

YET ANOTHER CALL FOR A GREATER ROLE FOR GOOD FAITH IN THE SOUTH AFRICAN LAW OF CONTRACT: CAN WE BANISH THE LAW OF THE JUNGLE, WHILE AVOIDING THE ELEPHANT IN THE ROOM?

AM Louw*

SUMMARY

This article examines the current approach of the South African courts to the role of good faith or *bona fides* in contracts, as well as the courts' stated reasons for this approach. The article specifically examines how arguments based on good faith have fared in the Constitutional Court to date, and the prospects for law reform to emanate from that court in the near future. The author suggests an understanding of good faith which he believes is in line with the *Constitution of the Republic of South Africa*, 1996 and argues that in terms of such an understanding of a robust good faith doctrine the legal fraternity or the courts can avoid some of the dangers that the judges of the Supreme Court of Appeal have warned about in this context in recent years. The author shares some concluding thoughts on the pressing need for law reform with respect to the role and presence of good faith in contracts.

KEYWORDS: Contract law; Good faith; *Bona fides*; Substantive equity; *Ubuntu*; Public policy; Fair dealing; Judicial conservatism; Legal uncertainty; Constitutional values; Constitutionalisation of the common law; *Boni mores* in contract law; Unfair contracts; Inequality; Consumer protection.

* Andre M Louw. LLD (Stellenbosch). School of Law, University of KwaZulu-Natal, Durban. Email: louw@ukzn.ac.za. This piece is dedicated to the memory of the late Honourable Mr Justice PJJ Olivier of the Supreme Court of Appeal, whose progressive and potentially ground-breaking minority judgment in *Eerste Nasionale Bank van SA v Saayman* 1997 4 SA 302 (SCA) was subsequently so reviled by his colleagues on the court. My colleagues have been more kind, and I wish to express my heartfelt thanks to Rob Sharrock and Lienne Steyn, who read an advanced draft of this piece and provided me with much-needed advice on how to avoid making a fool of myself.