jordan versus Money*[197] that estoppel is only applicable to a misrepresentation of existing fact. In the *High Trees* case, the defendant sought to rely on a promise or representation of future conduct. To bridge this problem, Lord Denning, relied on a line of cases in Equity that started in 1877 with *Hughes versus Metropolitan Rly Co*,[198] and developed the equitable defence of promissory estoppel. This basically entails that in any given case where one negotiating party makes a promise to the other party, and the latter reasonably[199] relies on that promise without necessarily changing his situation,[200] then the promisor would be estopped from asserting that the promisee

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[196] This doctrine provides that if one person makes to another a clear and unambiguous representation of fact intended to be acted upon and after been acted upon it appears that the representation is untrue, the representor is prevented or "estopped" from denying the truth.

[197] (1854) HL Cas 185.

[198] (1877) 2 App Cas 439. At 448 Lord Cairns said: "It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspence, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." This decision was followed in *Birmingham and District Land Co versus London and North Western Rly Co* (1888) 40 Ch D 268 and in *Salisbury versus Gilmore* (1942) 1 All ER 457.

[199] There still exists doubt as to whether the promisee should have acted or relied equitably on the promise if he is to rely on the doctrine. Such a requirement was, however, laid down by Lord Denning in the case of *D and C Builder Ltd versus Rees* (1965) 3 All ER 837. It is submitted that this should be a requirement in English law of contract. See Furmston *Law of Contract* at 105 and also Collins *The Law of Contract* at 74.

[200] Contoversy also exists as to the requirement of detrimental action on the part of the promisee. Although a requirement for estoppel, it is not clear whether it should also be a requirement for promissory estoppel. Although support for such a requirement is to be found in *Morrow versus Carty* (1957) NI 174 and *Emmanuel Ayodeyi Ajayi versus RT Briscoe (Nigeria) Ltd* (1964) 3 All ER 553, it is submitted that the contrary view of Lord Denning in *WJ Alan and Co Ltd versus El Nasr Export*

does not have a defence due to lack of consideration. It should be broadly interpreted, so as to include both an expressly worded promise, and also a promise derived from conduct.[201]

The question is whether the doctrine of promissory estoppel has developed into more than just a defence. Has it become a cause of action leading to contractual liability? Amongst the English courts and doctrinal writers there is both support for and opposition to this contention.[202]

In 1951, Lord Denning made it clear that promissory estoppel only operates as a defence and not as a cause of action. In *Combe versus Combe*[203] he stated: "The principle stated in the *High Trees* case... does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties."

How then should the cases of *Crabb versus Arun District Council*[204] and *Pascoe versus Turner*[205] be understood? In the first case, the plaintiff sold a piece of land that had access to a public road that the defendant was building. He did that in reliance on a promise by the council that he would be granted a second access to the road on the land that he retained. The council later refused to grant the access and asked the plaintiff 3000 pounds for a right of access. Although the plaintiff gave no consideration for the promise of the council, the Court of Appeal granted *Crabb* the right of the way.

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and Import Co (1972) 2 All ER 127 should prevail. Looking at other common law jurisdictions this appears to be the trend. See for instance the New Zealand case of *PvP* (1951) NZLR 854. In 1982 it was reaffirmed that detrimental action is not a requirement. See the case of *Taylor Fashions Ltd versus Liverpool Uirtoria Trustees Co Ltd* (1982) QB 133.

[201] See for instance Atiyah *Law of Contract* at 148.

[202] See for instance Harris and Tallon (eds.) *Contract Law Today* at 24; Collins *The Law of Contract* at 70 and also Furmston *Law of Contract* at 100. For a good analysis of this issue see Atiyah *The Law of Contract* at 137 - 141.

[203] (1951) All ER 767.

[204] (1976) Ch 179.

[205] (1979) WLR 431.

In the second case, *Pascoe* deserted his mistress, *Turner*. He promised her that the house and everything in it was hers, but he never arranged the conveyance of the house. Eventually he brought an action for possession of the property. The English Court of Appeal held that the woman had a right to the transfer of the property. The man was thus ordered to transfer the property.

In both cases, a cause of action was successfully relied upon. It has been argued[206] that the basis of these causes of action was not promissory estoppel, but rather proprietary estoppel since the court clearly stated that the basis of enforcement was estoppel. Proprietary estoppel is generally confined to cases where the promisee acts in the belief that he has obtained, or is about to obtain, an interest in the land of another. On the other hand, promissory estoppel can arise out of a promise that any legal right will not be enforced.

I percieve this distincton as artificial and developed in an attempt to deny promissory estoppel from leading to a cause of action.[207] Although in both *Crabb versus Arun District Council* and *Pascoe versus Turner,* the court awarded the expectation interest in the form of positive performance, possibly the expectation interest must always to be awarded in a successful reliance on promissory estoppel; i.e. it should only be granted if justice requires it. In all other cases, damages in the form of the reliance interest should be awarded. In these two cases, specific performance ought to have been granted only in the case of *Crabb versus Arun Council* and not in *Pascoe versus Turner*, since granting a right of way was the only way to achieve justice in the *Crabb* case.

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[206] See Atiyah *The Law of Contract* at 138 - 139. See also the report of Allen in Hondius (ed.) *Precontractual Liability: Reports to the XIIIth Congress of the International Academy of Comparative Law* (1991) at 132 - 133.

[207] If the position in English law were to be that promissory estoppel does not give rise to cause of action, one can only conclude that this is an outdated approach compared to other common law jurisdictions. See for example Section 90 of the Second American Restatement of Contracts. It provides as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." See also the Australian case of *Waltons Stores (Interstate) Ltd versus Maher* (1987 - 88) 164 CLR 387 (High Ct) where it was decided that promissory estoppel gives rise to a cause of action.

It is heartening that authorities writing about contemporary English contract law, such as Atiyah,[208] propose that cases like *Crabb versus Arun District Council* and *Pascoe versus Turner* could lead the English courts to finally accept that any promissory estoppel should lead to a cause of action. This would maximise justice, since contracts based on consideration would no longer be the sole cause of action for the enforcement of seriously made, even though unbargained for, promises.[209]

"To date, it has continued to be proclaimed that promissory estoppel can not give rise to a cause of action but is only available by way of defence, but there are, at the time of writing, signs that even this bastion is about to crumble."[210]

C. *Breaking down of negotiations: English law opposed to culpa in contrahendo or negotiating in good faith*

The traditional approach in English law appears to be that no liability can ensue for failed negotiations. If a negotiating party incurred expenditures in the ultimately unfilled hope of a contract resulting from such negotiations, this was regarded as business losses for the account of the aggrieved party.[211] Fortunately, in the cause of

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[208] See for instance Atiyah *The Law of Contract* at 141. After conceding that at present promissory estoppel is regarded by the English courts only as a defence, the learned author said the following: "But it must be said that there are signs of change on this point, and it may soon become necessary to insist that detrimental reliance is simply an alternative to consideration rights". See also Collins *The Law of Contract* at 78. Collins proposes an alternative basis for contractual liability, namely the "reliance model". However, it is difficult to see the conceptual differences between his "reliance model" and promissory estoppel leading to a cause of action.

[209] In the light of this reasoning a decision like *Proodos* C (1981) 3 All ER 189, where it was reaffirmed that promissory estoppel only serves as a defence, can only be deplored.

[210] Atiyah *The Rise and Fall of Freedom of Contract* (1979) at 777. The learned author quoted *Crabb versus Arun District Council* as support for this contention.

[211] This attitude is expressed by Barry J. in *William Lacey (Hounslow) Ltd versus Davis* (1957) 1 WLR 93 Lat 943: "If a builder is invited to tender for certain work, either in competition or otherwise, there is no implication that he will be paid for the work - sometimes the very considerable amount of work - involved in arriving at his price: he undertakes this work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of such contracts as are made as a result of tenders which prove to be successful."

justice, English courts began to recognize exceptions to this traditional viewpoint. In *Hedley Byrne and Co Ltd versus Heller and Partners Ltd,*[212] the Appeal Court recognised the independant tort of negligent misrepresentation.[213] Predictably, this case was relied upon in *Box versus Midland Bank Ltd.*[214] Here, the plaintiff sought an overdraft facility from his bank in order to conclude an export contract he needed in order to save his business. Relying on statements made by his bank manager that he would certainly be awarded the loan, he did not seek financial assistance elsewhere. When the head office ultimately refused the loan, he claimed damages from the bank, on the basis of negligent misstatements made by the bank manager. As basis for the claim, plaintiff relied on the *Hedley Byrne* case. By awarding damages, the court firmly established a position in English law, namely that in cases where negotiations break down, liability lies in tort if negligence on the part of the party responsible for negotiation breakdown, can be proved. It appears, therefore, that the situation of failed negotiations are treated similarly in English and South African law.[215] Therefore, the objections raised against delictual liability in South African law of contract[216] should hold equally true for English law of contract.[217]

Furthermore, English law, like South African law, does not recognise an explicit doctrine of good faith in contracts.[218] The central question of good faith in pre-contractual dealings concerns disclosure and protection against failed negotiations. The recent case of *Regalian Properties plc versus London Dockland Development Corporation*[219] clearly illustrates this reservation against adopting a good faith

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[212] (1964) AC 465.
[213] See for instance Hondius (ed.) *Precontractual Liability* at 128 and also Atiyah *Freedom of Contract* at 773.
[214] (1979) 2 Lloyds Rep 391.
[215] See the text at 29.
[216] See the text at 29. There it has been argued that the burden of proof to succeed with a delictual claim is unreasonably heavy.
[217] Furthermore, Atiyah argues that the court in *Box versus Midland Bank Ltd* actually applied *culpa in contrahendo* when it worked with negligence in negotiations. This is unacceptable since English law does not know the general doctrine of *culpa in contrahendo*. See Harms and Tallon (eds.) *Contract Law Today* at 29.
[218] See for example Hondius (ed.) *Precontractual Liability* at 142; see also *Walford versus Miles* (1992) 1 All ER 453 at 460, where Lord Ackner rejected the idea of good faith in no uncertain terms, saying that the concept was both unworkable in practice and repugnant in principle to the adversial ethic upon which English contract law is premised.
[219] (1995) 1 All ER 1005.

requirement. In this case in 1986, *Regalian* had entered into an agreement "subject to contract", with *London Dockland Development Corporation* for a proposed residential development of land. Anticipating that a contract would soon follow, *Regalian* incurred expenditure to put himself in a position to perform it. The parties were unable to reach a final agreement for a variety of reasons. Since *Regalian* could not sue on a contract for reliance loss, one option was to seek reimbursement of the expenditure from *London Dockland Development Corporation* by showing that this company was unjustly enriched at Regalian`s expense.

This was the key question in *Regalian Properties plc versus Docklands Development Corporation,* where *Regalian* had paid almost 3m pounds to professional firms in preparation for and anticipated contract. Rattee J. held that *Regalian* was unable to obtain reimbursement of his expenditure, because, as the agreement was "subject to contract", the parties were free to withdraw at any time and so the expenditure incurred in anticipation of the contract was incurred at the plaintiff's risk. This left *Regalian* clutching at the principle of good faith, particularly as applied in this context by Sheppard J. in *Sabemo Pty. Ltd versus North Sydney Municipal Council.*[220] The approach adopted in *Sabemo* was rejected by Rattee J. The learned judge appreciated that the English law of restitution had to be flexible and capable of continuous development. However, he saw no good reason to extend it to apply a principle, as Sheppard J. adopted in the *Sabemo* case to facts like those in the present case. Here, however much the parties expect a contract between them to materialise, both had entered into negotiations expressly on terms that each party was free to withdraw from the negotiations at any time. Rattee J. concluded that each party to such negotiations must be taken to know that, pending the conclusion of a binding contract, any cost incurred by him in preparation for the intended contract would be incurred at his own risk, in the sense that he would have no recompense for those costs if no contract resulted.[221]

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[220] (1977) 2 NSWLR 880, especially at 900 -3. The gist of *Sabemo* is that negotiating parties are to be protected where one party "unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party".

[221] At 1024 of the judgement.

The concerns expressed by Rattee J. are very much in line with the concern that the adoption of a good faith requirement in pre-contractual dealings will encourage uncertainty and a lack of respect for the parties' intentions.[222] As Brownsword points out, the argument against good faith in pre-contractual situations cannot be so clear-cut. In principle, there is an important difference between walking away from the negotiations for any reason whatsoever, and walking away for a reason that keeps faith with the integrity of the negotiating situation.[223] In all events, an inquiry into the parties' expectations and, if necessary, an inquiry into the reasons for breaking off negotiations, would be precisely what a good faith requirement would insist upon.[224]

The critique raised against delictual liability, connected with the fact that English law does not recognize the validity of contracts to negotiate[225] or the general duty to negotiate in good faith, leads to the suggestion that an alternative liability should be developed in English law to provide for the situations where negotiations fail. The doctrine of promissory estoppel, as an example of reliance-based liability,[226] is well positioned to provid the answer. With liberal interpretation on the part of the English courts, it would be possible to construe the statements made during negotiations as promises, thereby opening the way to use promissory estoppel.[227]

If liability in the form of contract, with the use of promissory estoppel was recognised, it would no longer be possible to raise the objection currently justified that the law of tort is being misused in English law to fill the gaps in the law of contract.[228]

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[222] Brownsword "Good faith In Contracts' Revisted" (1996) 49 *Current Legal Problems* 111 at 130.
[223] Brownsword *op. cit.* 130.
[224] Brownsword *op. cit.* 131.
[225] Were contracts to negotiate to be recognized, it means that the breaking down of negotiations would amount the breach of contract and, therefore, lead to liability in contract. In *Courtney and Fairbun Ltd versus Tolaini Brothers (Hotels) Ltd* (1975) 1 All ER 716, Lord Denning, however said: "The law ... cannot recognize a contract to negotiate..."
[226] See Atiyah *Freedom of Contract* at 773.
[227] In the United States of America the breaking down of negotiations are dealt within the realm of promissory estoppel as expressed in Section 90 of the Second American Restatement of Contracts. For an application of this approach see *Hoffman versus Red Owl Stores* 133 NW 2d 267.
[228] See for instance *Banque Financiere de la Cite SA versus Westgate Insurance Co Ltd* (1989) 2 All ER 952 where Slade L.J. at 1011 said: "It should be no part of the general function of the law of tort to fill in contractual gaps." See also Twining (ed.) *Legal Theory and Common Law* (1986) at 137.

D. Unfair contract terms

Classical theory of contract in England distinguishes between fairness in the process of negotiating and of concluding a contract. In order to obtain fairness or justice in the stage preceding the contract (so-called procedural fairness),[229] English law has developed certain "narrow technical doctrines";[230] for instance fraud, misrepresentation, duress, and undue influence. English law's attempts to hold parties liable to only those contractual terms they have freely consented to culiminated in the development of these doctrines. Freedom of contract is thus limited by the application of these doctrines so that a just result can be reached.

Like South African law, English law mainly solves the question of unfair contract terms through an application of the principles of tort. Fraud and duress are established as torts.[231] Undue influence, however, is not bound by the same strictness of application.[232] An aggrieved party to whom a negligent misrepresentation has been made, has a dual course of action available. He can either rely on the tort of negligent misrepresentation, as established in *Hedley Byrne and Co Ltd versus Heller and Partners Ltd,*[233] or on section 2 (1) of the Misrepresentation Act of 1967.[234] Because the burden of proof is less onerous in terms of section 2 (1) than in terms of tort, it is submitted that an aggrieved party should rather rely on the act of 1967.

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[229] Atiyah *The Law of Contract* at 282.
[230] Collins *The Law of Contract* at 203.
[231] Collins *The Law of Contract* at 138 - 142, for the position regarding duress and the report of Allen in Hondius (ed.) *Precontractual Liability* at 129 for the position regarding fraudulant misrepresentations.
[232] Collins *The Law of Contract* at 142 - 143.
[233] (1964) AC 465.
[234] Section 2 (1) reads as follows: "Where a person has entered into a contract after a misrepresentation has been made to him by another party therto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulenty, that person shall be so liable notwhithstanding that the misrepresentation was not made fraudulenty, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true."

English law would be far more equitable and clear if the general duty to negotiate in good faith was recognised. In light of the clear and unambigous rejection of such a general duty in *Interfoto Picture Library Ltd versus Stiletto Visual Programmes Ltd*,[235] one might pose the question whether or not English law should recognise a general doctrine where all unfair contract terms can be set aside? An other related question is whether the Unfair Contract Terms Act of 1977 and the EC Directive on Unfair Contract Terms[236] make the recognition of such a general discretion of fairness unnecessary?

The general rule in English law is that the law does not concern itself with the adequacy of the consideration. In other words, unfairness does not constitute a general ground for the setting aside of a contractual obligation.[237] Although an attempt was made to introduce an equitable discretion for the setting aside of all unfair contract terms, it did not succeed. In *Lloyd's Bank Ltd versus Bundy*,[238] Lord Denning introduced the doctrine of inequality of bargaining power,[239] but in *Horry versus Tate and Lyle Refineries Ltd*[240] and *Pao On versus Lau Yiu Long*[241] it was made clear that this doctrine cannot serve as grounds for setting aside all unfair contract terms. However, from the judgement of *National Westminster Bank Ltd versus Morgan*,[242] it

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[235] (1989) QB 433. In this case Bingham L.J. said the following: "In many civil law systems, and perhaps in most lefal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloqualism as "playing fair", "coming clear on", "putting one's card face upwards on the table". It is in essence a principle of fair and open dealing... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness." (emphasis added by current author).

[236] (1993) OJ L 95/29; generally see Dean "Unfair Contract Terms: The European Approach" (1994) 56 *MLR* 581; Hondius "EC Directive on Unfair Terms in Consumer Contracts: Towards a European Law of Contracts" (1994) 7 *JCL* 34.

[237] See Atiyah *The Law of Contract* at 290.

[238] (1975) QB 326.

[239] At 336 - 337 of this case Lord Denning said the following with reference to the general rule in English law that contract can not be set aside on the ground of unfairness: "There are exceptions to this general rule. There arecases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms - when the one is strong in bargaining power and the other so weak - that as a *matter of common fairness*, it is not right that the strong should be allowed be pushed the weak to the wall." (Emphasis added by current author)

[240] (1982) 2 Lloyd Rep 416.

[241] (1980) AC 614.

[242] (1985) AC 686.

should be clear that even though the general doctrine of inequality of bargaining power has been rejected, it does not mean that its underlying principle (fairness), has been likewise rejected. The courts continue to evaluate fairness in the course of applying the widely recognised doctrines of duress and undue influence.[243]

The conclusion proffered,therefore, is that the English law of contract needs a general remedy for setting aside unfair contract terms.[244] Furthermore, both the Unfair Contract Terms Act of 1977 and the EC Directive on Unfair Contract Terms are too limited in their respective scopes of applicability[245] to provide an all-embarcing remedy based on unfairness.

South African law of contract is just as, unsatisfactory, maybe even more, in reference to how it handles situations where a contract has been formed on the basis of one party`s unfree will.[246] The discussion of the South African common law,[247] has shown that South Africa can safely claim to have inherited this from English Law. Until the South African legislator transforms the Draft Legislation on the Control of Unfair Contract Terms[248] into a final act, this unsatisfactory situation will continue.

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[243] See in general Thal "The inequality of bargaining power doctrine: the problem of defining contractual unfairness" (1988) 8 *Oxford JLS* at 17.
[244] Waddams "Unconscionability in contracts" (1976) 39 *MLR* at 369.
[245] The 1977-act is only applicable on exemption clauses, in other words it deals only with those situations where a contract imposes too light a burden on one contractual party. It has nothing to say about the situation where a contract imposes too heavy a burden on one party. Thus, Atiyah *The Law of Contract* (1983) at 304 says: "It does not, despite its title, deal with the whole subject of unfair contracts." For further discussion of this see Hondius (ed.) *Unfair Terms in Consumer Contracts* (1987) at 122. See also Bourgoignie (ed.) *Unfair terms in Consumer Contracts* (1983) at 65 and 109. For a discussion of the EC Directive see Atiyah *The Law of Contract* at 312 - 318.
[246] See at 34 - 43 of the text.
[247] See at 43 - 47 of the text
[248] See at 41 - 43 of the text

IV. Good faith in the Israeli law of contract

A. Common law values: the introduction of English law

In 1922, when the League of Nations granted England Palestine as a Mandatory Territory for the purpose of establishing a national home for the Jewish People,[249] two main laws were in operation to regulate contract law.[250] These laws were the *Mejelle* and the Ottoman Code of Civil Procedure.[251] By means of article 46 of the Palestine Order-in-Council of 1922, the British legal system found its way into Palestine. Article 46 recognised that the current laws should remain in force for the regulation of contract law, but, in addition that the courts were to be given residuary powers to fill any *lacunae* in the laws by means of the teachings of English common law and equity. One can only assume that the Mandatory judges would have been British and, if not, that they would certainly have been educated with reference to English common law. Article 46 was therefore used often, to such an extent in fact that it was actually misused in the sense that judges applied English law even when no *lacunae* in the existing law existed.[252] Therefore, in 1948, with the establishment of the State of

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[249] See Shapiro and De Witt-Arar (eds.) *Introduction to the Law of Israel* (1995) at 1 an overview of the history of Israeli law.

[250] For the historical background of the law of contract in Israel see the contribution by Professor Gabriela Shalev in the section on contracts in the *International Encyclopedia of Laws* (1995) at 29 - 30.

[251] Some of the looks of the *Mejelle* (the Ottoman code of civil law) regulated important contractual transactions, such as sale and lease, upon the establishment of the State of Israel. According to section 64 of the Ottoman Law of Civil Procedure all forms of contracts were recognized, as long as the content thereof was not contrary to law, to morality or to public order. See Shapiro and De Witt-Arar (eds.) *Law of Israel* at 111 where Professor Shalev identifies section 64 of the Ottoman Law of Civil Procedure as the statutory basis of the principle of freedom of contract until the establishment of the State of Israel in 1948.

[252] See also Yardin "The new statute law of contracts" (1974) 9 *Israel Law Review (ILR)* at 512 where the learned author says the following:"English principles and precedents were applied throughout, whether in compliance with the mandate contained to that effect in art. 46 of the Palestine Order-in-Council of 1922 or, simply because English law and English law reports were better known to most lawyers, both on the bench and at the bar."

Israel, English law constituted the main body of contract law in Israel, even though the Ottoman statuory provisions had not yet been repealed.

The early years of statehood did not see a radical change in the situation that pertained on the eve of establishing the State of Israel. Judges continued to fill *lacunae* by falling back on English law.[253] However, the Israeli judiciary also displayed a tendency towards independence. As a result, the application of English law was gradually being restrained. A process started whereby the Israeli judiciary reacted to common law values that had been firmly established in Israel as a result of the introduction of English law.

Reaction did occur, for instance, against consideration as an additional requirement for the creation of a contract. The judiciary also reacted against the non-recognition of the remedy of specific performance following the breach of a contract (a well established attitude in the common law world).[254] However, no reaction followed non-recognition of the general value of good faith to regulate the conduct of parties in a contractual setting. This reaction only came later from the legislator with the introduction of good faith in the Contracts (General Part) Law of 1973.

B. English law dying a slow death in Israel

The reaction of the Israeli judiciary was supported and strengthened by the Israeli legislator. In effectt, a new era in Israeli contract law began in the early 1960`s when the legislator began its codification enterprise.[255] In all areas of private law, laws were

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[253] This residual power of judges was maintained by means of section 11 of the Law and Administration Ordinance of 1948, which provided that Israeli law was to absorb the Mandatory Law which applied prior to independence. Art. 46 of the Mandatory Law, therefore, survived.

[254] Shapiro and De Witt-Arar (eds.) *Law of Israel* at 112.

[255] The legislative aim was described by the then Minister of Justice, Dr. Dov Yosef, as "to formulate a comprehensive plan for freeing Israeli law from the bonds of alien laws and alien languages."

enacted[256] and in the field of contract law, three laws were enacted over a period of two decades. The three general laws were the Contracts (General Part) Law of 1973, the Contracts (Remedies for Breach of Contract) Law of 1970 and the Standard Contracts Law of 1982. Apart from these general laws, numerous special laws were also enacted with the view of forming part of what later became the Civil Code.[257]

These various laws contained sections stipulating autarkey.[258] Normally this type of section reads as follows: "Article 46 of the Palestine Order-in Council, 1922 - 1947, shall not apply to matters dealt with by this law."[259] Therefore, *lacunae* in the laws could no longer be filled with reference to English law.[260]

Finally, all formal links with English law were cut with the enactement of the Foundations of Law Act of 1980. This was done by revocating article 46 of the Palestine Order-in-Council. Furthermore, the Foundation of Laws Act provided that, if a legal question arose for which no answer could be found in a statue, in the Israeli case law or by means of analogy, the court, confronted with the question, would decide the question in the light of the principles of freedom, justice, equity and peace of the heritage of Israel.

Although traces of English influence are still detectable in Israeli contract law,[261] in Israel today contract law is a modern, independent and exclusive system. It has a dual

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Certainly when the Minister referred to "alien laws" he had in mind, primarily, English law. See Shapiro and De Witt-Arar (eds.) *The law of Israel* at 112.

[256] For example the Land Law of 1969, the Movable Property Law of 1991 and the Sucession Law of 1965.

[257] It appears that Israel started with a compilation of the law which would lead to an ultimate "full-fledged" codification. See on this topic Tallon "Codification and Consolidation of the law at the present time" (1979) 14 *ILR* 1 at 2.

[258] See Legislation "General Comments on Contracts (General Part) Law 1973" (1974) 9 *ILR* at 274.

[259] Section 63 of the Contracts (General Part) Law 1973.

[260] Note however, that Israeli contract law did not only purify itself from English law but also from the remnants of the *Mejelle* and the Ottoman Code of Civil Procedure. This was done by means of section 62 of the Contracts (General Part) Law of 1973, which provided:
"There are hereby repealed
(1) articles 658, 948, 949 and 1007 and the Twenth Book of the Mejelle;
(2) articles 64 of the Ottoman Code of Civil Procedure of the 2nd Rejeb, 1296 (21st une, 1879)".

[261] See Shapiro and De Wiitt-Arar (eds.) *Law of Israel* at 114.

basis, namely Israeli legislation, and also decisions flowing from the reasoning of a „pure" Israeli judiciary.[262]

C. *Justice in the pre-contractual stage: good faith playing a vital part*

1. Freedom of contract: of vital importance in the Israeli law of contrac

When article 64 of the Ottoman Code of Civil Procedure was repealed, it could be claimed that the principles of freedom of contract were repealed with it.[263] However, a contract law jurisdiction without freedom of contract is unthinkable, therefore this principle was maintained with the enactment of section 24 of the Contracts (General Part) Law of 1973. This section provides that the contents of a contract may be whatever is agreed upon by the parties.[264]

Freedom of contract[265] is of vital importance in the Israeli law of contract, as is apparent from the decision in *Beit Yules versus Raviv,*[266] where the Deputy President of the Supreme Court, Elon J., described freedom of contract as "one of the basic principles of the Israeli social and legal system."[267] Barak J. expressed the same

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[262] "Instead of foreign law imposed on the country by other, it has become local, autonomous law." See Yardin *op. cit.* at 515.
[263] See note 260 and note 251.
[264] See Legislation *op.cit.* 285.
[265] In terms of German legal theory the principle of freedom of contract can be devided into two areas of application, namely freedom of formation and freedom of formulation. Section 24 does not give express recognition to freedom of formation, entailing that a party is free to choose whether or not to contract, what kind of contract to conclude and with whom. Parties are only expressly authorized to determine the content of their contract. Only freedom of formulations is therefore expressly stipulated.
[266] (1989) P.D.441, F.H. 22/82.
[267] See at 470 - 471, 478 of the judgement.

attitude in somewhat stronger terms. He described freedom of contract as a "fundamental constitutional right".[268]

2. Good faith in pre-contractual negotiations

Israeli law of contract saw the introduction of good faith as the newly established basic guiding principle of the conduct of contractual parties. Section 12 of the Contract (General Part) Law of 1973 deals with good faith in pre-contractual negotiations, and section 39 with good faith in the performance of the contract. The following discussion is limited to section 12, since section 39 relates to the stage after the formation of the contract. "It would appear that section 12 is the more impressive and innovative of the two above-mentioned sections of the General Contracts Law. Not only did it apply a new substantive principle, i.e. that of good faith, but it also introduced this principle into an area in which contract law previously had virtually no foothold, i.e. the area of pre-contractual negotiations."[269]

With the introduction of section 12,[270] for the first time in Israeli law, judges were provided with an effective measure for implementing and upholding justice in the pre-contractual stage. Unlike in South Africa and England, justice could be lifted to a level where justice and freedom of contract could walk hand-in-hand. Although this liberal interpretation of good faith has to be welcomed, in certain instances the Israeli judiciary, in applying of section 12 (a) and 12 (b),[271] made an unacceptable intrusion on the principle of freedom of contract.[272]

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[268] See at 486 of the judgement.
[269] See Shalev "Forty years of contract law" (1990) 24 *ILR* 657 at 662.
[270] Section 12 (a) reads as follows: "In negotiating a contract a person shall act in customary manner and in good faith."
[271] Section 12 (b) reads as follows: "A party who does not act in customary manner and in good faith shall be liable to pay compensation to the other party for the damages caused to him in consequence of the negotiations or the making of the contract, and the provisions of sections 10, 13 and 14 of the Contracts (Remedies for Breach of Contract) Law, 5731 - 1970, shall apply *mutatis mutandis*.
[272] This submission will appear from the discussion following in this part.

Some illustrations of why justice has profited so much from the introduction of section 12 follow. The Israeli courts[273] interpreted section 12 as applying not only to the situation where no contract follows from negotiations, but also to situations where a contract does follow. The latter situation is also regulated by specific provisions in the Contract (General Part) Law,[274] but because good faith in section 12 has been interpreted as a residual category, it can also provide an alternative cause of action, together with these statutory causes of action.[275] In saying this, it should be apparent that section 12 goes even further than the continental *culpa in contrahendo,* on which it is based. The traditional doctrine of *culpa in contrahendo* is no longer applicable once a contract has been formed.[276]

Furthermore, the Israeli courts also decided that section 12 is applicable to govrnment contracts.[277] Government contracts normally start with the publication of a tender. This is the start of the pre-contractual negotiations and on more than one occasion the Supreme Court of Israel have applied the provisions of section 12 to these pre-contractual negotiations.[278] In other words, *negative interesse* damages can be claimed from the Israeli Government if it acted contrary to good faith. Section 12 thus provides an alternative cause of action above the public law actions against the Government.[279]

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[273] See for example *Pnidar versus Castro* (1981) P.D. 673 and *Kessler versus Meirov* (1983) P.D. 547. *Pnidar versus Castro* made another valuable contribution to justice in the pre-contractual stage by deciding that all parties involved in the negotiation of a contract have to act in good faith and not only the parties that will eventually become contractual parties.

[274] Unilateral mistake known to the other party (section 14 (a)), deceit (section 15), duress (section 17) or extortion (section 18).

[275] However, from the decision of *Spector versus Tsarfati* (1978) P.D. 231 it is claer that when a contract has been formed and section 12 is relied upon as cause of action for something that went wrong during the negotiations, the remedy of recission is not available to the aggrieved party. In reaching this conclusion the court interpreted section 12 (b) strictly as only providing for the *negative interesse* damages. For a discussion of this case see Yardin "The new law of contracts in action" (1979) 14 *ILR* 104.

[276] See Kessler and Fine "*Culpa in Contrahendo*, bargaining in good faith and freedom of contract: a comparative study" (1964) 77 *Harvard LR* 401.

[277] Shalev "Administrative Contracts" (1979) 14 *Israel Law Review* 444 at 477 - 479.

[278] See for instance *Ben Haim versus Israel Land Authority* (1976) P.D. 412 and *Maior Co versus Netivei Ayalon Co* (1981) P.D. 596.

[279] See further on the issue of Government Contracts the report of Shalev in Hondius (ed.) *Pre-contractual Liability: Reports to the XIIIthe Congress of the International Academy of Comparative Law* (1991) at 193 - 194.

Finally, it should be noted that section 12 relates to all forms of conduct in the pre-contractual process, not only to promises. It therefore provides for wider protection than promissory estoppel in those jurisdictions where it has been established that promissory estoppel leads to an independant cause of action.[280] Even if English law does come to recognise that promissory estoppel leads to a cause of action,[281] clearly a provision similar to section 12 of the Israeli Contracts (General Part) Law of 1973, would provide more protection to an aggrieved party, and thus lead to more justice in the pre-contractual stage.

However, since the Israeli judiciary in some instances adopted, too liberal an approach in interpreting good faith (section 12). In *Sonnenstein versus Gabasso,*[282] the court decided that the raising of illegal demands amounted to a lack of good faith. This is arguable. The good faith requirement among negotiating parties has been interpreted[283] as an internal requirement of consideration for the interests of the other party. The requirement of legality is an external requirement.[284] Thus, the mere raising of an illegal requirement in itself cannot amount to a lack of good faith.

The Israeli courts[285] also expressed the opinion that in cases where no contract ensued as a result of lack of good faith in the negotiations, an aggrieved party could claim more than his *negative interesse* damages[286] in terms of section 12 (b). In other words the expectation interest (in the form of either *positive interesse* damages or specific performance), is protected even though no contract ensued.[287] This is an unjustified

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[280] See for instance Australia and the United States of America.
[281] See the text at 51f.
[282] (1988) P.D. 218.
[283] *Pnidar versus Castro* (1989) P.D. 441.
[284] See for instance the General Report of Hondius in Hondius (ed.) *Precontractual Liability* at 19. See also the report of Shalev at 185.
[285] See for instance *Shikun Ovdin versus Zafnik* (1983) P.D. 579 and *State of Israel versus Eilat Co for Ship Services* (1986) P.D. 785. In the first-mentioned case Ben-Porat J. said the following: "The remedies of compensation specified in section 12 (b) are not a closed or comprehensive list."
[286] Otherwise known as reliace interest.
[287] On an interpretation of section 12 (b), quoted in note 271 above, it should be clear that only the reliance interest is provided for. By interpreting section 12 (b) so extensively the Israeli courts clearly acted inconsistent with the earlier judgement of *Spector versus Tsarfati* (1978) P.D. 231 (see note 275 above) where section 12 (b) had been interpreted quite literally.

intrusion on the principle of freedom of contract.[288] The Israeli courts should not be able to disregard the distinction between the pre-contractual and the contractual stage by ordering specific performance or *positive interess* damages in the case of breach of section 12 (a).[289]

In the case of *Beit Yules versus Raviv,*[290] the court took one step further the reactionary process against the principle of good faith, that *Laserson versus Shikun Ovdim*[291] started. The court decided that the requirement of good faith in section 12 (a) could not be interpreted so widely as to require a negotiating party to treat all private tenders equally.[292] By deciding this, the court put a halt on the run-away train of good faith. The court put it in perspective by deciding that freedom of contract remains the most important principle in Israeli law of contract. Good faith can only override freedom of contract if justice requires it. This is a laudable decision, for if Israeli society wants to retain the people's trust in the effectiveness of contract as a means to regulate private and commercial life, good faith cannot be allowed to override freedom of contract. People must know that if they act reasonabley[293] they are still in the position to form a contract on the basis of a normal decleration of will. The

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[288] Despite these objections the court made an order of specific performance in the case of *Sonnenstein versus Gabasso* (1988) P.D. 278. This deplorable situation also prevails in the Netherlands and in Japan. For the position in the Netherlands see the case of *Plas versus Valburg* as discussed by Hondius in his General Report: see Hondius (ed.) *Precontractual Liability* at 23.

[289] For the discussion of this issue see Shalev *op.cit.* 671.

[290] (1989) P.D. 441, F.H. 22/82.

[291] (1984) P.D. 237. Elon J. had the following to say about good faith: "Regarding the actual implication of this principle and its implementation, it is right and fitting that the scope and range of the areas to which it applies be expanded...but the degree of expansion which is appropriate with respect to the geographical application of the principle of good faith in the various branches of law, is not equally appropriate with respect to the substance of this principle, and certainly, its areas of application should not be extended beyond the legal channel designated for it from the outset by the legislator." For this quotation see Shalev *op.cit.* 672.

[292] In the case a quo it was decided that all private tenders should be treated equally. This amounted to a situation where the acceptance of one tender amounted to a lack of good faith towards the other, resulting in liability in terms of section 12 (b). This is nothing less than saying that a court is in a position to dictate with whom a person should contract.

[293] The principle of good faith is objectively judged in the sense that reasonable conduct would normally amount to conduct in good faith. See the report of Shalev in Hondius (ed.) *Precontractual Liability* at 182.

courts should not be in a position to form a contract on behalf of parties by applying good faith[294] (embodied in section 12 of the Contracts (General Part) Law of 1973).

In modern Israeli law of freedom of contract is a point of departure, but, as appears from recent decisions,[295] the principle of good faith is still applied to such an extent that the conclusion must be that justice in the pre-contractual process is protected to the highest level possible.

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[294] In the light of this reasoning the judgement of *Hevra Kadisha versus Kastenbaum* (1991) P.D. 464 should be treated with circumspection. Although the court said in this case that section 30 of the General Contracts Law is to prevail when it is in conflict with freedom of contract, it should not be understood to reaffirm the "pre-*Raviv*" position when good faith had been perceived as being more important than freedom of contract.

[295] See for instance *Central Company for Housing and Construction versus Pink* (1986) P.D. where the court said that non-disclosure of facts, even facts which the aggrieved party could have easily informed himself about, would amount to a lack of good faith. See also *Tefahot versus Nezer* (1988) P.D. 828 where it was decided that conducting parallel negotiations amounted to a lack of good faith.

V. Conclusion

It has been said that South African common law is directly influenced by English law. One of the most prominent influences in the field of contract law is the non-recognition of the principle of good faith as a guideline for the conduct of parties embarking on the process of forming a contract. From the experience in Israel it should be clear how much justice could benefit from recognising this general duty to act in good faith.

Enforced introduction of this principle is only possible with the intervention of the South African legislator. Like their English colleagues, South African judges appear to have taken a rather unfavourable stance against such a general duty to act in good faith. The South African legislator has already done very valuable work in this field. However, there is room for improvement. From this discussion, it is possible to identify two main problems in the field of pre-contractual justice in South Africa. First, liability lies in delict where a contract has been formed on the basis of one party's unfree will. Secondly, the fact that failed negotiations, resulting in a contract in non-formation of a contract, also appears to have been dealt the realm of the law of delict. The enactement of the Draft Legislation on the Control of Unfair Contract Terms would provide a solution for the first problem, since it would introduce liability in contract. The Draft Legislation, however, does not provide a solution for the second problem, since the scope of section 1 of that draft law does not cover a situation where negotiations fail as a result of conduct in contravention of good faith. The proposed legislation should be formulated on the model of section 12 of the Israeli Contracts (General Part) Law of 1973, so as to cover failed negotiations.

The final enactement of the proposed Draft Legislation can start the process towards consolidating South African law of contract. In the light of the current state of South African contract law, such a process can only be welcomed. Indeed, the codification of South African private law no longer seems such a contrived idea.

South Africa should follow the example of Israel. The time for change is ripe in South Africa. The law of contract needs the general duty to act in good faith, and introducting this would position South African where the balance between pre-contractual justice and freedom of contract has been correctly struck.

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