# Table of Contents

ABSTRACT .................................................................................................................. 4

OPSOMMING .............................................................................................................. 6

Acknowledgments ....................................................................................................... 8

1 Introduction and overview

1.1 Problem Statement ................................................................................................. 9

1.2 Research question ................................................................................................ 11

1.3 Research methodology .......................................................................................... 12

1.4 Chapter overview .................................................................................................. 12

2 The South African historical position with regard to the interpretation of contracts

2.1 Introduction ............................................................................................................. 13

2.2 Roman law ............................................................................................................. 13

2.3 Roman-Dutch law ................................................................................................ 17

2.4 English law ........................................................................................................... 20

2.5 The South African position before the introduction of the Constitution .................. 22

2.6 Conclusion ............................................................................................................. 23

3 The legal position to the interpretation of contracts after the introduction of the Constitution

3.1 Introduction ............................................................................................................. 25

3.2 The impact regarding the Constitution and other factors regarding the interpretation of contracts ................................................................................................................ 26
Abstract

In South Africa, contractual law principles find their origin from the common law. As it is known today, South Africa is a constitutional democracy and all law, including contract law should comply with the Constitution to be valid.

It is important to know where the interpretation of contracts started and how it developed over the years. With this study, a broad overview of the Roman law is given and how it started in the earliest years. The Roman-Dutch law and English law are also explained as it has a very important role in the interpretation of contracts. In South Africa, contract law principles reflect a mixture of Roman-Dutch Law and English Law principles and rules.

The intentions of the parties are very important and therefore the courts look at the written agreement first to determine the intentions of the parties. When assistance is needed and the written agreement itself can’t be used to determine the intentions of the parties and the purpose of the agreement, surrounding circumstances may be used to determine the intentions of the parties. No evidence used by the parties in order to assist them, may contradict or detract from the terms of a written contract. The above is referred to as the Parol Evidence Rule.

Since the beginning of the new democracy in South Africa, there have been significant developments in the law relating to the interpretation of contracts and courts tend to take an open approach when interpreting contracts. More focus is placed on the natural meanings of the words to try and honour the purpose of the agreement.

If the contract is able to clearly and unambiguously define the terms of the contract, the court will interpret those terms according to the contract as they are. In those circumstances, surrounding circumstances can’t be used.

With this study, a comparison between the South African and Canadian position is also drawn regarding the interpretation of contracts. Canada’s Constitution also has an influence on their law of contracts, similar to the South African Constitution.
having a fundamental influence on South African law of contracts. Both countries tend to give preference to the meaning of the words and to read the contract as a whole. Surrounding circumstances are looked at when assistance is needed to honour the parties true intentions when it can’t be seen from the agreement itself. Although there are small differences, both countries see it as important to use the agreement as it is intended by the parties and not to try and create a new agreement when interpretation is applied.

It is clear that the South African Constitution, together with the Parol Evidence Rule brought profound changes to the law of contracts and especially to the interpretation of contracts.
In Suid-Afrika het kontraktuele beginsels hul oorsprong gekry vanaf die Gemenereg. Soos dit vandag beteken is, is Suid-Afrika 'n grondwetlike demokrasie en alle reg, insluitende die kontraktereg moet hulself bind aan die reëls van die Grondwet.

Dit is belangrik om te weet waar die interpretasie van kontrakte begin het en hoe dit deur die jare ontwikkel het. Daar word 'n oorsig gegee van die Romeinse reg en hoe dit in die vroegste jare begin het om 'n invloed te hê. Die Romeins-Hollandse reg asook die Engelse reg word ook verduidelik, omrede dit 'n belangrike rol in die ontwikkeling van die interpretasie van kontrakte gehad het. In Suid-Afrika behels die kontraktuele beginsels 'n mengsel tussen Romeins-Hollandse reg en Engelse reg.

Die bedoeling van die partye is baie belangrik en daarom kyk die howe na die geskrewe ooreenkoms om die bedoeling van die partye vas te stel. Wanneer dit nie alleenlik deur die ooreenkoms bepaal kan word nie en die howe sukkel om die doel van die ooreenkoms tesame met die bedoelings van die partye vas te stel, mag die howe kyk na omringende omstandighede om hulle daarmee te help. Geen bewysmateriaal in daai proses mag van die ooreenkoms afwyk of poog om die ooreenkoms te verander nie. Hierdie word gesien as die 'Parol Evidence Rule.'

In Suid-Afrika, in die nuwe demokrasie was daar uitsonderlike ontwikkelings in die reg rakende die interpretasie van kontrakte en die howe is geneig om 'n 'open approach' soos die Engelse dit noem, te volg wanneer kontrakte geïnterpreteer word. Die fokus word geplaas op die natuurlike bedoelings van die woorde, die woorde soos dit is en sodoende word uiting gegee aan die doel van die ooreenkoms.

Indien 'n kontrak duidelik en ondubbelsinnig die terme van die ooreenkoms kan bepaal, sal die howe die kontrak interpreteer net soos hy is. In hierdie omstandighede mag daar dan nie na omringende omstandighede gekyk word nie.

'n Vergelyking word gedoen tussen die Suid-Afrikaanse en Kanadese reg met betrekking tot die interpretasie van kontrakte. Kanada se 'Grondwet' het ook 'n baie belangrike invloed op hul kontraktereg, wat baie soortgelyk is aan Suid-Afrika. Beide
lande gee voorkeur aan die bedoelings van die woorde soos hulle is, om die kontrak as 'n geheel te kan lees. Omringende omstandighede word dan na gekyk wanneer bystand benodig word om uiting te gee aan die bedoeling van die partye en die doel van die ooreenkoms wanneer dit nie self vanuit die ooreenkoms bepaal kan word nie. Alhoewel daar klein verskille is tussen die twee lande, is dit vir beide lande belangrik om die ooreenkoms te gebruik soos dit bedoel word deur die partye en nie om 'n nuwe ooreenkoms te probeer skep wanneer interpreisasie van kontrakte toegepas word nie.

Dit is duidelik dat die Grondwet, tesame met die 'Parol Evidence Rule' besonderse veranderinge gehad het op die Kontraktereg en spesifiek op die interpreisasie van kontrakte.
Acknowledgments

Firstly, I would like to thank all my family members and friends who have supported me during the course of my LLM-Studies.

I would not be in this position today if it were not for my father. Thank you for all your sacrifices and support. Thank you for always believing in me. Dad, you gave me opportunities, I would never have had if it wasn’t for you and I will always be grateful. I hope I make you proud and will never have enough words to express my gratitude.

Thanks to my dearest mom who always encourages me and believes in me. You are the best and I appreciate everything you do for me.

I would also like to thank my biggest supporter, my boyfriend. Thank you for always being there for me, you are my rock and I couldn’t have done this without you.

My path was planned long ago and I thank God for always giving me strength, even when I was tired. I am thankful for this blessing.

A special thanks to Prof. De La Harpe and especially Mrs. S Schoeman and Mr. P Bothma for assisting me to great extend with the writing of this mini-dissertation. Thank you for all the advice and patience. It is highly appreciated.
1 Introduction and overview

1.1 Problem Statement

Contract law principles in South Africa are derived from the Common Law.\(^1\) The Constitution of South Africa, 1996, brought about changes to our law.\(^2\) In terms of section 2 of the Constitution, it provides that all law, including the Common law, must ensure that it is consistent with the provisions of the Constitution.\(^3\) In Barkhuizen v Napier\(^4\) the following remark was made by the Constitutional Court:

Under our legal order, all law derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control.\(^5\)

As stated in Barkhuizen,\(^6\) the Constitutional Court made a remark that all law is subject to constitutional control and if not, it is invalid.\(^7\) The primary values of the South African Constitution have a significant effect on many fields of law, the Law of Contracts being no exception.

Roman law recognised a number of distinct types of contracts which were binding only if they were ‘clothed’ in special forms and formulas as the Romans knew it.\(^8\) In other words, Roman law had “a law of contracts,” rather than a law of contract as stated by certain authors.\(^9\)

In the Roman-Dutch law of contracts were based on the principle of good faith, but more emphasis was placed on consensus between the parties during negotiations.

---

\(^1\) R v Goseb 1956 (2) SA 698; 1959 (1) SA 839. Also see Pillay The Impact of pacta sunt servanda in the law of contract 5.  
\(^2\) Rautenbach South Africa: Teaching an 'Old Dog' New Tricks? 185-209. Also see https://legaldictionary.net.  
\(^4\) Barkhuizen v Napier 2007 (5) SA 323 (CC).  
\(^5\) Barkhuizen v Napier 2007 (5) SA 323 (CC) para 35.  
\(^6\) Barkhuizen v Napier 2007 (5) SA 323 (CC).  
\(^7\) Barkhuizen v Napier 2007 (5) SA 323 (CC) para 35.  
This also emphasised the accepted principle that all informal agreements were binding as long as consensus was reached between the contracting parties.\textsuperscript{10}

In the Cape Colony English law principles relating to the interpretation of contracts were introduced by the decision in \textit{De Villiers v Cape Divisional Council}.\textsuperscript{11} This decision allowed for the reception of principles from the English law of interpretation of contracts into South Africa. One of the most important principles of interpretation of the English law introduced into South Africa is the Parol Evidence Rule.\textsuperscript{12}

Today, many contracts are drafted and recorded to facilitate proof of the agreement as well as to stipulate the rights and obligations of the parties to the agreement. Unfortunately, the parties’ intentions are not always clearly reflected on the written agreement which results in the contract having to be interpreted.

The main focus of interpretation of contracts is to ascertain the intention of the parties from the written instrument and to give effect to the parties’ collective intention.\textsuperscript{13} Therefore, the courts look at the written agreement and under certain instances to the surrounding circumstances to determine the intention of the parties when it can’t be deduced from the agreement itself.\textsuperscript{14} This is also known as the Parol Evidence Rule. This approach has moved on somewhat by the introduction of the \textit{Constitution of South Africa, 1996}.

The \textit{Constitution of South Africa, 1996}, brought about changes to our law, the Law of Contracts being no exception. Lewis JA summated the developments perfectly in the case of \textit{Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd}\textsuperscript{15} by stating that:

\begin{quote}
This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties — what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that Parol Evidence is inadmissible to modify, vary or add to the written terms of the
\end{quote}

\begin{thebibliography}{9}
\item Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition} 219.
\item \textit{De Villiers v Cape Divisional Council} 1875 Buch 50.
\item \textit{Union Government v Vianini Pipes (Py) Ltd} 1941 AD.
\item Chrisie \textit{The Law of Contract in South Africa} 159.
\item Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 30.
\item \textit{Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd} 2016(1) SA 518 (SCA).
\end{thebibliography}
agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded — the context — to determine the parties' intention.  

This position is similar to that of the Canadian legal position in respect of the interpretation of contracts which was also influenced by the introduction of their constitution.

In Canada, to discover and give effect to the parties' true intention as expressed in the written document as a whole at the time the contract was made is the main purpose and objective of interpreting a contract. Interpretation of a contract must be objectively based even if modern courts tend to interpret contractual language contextually and in accordance with the surrounding circumstances of the agreement. Canada also has a Constitution which influences the law of contract and the similarities to the South African position are viewed. In the light of the above the interpretation of contracts is reviewed and how it has developed among the years.

1.2 Research question

How did the Constitution influence the court's approach to the interpretation of contracts, if at all?

---

16 Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016(1) SA 518 (SCA) para 27.
1.3 Research methodology

In order to answer the research question, a literature review will be attended to by consulting primary and secondary sources of law. A comparison of legal principles pertaining to the interpretation of contracts in South Africa with the legal principles as applied in Canada will also be done in order to determine whether there are any lessons that may be learnt from the Canadian approach.

1.4 Chapter overview

In order to answer the research question the South African historical position with regard to the interpretation of contracts is discussed in Chapter two. Roman, Roman-Dutch and English Law together with the legal position in South African law are considered. Chapter three follows with the legal position to the interpretation of contracts after the introduction of the Constitution, thus after the 1996 Constitution and how the Parol Evidence rule had effected the interpretation of contracts. Thereafter, the position pertaining to the Canadian context of the interpretation of contracts is discussed in Chapter four. Chapter five will provide a comparison between the South African legal position and that of the Canadian legal position in respect of the interpretation of contracts, in order to reach a conclusion in Chapter six where the research question of how the Constitution influenced the process by which contracts are interpreted, if at all.
2 The South African historical position with regard to the interpretation of contracts

2.1 Introduction

In this chapter, the position with regard to the interpretation of contracts prior to the 1996 Constitution of South Africa is explained. This refers to the period prior to the abolishment of Apartheid, before 1996. The impact of Roman law on the interpretation of contracts and how contracts were historically considered and formulated are explained, as well as how it changed between the Roman and Roman-Dutch law and what impact the Roman-Dutch law had on contracts in South Africa. The influence of the English law and what impact these laws had on South Africa are also looked at. There have been changes since the period before 1996 and together with important case law and other resources, these changes had a big influence on the new constitutional democracy in South Africa.

2.2 Roman Law

When reference is made to the ‘second life’ of Roman law, it means the reception thereof into the law of the European continent after the fall of both Roman empires. It is the law of the *Corpus Iuris Civilis* as developed by scholars of Roman law of the middle ages and Renaissance which was modified and taken up in Codes throughout Europe.

Historically, Roman contracts were considered as formal contracts. The contracts were only considered as valid when they were expressed in a prescribed manner. Legal significance was attached to verbal contracts only. Being reduced to writing was not required and only exception to this was if they were in the specific

20 Van Warmelo *Vrywaring teen gebreke by koop in Suid Africa* 58, 70.
21 Cornelius *Principles of the Interpretation of Contracts in South Africa* 12.
22 Cornelius *Principles of the Interpretation of Contracts in South Africa* 12.
prescribed form, as explained by Van Niekerk.\textsuperscript{23} It was furthermore irrelevant whether the parties reached consensus or not.\textsuperscript{24}

Therefore, consensus was not an important factor for a valid contract. As long as the words were expressed according to the prescribed form, they only recognised an agreement as a contract unless they were compelled to do so by law, as explained by Buckland and Steyn.\textsuperscript{25} The contract was a convention where the formalities and solemnities performed, constructed the binding nature.\textsuperscript{26}

Roman law recognised a number of distinct types of contracts which were binding only if they were ‘clothed’ in special forms and formulas as the Romans knew it.\textsuperscript{27} In other words, Roman law had “a law of contracts,” rather than a law of contract as stated by some authors.\textsuperscript{28}

There was no room for plain language. It was very rare for anyone to use plain language as it was not a priority for formal rituals and specific utterances which had preference over plain language. The Romans therefore followed a very literal interpretation of the words used by the parties. The slightest mistake used in the formal wording would invalidate a contract. It was only with the emergence of less formal contracts that the interpretation of contracts, as it is known today, gained importance.\textsuperscript{29} The words used in formal transactions came to be given the meaning which the declarant actually had in mind.\textsuperscript{30} The law relating to the interpretation of contracts has also developed along similar lines.\textsuperscript{31}

Emperor Justinian who was in control of the Roman Republic from 527 to 565, made a very big change and took a big task to reduce Roman law to writing.\textsuperscript{32} This made

\textsuperscript{23} Van Niekerk 2011 De Jure 368.
\textsuperscript{24} Cornelius Principles of the Interpretation of Contracts in South Africa 12.
\textsuperscript{25} Buckland and Steyn A Textbook of Roman Law from Augustus to Justinian 415.
\textsuperscript{26} Olariu Contracts in Roman Law 1.
\textsuperscript{27} Du Plessis et al The Law of Contract in South Africa 11.
\textsuperscript{28} Du Plessis et al The Law of Contract in South Africa 11.
\textsuperscript{29} Buckland A Textbook of Roman Law from Augustus to Justinian 412.
\textsuperscript{30} Kaser Das Romische Privatrecht 1812.
\textsuperscript{31} Kaser Das Romische Privatrecht 1812.
\textsuperscript{32} Molcuţ Oancea, Drept roman [Roman Law] 244.
the writings and commentary thereon the most important sources of Roman Law.\textsuperscript{33} This was a very big change for the majority of legal systems in Europe and later had a big impact in South Africa as the basis of the common law.\textsuperscript{34}

Roman law placed much emphasis on the literal meaning of words.\textsuperscript{35} Not only was this the position with regard to the interpretation, but also with regard to the formation and validity thereof and the slightest mistake could make a contract invalid.\textsuperscript{36} The literal interpretation was moved away from and was increased by the trade with non-Romans.\textsuperscript{37} There was an increase to informal kinds of transactions\textsuperscript{38} and it was judged on the basis of good faith, thus interpretation became less strict and formal.\textsuperscript{39}

Zimmermann\textsuperscript{40} stated that the turning point for this was the \textit{cause Curiana}, a case in which the Centumviral court interpreted a will in accordance with the intention of the testator, rather than the literal meaning of the words contained therein.\textsuperscript{41} Therefore, other factors than the mere words were allowed to determine the interpretation thereof.\textsuperscript{42} Even the course of negotiations between the parties was an admissible aid in the interpretation of the contract.\textsuperscript{43}

Roman law was used by the Dutch jurists from the seventeenth and eighteenth centuries for guidance in the development of the rules and principles that are now called Roman-Dutch law.\textsuperscript{44} The rules for the interpretation of contracts devised by these jurists were consequently derived from the rules applied for this purpose by

\textsuperscript{33} Schylz F \textit{History of the Roman Legal Science} 5.
\textsuperscript{34} DH Van Zyl \textit{History and Principles of Roman Private Law} 9.
\textsuperscript{35} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 7.
\textsuperscript{36} Kaser \textit{Das Romische Privatrecht} 8 1 2a; Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition} 622-625.
\textsuperscript{37} Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition}.
\textsuperscript{38} Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition} 625-628.
\textsuperscript{39} Kaser \textit{Das Romische Privatrecht} 8 2 2b.
\textsuperscript{40} Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition}.
\textsuperscript{41} Kaser \textit{Das Romische Privatrecht} 8 2 2b. Also see Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition} 631.
\textsuperscript{42} Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition} 631.
\textsuperscript{43} Buckland \textit{A Textbook of Roman Law from Augustus to Justinian} 415.
\textsuperscript{44} Kellaway \textit{Principles of Legal Interpretation of Statutes, Contracts and Wills} 25-26.
Roman law as stated by Cornelius.\textsuperscript{45} Therefore, reliance was placed on Roman authorities\textsuperscript{46} who looked at the role of equity in interpretation.\textsuperscript{47} To give effect to those principles, the need for certain presumptions from which the interpretation could proceed were recognised by Roman law. It was for example presumed that the contract did not contain an omnisio, in other words excluding something that should have been there and that the parties meant what they contracted and chose their words with care.\textsuperscript{48}

The rules for the interpretation of contracts were devised by the Dutch jurists and were also derived from the rules applied for this purpose by Roman law as stated above. This approach was also was apparent in the acceptance of the \textit{bona fidei}\textsuperscript{49} principle in all contracts and the role that reasonableness played in the interpretation of contracts in general.\textsuperscript{50}

Contracts were concluded in formalistic verbal statements. If a party denied their statement, they were liable under the law of the Twelve Tables\textsuperscript{51} and had to pay twice the amount originally owned. However Thomas\textsuperscript{52} stated that:

\begin{quote}
Roman law never developed a general theory of contract such as is to be found in modern legal systems, including those derived from Civil-law. History gave Rome a series of individual contracts which, while they might be grouped in categories, often manifested considerable differences among themselves.\textsuperscript{53}
\end{quote}

Formalism then disappeared with time and parties were free to choose whatever words they wanted to use and the requirement of the prescribed form also disappeared.\textsuperscript{54} Finally, classic Roman law found a calm state of mind between strict literalist interpretation and giving effect to the actual intention of the parties.\textsuperscript{55}

\begin{thebibliography}{99}
\bibitem{45} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 8.
\bibitem{46} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 8.
\bibitem{47} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 8.
\bibitem{48} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 18.
\bibitem{49} \textit{Bona fidei}: Latin for 'good faith.'
\bibitem{50} Van der Linden \textit{Regtsgeleerd, Practicaal en Koopmans Handboek} 1 1 6 1 6.
\bibitem{51} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 10.
\bibitem{52} Thomas \textit{Textbook of Roman Law} 226.
\bibitem{53} Kaser \textit{Das Romische Privatrecht} 5 2.
\bibitem{54} Kaser \textit{Das Romische Privatrecht} 8 2 2d.
\bibitem{55} Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition} 634.
\end{thebibliography}
According to Cornelius, Theodosius explained that a person who followed “the letter of law, but ignored the spirit of the law,” violated the law concerned and said that this would apply to all legal interpretations in general.\textsuperscript{56}

As contended by Kellaway,\textsuperscript{57} the English law of interpretation derived many of its rules from Roman law as a result of the work of English jurists and the influence of Canon law. According to Jolowicz,\textsuperscript{58} the emphasis was placed on the Roman authorities who seemed to favor the strict interpretation, ignoring the warnings\textsuperscript{59} of placing too much value on the 'literal meaning of the text'.\textsuperscript{60}

\textbf{2.3 Roman-Dutch law}

The principles received from Roman-Dutch-law which became the cornerstones of the South African law of contract, are a consensual approach to contractual liability, freedom of contract and the strict enforcement of contractual obligations (\textit{pacta sunt servanda}).\textsuperscript{61} Simon van Leeuwen was the first Dutch jurist to introduce the term 'Roman-Dutch law.\textsuperscript{62} The sources impacting on the reception of the Roman-Dutch law were the writings of the post-glossators, more than the original Roman sources.\textsuperscript{63}

Even in the early stages, the Roman-Dutch law and English laws relating to the interpretation of contracts in particular, developed along dissimilar lines as the emphasis was placed on different aspects of interpretation.\textsuperscript{64} In the Roman-Dutch law, contracts were based on the principle of good faith. More emphasis was placed on consensus between the parties during negotiations and the fact that they agreed on the terms. This also emphasised the accepted principle that all informal

\textsuperscript{56} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 8.
\textsuperscript{57} Kellaway \textit{Principles of Legal Interpretation of Statutes, Contracts and Wills} 22.
\textsuperscript{58} Jolowicz \textit{Roman Foundations of Modern Law} 12.
\textsuperscript{59} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 8.
\textsuperscript{60} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 8.
\textsuperscript{61} Elselen \textit{Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme} 518-519, 532-533.
\textsuperscript{62} Thomas et al \textit{Historical Foundations of South African Private Law} 70.
\textsuperscript{63} Hosten \textit{Romeinse reg, Regsgeskiedenis en regsvergelyking} 12.
\textsuperscript{64} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 9.
agreements were binding as long as consensus was reached between the contracting parties.\textsuperscript{65}

The interpretation of contracts was also based on the principle of good faith, an honest and sincere intention. It would never be acceptable to insert a clause into a contract that was dishonest or against public policy.\textsuperscript{66} Roman-Dutch authorities recognised one general theory of contract, in which all contracts were prescribed upon good faith, where all agreements deliberately entered into constituted a contract.\textsuperscript{67}

More emphasis was placed on the consensus of the parties when contracts were interpreted as consensus was not required previously. England for example, was not able to be changed or adapted as it was in Roman-Dutch law, it was more adaptable and could be changed.\textsuperscript{68} This developed according to Baker\textsuperscript{69} in the earlier times, where English judges took part in the drafting and passing of legislation by Parliament and they were “acquainted with the policy behind the legislation and the interpretation consisted of an application of such policy.”\textsuperscript{70} The article known as *Tacit Terms and the Common Unexpressed Intention of the Parties to a contract*, stated:

> Although it is often said that the purpose of interpretation is to ascertain the intention of the parties, it is trite that it is the objective meaning of the contract rather that the subjective intention, which is being determined.\textsuperscript{71}

It is clear that the objective meaning of the contract is more important than the subjective intention thereof as stated above.

Roman-Dutch law did not make a clear distinction between different kinds of legal instruments when it came to the interpretation thereof.\textsuperscript{72} Voet,\textsuperscript{73} stated that the principles relating to such interpretation of statutes could also be applied to

\textsuperscript{66} Van Leeuwen *Het Roomsch-Hollandsch Recht* 4 20 2.
\textsuperscript{67} Wessels *History of the Roman-Dutch Law* 566.
\textsuperscript{68} Jolowicz *Roman Foundations of Modern Law* 12.
\textsuperscript{69} Baker *An Introduction to English Legal History*.
\textsuperscript{70} Baker *An Introduction to English Legal History* 239.
\textsuperscript{71} Cornelius 2013 *De Jure* 1088.
\textsuperscript{72} Cornelius *Principles of the Interpretation of Contracts in South Africa* 12.
\textsuperscript{73} Voet *Commentarius ad Pandectas* 18 1 27.
contracts, since it made laws for the parties. A basic rule in Roman-Dutch law that was accepted was that all promises that were made, were made with true intention. This meant that it would be seriously and deliberately enforceable.\textsuperscript{74} Thus, the intention of the parties is how the contracts were interpreted.\textsuperscript{75} “It is true that a man must be taken to mean what he says,”\textsuperscript{76} therefore the intentions of the parties were important. The distinction between \textit{stricti iuris}\textsuperscript{77} and \textit{bonae fidei} contracts also started to fade away and gained less importance.\textsuperscript{78}

All contracts came to be regarded as \textit{bonae fidei} and thus reasonableness played its part in the interpretation of contracts.\textsuperscript{79} The Roman-Dutch law took over Roman law regarding language used in contracts in the sense that words and terms had to be read in their context.\textsuperscript{80} The Roman-Dutch law jurists preferred and assumed a more contextual approach to contractual interpretation which is now preferred in countries all over the world.\textsuperscript{81}

The Roman-Dutch law took over the Roman law in the sense that words and terms had to be read in their context. The contextual approach was therefore taken over.\textsuperscript{82} The law of contract tries to achieve a balance between relevant principles and policies to satisfy the requirements of reasonableness and fairness.\textsuperscript{83} There is always room for development and new principles are very important.

Through the years, the Roman-Dutch law has been seen as the binding law in South Africa. It must be understood that the law of Holland was the law that was applied in

\textsuperscript{74} Grotius 6 6 2; Van der Linden 1 14 2. Also see Wessels \textit{History of the Roman-Dutch Law} 566.
\textsuperscript{75} Vinnius 20 1; Van Bijnkershoek 2 15 7.
\textsuperscript{76} R.W. LEE, D.C.L., F.B.A. \textit{An Introduction to Roman-Dutch Law} 268.
\textsuperscript{77} Latin term which means according to strict right of law. It is a legal rule of interpretation.
\textsuperscript{78} Van der Keessel 1041. Also see Glover 2005 \textit{Fundamina} 28.
\textsuperscript{79} Van der Linden 1 1 6 1 6.
\textsuperscript{80} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} Cornelius 22. Also see Voet 34 5 4 5.
\textsuperscript{81} Louw \textit{The Plain Language Movement and Legal Reform in South African Law of Contract} 18.
\textsuperscript{82} Voet 34 5 4 5; Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 22.
\textsuperscript{83} Van der Merwe et al \textit{Contract: General Principles} 11.
the Cape and not the law of the Netherlands.\textsuperscript{84} The Roman-Dutch law principles that were applied did not only consist of legislation, but also of the work of authors.\textsuperscript{85}

\textbf{2.4 English law}

The English law was certainly influenced by The Roman law, but there was no reception thereof into the English law as explained by Baker.\textsuperscript{86}

As seen in \textit{Van Pletsen v Henning}\textsuperscript{87} and \textit{Union Government v Smith}\textsuperscript{88} the Appellate Division showed a leaning towards English cases of the extreme literal school, to the effect that the literal meaning of the words should be applied even if it is contrary to the common intention of the parties. Cornelius\textsuperscript{89} disagrees with Kellaway. He does not suggest that, in the law, "an interpretation would never be justified in looking to English law for guidance, because of the historical influence of English law on the development of our modern South African law and it may well prove expedient to take cognisance of English law when developing our own law."\textsuperscript{90} However, The South African law of interpretation is still Roman-Dutch law.\textsuperscript{91}

Kellaway does not account for the important influence of equity on the English legal system.\textsuperscript{92} His view is not unique among South African jurists and unfortunately, as Cornelius stated,\textsuperscript{93} this problem started in \textit{De Villiers v Cape Divisional Council case}.\textsuperscript{94} This decision allowed for the reception of principles from the English law of interpretation of contracts into South Africa.\textsuperscript{95} The Cape Colony English law principles

\textsuperscript{84}Venter, van der Walt and Pienaar \textit{Regsnavorsing} 130.
\textsuperscript{85} A few examples: Hugo de Groot (1583-1645), Arnoldus Vinnius (1588-1657), Simon van Groenewegen van der Made (1613-1652), Simon van Leeuwen (1626-1682), Ulrich Huber (1636-1694), Johannes Voet (1647-1713), Cornelis van Bynkershoek (1673-1743), DG van der Keessel (1738-1816), Johannes van der Linden (1756-1835).
\textsuperscript{86}Baker \textit{An Introduction to English Legal History} 329.
\textsuperscript{87}\textit{Van Pletsen v Henning} 1913 AD 82 99.
\textsuperscript{88}\textit{Union Government v Smith} 1935 AD 232 240-241.
\textsuperscript{89}Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 10.
\textsuperscript{90}Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 10.
\textsuperscript{91}Lawsa Vol 12 168.
\textsuperscript{92}Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 9.
\textsuperscript{93}Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 9.
\textsuperscript{94}1875 Buch 50.
\textsuperscript{95}Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 9.
relating to interpretation of contracts were introduced by this decision.\textsuperscript{96} The court held it best that statutes passed after the secession of the Cape Colony from British rule were to be construed in accordance with English rules of interpretation, rather than with those of the Roman-Dutch law. This seemed to contradict the fact that the Roman-Dutch law had not been abolished in the Southern African colonies, but was recognised as the common law of South Africa by the British authorities.\textsuperscript{97}

Even though the decision of De Villiers J did not lead to the abolition of the Roman-Dutch law relating to interpretation, it allowed for the reception of principles from the English law of interpretation into the law of South Africa, as explained by Steyn above.\textsuperscript{98} This resulted in courts referring to English and Roman-Dutch rules of interpretation.

It was concluded in case law that in both the English and the Roman-Dutch law it is a rule,\textsuperscript{99} even without considering the different paths taken in the development of the English and Roman-Dutch laws of interpretation, or whether the theoretical basis of interpretation in the various systems was compatible.\textsuperscript{100}

The agreement itself between the parties did not receive much attention in the early English law, as best explained by Teveen.\textsuperscript{101} The early English law was not concerned with the Roman and Roman-Dutch law, especially pertaining to consensus as a prerequisite for contractual liability.\textsuperscript{102} When guidance is needed from English sources, the difference between English law on the one hand and South African and Roman-Dutch law on the other should be taken into consideration.\textsuperscript{103}

\textsuperscript{96} 1875 Buch 50.  
\textsuperscript{97} Steyn 1937 \textit{THHR} 42.  
\textsuperscript{98} Steyn \textit{Uitleg van Wette – Statutes} xxvi.  
\textsuperscript{99} \textit{Von Wieligh v The Land and Agricultural Bank of South Africa} 1924 TPD 62 66.  
\textsuperscript{100} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 9.  
\textsuperscript{101} Teeven \textit{A History of the Anglo-American Common Law of Contract} 180.  
\textsuperscript{102} Louw \textit{The Plain Language Movement and Legal Reform in South African Law of Contract} 12.  
\textsuperscript{103} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 10.
2.5 The South African position before the introduction of the Constitution

One of the most important principles of interpretation of the English law introduced into South Africa is the Parol Evidence Rule. This was expressed in Union Government v Vianini Pipes (pty) Ltd.\textsuperscript{104} It was expressed very well in the mentioned case as follows:

[W]hen a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents nor may the contents of such a document be contradicted, altered, added to or varied by parol evidence...\textsuperscript{105}

The above quote clearly explains what the Parol Evidence Rule is. This clearly states that when you have an agreement which is in writing, this is seen as the agreement between the parties. No evidence may change the agreement to something other than what the parties have intended it to be.

Evidence was very restricted\textsuperscript{106} and that may be adduced in aid of interpretation and formed a background to all other rules of interpretation. When using the Parol Evidence Rule to interpret a word or clause of a disputed meaning, the question is imposed in the Finbro case.\textsuperscript{107} It was whether to read in isolation or in its context where it makes sense, and if the latter, where the line is to be drawn between context and extraneous matter.\textsuperscript{108}

In the case of Pieters & Co v Solomon,\textsuperscript{109} the learned judge explained:

When a man makes an offer in plain unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed and accepted by him \textit{bona fide} in that sense, then there is a concluded contract. He cannot be heard to say that he meant his promise to be

\begin{footnotesize}
\textsuperscript{104} Union Government v Vianini Pipes (Py) Ltd 1941 AD.
\textsuperscript{105} Union Government v Vianini Pipes (Py) Ltd 107 43-47.
\textsuperscript{106} Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 97.
\textsuperscript{107} Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein 1983 3 SA 191 (O).
\textsuperscript{108} Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein 1983 3 SA 191 (O).
\textsuperscript{109} Pieters & Co v Solomon 1911 AD 121.
\end{footnotesize}
subject to a condition which he omitted to mention and of which the other party was unaware.\(^\text{110}\)

When an offer is made as stated in the above case law and it is accepted in a \textit{bona fide} manner, a contract is concluded and the conditions thereof cannot be reversed or changed. In South Africa the purpose of interpretation immediately before 1996 remained to ascertain the common intention of the parties. It was important to know what the parties intend to do and what they tried to achieve.\(^\text{111}\)

The correct approach to the application of the interpretation is, after having ascertained the literal meaning of the word or phrase in question, is then to have regard to the context in which the word or phrase is used. The background circumstances to be applied as explained in case law and extrinsic evidence regarding the surrounding circumstances when the language of the document is ambiguous, is used when assistance is needed to ascertain the meaning thereof.\(^\text{112}\)

In South Africa many of the Roman-Dutch presumptions are still used today and the Parol Evidence Rule of the English law was also taken over by South African courts as stated above.\(^\text{113}\)

\textbf{2.6 Conclusion}

Thus today, it is commonly accepted that the current South African law is a mixed law system consisting mainly of the Roman-Dutch law, but has the influence of the English law.\(^\text{114}\) Furthermore, in the areas where there is no precise certainty, the Roman-Dutch law is seen as the common law.\(^\text{115}\)

In Roman law, contracts were only considered as valid when they were expressed in a prescribed manner as stated in sub-paragraph 2.2 above. Being reduced to writing and consensus between the parties were not required. They followed a very literal

\(^{110}\) Pieters & Co \textit{v} Solomon 1911 AD 121 130.
\(^{112}\) Coopers & Lybrand \textit{v} Bryant 1995 3 SA 761 (A) 767E-768E.
\(^{113}\) Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 16.
\(^{114}\) Venter, van der Walt and Pienaar \textit{Regrsnavorsing} 204. Also see Fagan in Zimmermann and Visser \textit{Roman-Dutch Law in its South African Historical Context} 62. Also see 2018 http://www.justice.gov.za/sca/historysca.htm.
\(^{115}\) Venter, van der Walt and Pienaar \textit{Regrsnavorsing} 205.
interpretation of the words used by the parties and there was no room for plain language. Thus, emphasis was placed on the literal meaning of the words. Eventually, formalism disappeared and parties were free to choose whatever words they wanted to use. The requirement of the prescribed form also disappeared as stated above.

Roman-Dutch law contracts and the interpretation thereof were based on the principle of good faith. More emphasis was placed on the consensus between the parties as stated in sub-paragraph 2.3 above. It would never be acceptable to insert a clause into a contract that was dishonest or against public policy. All promises made, had to be made with true intention. The Roman-Dutch law took over the Roman law regarding language used in contracts and words had to be read in their context. The South African law regarding the interpretation of contracts is still Roman-Dutch law.

The English law was influenced by the Roman law, but there was no reception thereof into the English law. One of the most important principles of interpretation of the English law introduced into South Africa, was the Parol Evidence Rule, which is explained best in case law as seen above in sub-paragraph 2.4.

In South Africa, the purpose of interpretation prior to the 1996 Constitution was to ascertain the common intention of the parties and then to have regard to the context in which the word or phrase is used. Surrounding circumstances may also be looked at when assistance is needed and when the language of the document is ambiguous.

In the earliest years agreements reduced to writing and consensus between the parties was not required. As the years went by, it developed where contracts in good faith were based on consensus between the parties. Contracts had to be read in their context. In South Africa, the common intentions of the parties had to be ascertained from the agreement itself, as it was very important regarding the interpretation of contracts.
3 The legal position to the interpretation of contracts after the introduction of the Constitution

3.1 Introduction

Over the last couple of years in the new democratic South Africa, there have been significant developments in the law relating to the interpretation of contracts. In our constitutional dispensation, as explained best by Sharrock, the courts tend to take an open approach when it comes to the interpretation of a contract. This means that the natural meaning of words is used as a starting point when interpreting contracts. On 27 April 1994, a new dispensation of constitutional sovereignty was introduced for South Africa with the Interim Constitution.

For all pieces of law, including the interpretation of contracts, the role of the courts when interpreting contracts is critical and the Constitution tasks the judiciary with the responsibility to interpret and protect the values of the Constitution. Another task of the courts is to give attention to any law, including the interpretation of contracts that are inconsistent with the Constitution, to be removed and to be declared invalid along with the common law that needs to be developed in accordance with the spirit, purport and object of the Bill of Rights. This is also applicable when contracts are interpreted.

The South African Constitution had a profound influence on the interpretation of contracts since 1993, after the abolishment of apartheid. It has given change and moral context to the application and interpretation of contracts, which has been important for this study. In the past, the approach that was used, namely a subjective literal approach was unsatisfactory. The reason being for this is that

---

116 Sharrock Business Transactions Law.
119 Section 39(1) and (2) of the Constitution 108 of 1996.
120 D Tladi 2002 De Jure 306. Also see Kriegler R in Ex Parte The Minister of Safety and Security and Others. In Re: The State v Walters and Another (CCT 28/01, delivered on 21 Mei 2002) para 60.
121 The Constitution 108 of 1996.
122 The apartheid system in South Africa was ended through a series of negotiations between 1990 and 1993 and through unilateral steps.
language is indeterminate as very few words bear a single ordinary meaning and people’s words tend to be technical. In the constitutional dispensation of South Africa the courts tend to take an open approach when it comes to the interpretation of a contract as stated above. Sharrock explained the “natural meaning of words” is used as a starting point when contracts are interpreted.

When we look at the interpretation of contracts, the court first attempts to determine the ordinary and grammatical meaning of the words used by the parties, meaning the words as they originally are. The court then proceeds on the assumption that this meaning accurately reflects the common intention of the parties, what the parties mean by the contract and what they want to achieve, in other words the purpose of the agreement as to what they are trying to achieve through it. The clearer the natural meaning, the more difficult it is to justify departing from it, as the common intention and clear meaning of the parties are the important things to look at. It states their intentions clearly and limits difficulties. However, this is easier said than done as there can still be difficulties, even with the clear meanings being present.

It is still important to want to use the words meant by the parties, as it eliminates complications and misunderstandings, as stated above. As a result of this, the courts do not follow such a literal approach as they did in the past. In this chapter, the impact and changes regarding the interpretation of contracts in a post-apartheid area are further looked into.

3.2 The impact of the Constitution and other factors regarding the interpretation of contracts

As explained by Barnard, there are various ways in which the Constitution and the Bill of Rights can be applied to the law of contract. With regard to a horizontal

---

124 Pillay The Impact of pacta sunt servanda in the law of contract 20.
125 Sharrock Business Transactions Law 170.
126 Sharrock Business Transactions Law 170.
127 Sharrock Business Transactions Law 170. Also see Pillay The Impact of pacta sunt servanda in the law of contract 20.
application, it can occur either directly or indirectly. The common law may also be developed when applying a provision of the Bill of Rights to a natural or juristic person, in order to give effect to the right to the extent that legislation does not do so and to limit a right, provided that it is in accordance with section 36(1) of the Constitution. The main difference in substance between direct and indirect horizontality is that in the latter type of case the court must also take the private interests of the parties in the particular circumstances of the case into account and balance them. On the other hand, in a case of direct horizontal application, a rule of general applicability is formulated, subject only to limitation thereof and this was best explained in the *Knox* case.

Since the promulgation of the Interim Constitution the debate regarding the nature and scope of the direct and indirect horizontal application of the principles of the Bill of Rights has been raging and is still to be resolved. The fact that the Constitution and the Bill of Rights apply horizontally between private individuals and therefore, examining the law of contract in this light is of paramount importance is something on which consensus has been reached. This horizontally becomes the reason why we are morally and legally obliged to contract in good faith.

There are a few sections summarised by Van der Walt, regarding the horizontal application of the Constitution. Furthermore, section 39(1)(a) provides that “a court, tribunal or forum, when interpreting the Bill of Rights itself, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” When we interpret contracts or apply any division of law,

---

129 Lubbe 2004 *SALJ* 395.
130 Section 8(2) of the *Constitution* 108 of 1996, which provides for the “horizontal” application of the Bill of Rights.
131 Section 8(3) of the *Constitution* 108 of 1996.
132 *Knox D’Arcy Ltd v Shaw* 1996 2 SA 651 ON. *Cf Fidelity Guards Holdings (Pty) (Ltd) v Peannain* 1997 10 BCLR 1443 (SE).
134 Bhana 2013 *SAJHR* 351-375.
135 Bauling and Nagtegal 2015 *De Jure* 161.
136 Van der Walt 2001 *SAJHR* 341.
137 Van der Walt 2001 *SAJHR* 341 361. Also see section 8(1), 8(2), 8(3) and 39(2) of the *Constitution Act 108 of 1996*.
138 Section 39(1)(a) of the *Constitution* 108 of 1996. Also see *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) para 33.
we must also promote the values that underlie an open and democratic society based on human dignity, equality and freedom as required by the Constitution.

A court is thus bound to the values of freedom, equality and human dignity when it comes to interpreting the Bill of Rights itself and to contracts in general, as explained above. This also includes the interpretation of contracts. As seen in Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) case,¹³⁹ the Constitutional Court held that the common law has to be developed within the matrix of the constitutional value system. It can thus be said that the interpretation of contracts should be done within the matrix of the constitutional value system.

When we take a deeper look, it was stated in Barkhuizen v Napier¹⁴⁰ when the Constitutional Court made the following remark as previously stated and quoted again:

> Under our legal order, all derives its force from the Constitution and is thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control.¹⁴¹

All law have to be consistent with the Constitution to be valid and this includes the interpretation of contracts. The primary values of the South African Constitution have a significant effect on the law of contract.¹⁴² The above abstract is very important as we can’t use contracts if they are not in line with the Constitution.

The interpretation of contracts should always be in line with the Constitution and the values of the Constitution must be reflected in the interpretation of contracts as the values of the Constitution can’t be departed from. If we interpret the contracts in line with the Constitution, there will be no reason in this regard to recall it or make it void.

It can thus be said, in a constitutional democracy, the common law of contract has to become infused with the values contained in the Constitution as the common law co-

---

¹³⁹ Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC) para 54.
¹⁴⁰ Barkhuizen v Napier 2007 (5) SA 323 (CC).
¹⁴¹ Barkhuizen v Napier 2007 (5) SA 323 (CC) para 35.
exists with the Constitution. The Constitution requires that all law, including the common law, must conform to it as the Constitution is the highest law in the land.\textsuperscript{143}

The Bill of Rights and the effect that it may have on the law of contract is primarily a matter of constitutional law, which forms part of the public law.\textsuperscript{144} We should make sure that all law applied or meant to be applied, confirms with the Constitution as stated above and does not contradict it. This also applies to the interpretation of contracts and should always be kept in mind.

When looking at the Bill of Rights again, a question of importance for the interpretation of contracts is whether the provisions of the Bill of Rights have any retrospective application.\textsuperscript{145} It was furthermore also confirmed in \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others}.\textsuperscript{146}

When attention needs to be given to purposive interpretation, it can be described as an approach to statutory and constitutional interpretation under which common law courts interpret an enactment within the context of the law’s purpose and when dealing with statutory interpretation, the Constitution requires purposive interpretation.\textsuperscript{147} It is desirable and recommended that the interpretation of contracts should be kept in line with the interpretation of statutes. Purposive interpretation of contracts must now be regarded as an established part of our law as confirmed in the \textit{Skibya Property Investments} case.\textsuperscript{148}

\begin{footnotes}
\footnotetext[143]{Section 2 of the Constitution 108 of 1996.}
\footnotetext[144]{Basson and Viljoen \textit{South African Constitutional Law} 14.}
\footnotetext[145]{Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 76.}
\footnotetext[146]{\textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others} (2004) ZACC 15; 2004 (4) SA 490 CC para 91 of the mentioned case: “The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights.'”}
\footnotetext[147]{Examples hereof: \textit{African Christian Democratic Party v Electoral Commission and Others} [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) paras 21, 25, 28 and 31; \textit{Daniels v Campbell NO and Others} [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) paras 22-30; \textit{Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others} [1999] ZASCA 72; 2000 (1) SA 113 (SCA) para 21.}
\footnotetext[148]{\textit{Skibya Property Investments (Pty) Ltd} [2004] 1 All SA 386 (SCA) 391.}
\end{footnotes}
Purposive interpretation is appropriate, not only when the wording of the contract is ambiguous and not understood, as in *Venter v Credit Guarantee*,\textsuperscript{149} but when the clear meaning of the words, if put into effect, would nullify the essential purpose of the contract as in *Turner Morris (Pty) Ltd v Riddell*.\textsuperscript{150} The original meaning of the contract can’t be departed from when the parties intended it to be as it is.

### 3.3 Written agreements

The fundamental consideration in determining the terms of a written contract or its application to an event that arose during the course of their relationship, is to discern the intention of the parties from the words used in the context of the document as a whole. A further consideration is, the factual matrix surrounding the conclusion of the agreement and its purpose or the mischief it was intended to address as stated by Spilg J with Maluleke and Kathree-Setiloane JJ in a recent High Court case.\textsuperscript{151} The contentious words are considered by having regard to their context in relation to the contract as a whole and by taking into account the nature and purpose of the contract.\textsuperscript{152} You therefore look at why the contract was there in the first place and what the parties trying are to reach, thus what is the purpose of the written contract.

Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. This means, the words used as they are can’t just be changed at sole discretion. The words should be kept as stated in the written agreement if the intentions of the parties are clear.

The ‘inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the

\textsuperscript{149} *Venter v Credit Guarantee* 1996 (3) SA 966 (SCA).
\textsuperscript{150} *Turner Morris (Pty) Ltd v Riddell* 1996 4 SA 397 (E) 404H-J.
\textsuperscript{151} With reference to *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39 and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016(1) SA 518 (SCA) paras 27, 28, 30 and 35.
\textsuperscript{152} *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979(1) SA 195 (A) 202C and *List v Jungers* 1979 (3) SA 106 (A) 118G-H the Supreme Court of Appeal (‘the SCA’).
preparation and production of the document.”\textsuperscript{153} Thus we look at the document and the language thereof.

To add even more weight to this extract, Wallis JA went further and stated the following in \textit{Bothma Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk}:\textsuperscript{154}

\begin{quote}
Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is ‘essentially one unitary exercise’. Accordingly it is no longer helpful to refer to the earlier approach.\textsuperscript{155}
\end{quote}

The above is self-explanatory and very important in this research. Not only is the words of the agreement important and looked at, the agreement as a whole is considered as to how the agreement was concluded and what the parties wanted to achieve through it. This no longer occurs in stages as explained above.

In today’s time, to facilitate proof of the agreement and also to stipulate the obligations, rights and time of performance of the parties to the agreement, almost all contracts are drafted and recorded to do so.\textsuperscript{156} It is difficult to try to figure out what is in the mind of the parties and what they mean, therefore the courts tend to turn to the written agreement for clarity and use the principles of interpretation to assist them. It makes it easier as people’s minds can’t be read and written agreements tend to have less complications. Unfortunately written agreements aren’t always just black and white. Where do courts start then? The normal point of

\begin{footnotesize}
\begin{footnotes}
\item[153] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.
\item[154] Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA).
\item[155] Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) para 12.
\item[156] Hutchison and Pretorius The Law of Contract in South Africa 400.
\end{footnotes}
\end{footnotesize}
department the courts’ tend to use, is the presumption of validity as Pillay stated best.157

The first step in interpreting a contract was explained in another court case namely *Cinema City (Pty) Ltd v Morgenstem Family Estates (Pty) Ltd.*158 The court stated that it was the reading of the contract in order to establish the literal meaning and the judge went further to say that a contextual approach should be qualified with the literal meaning. This adds to the discussion above where it is stated that the words should be read as they are and shouldn’t be changed or departed from. Jansen JA explained the process of interpretation as:159

> [T]he first step in interpreting a written contract is to read it. This entails attaching to each word that ordinary meaning (of the several which the word undoubtedly will bear) which the contract seems to require and applying the common rules of grammar (including syntax). Thus we may arrive prima facie meaning of each work, phrase and sentence. The document must, however, be read and considered as a whole and in doing so it may be found necessary to modify certain of the prima facie meanings so as to harmonize the parts with each other and with that whole. Moreover, it may be necessary to modify the meanings thus arrived at so as to conform to the apparent intentions of the parties.160

The court went even further by stating that “it would be consistent with modern thinking to allow evidence of surrounding circumstances in all cases as an aid to interpretation, without requiring the open sesame of uncertainty.”161 This might not be the sensible solution as surrounding circumstances are there to aid when the clear meaning can’t be obtained from the agreement itself. To start reading the contract or written agreement as it is, still remains a good place to start.

One of the questions asked in the case of *V v V*162 was whether it was permissible to go behind the terms of a written agreement which was made part of the court order and which appears to be clear and unambiguous. This involves a consideration of the method of interpreting contracts as well as the entitlement to introduce extrinsic

---

157 Pillay *The Impact of pacta sunt servanda in the law of contract* 15.
158 *Cinema City (Pty) Ltd v Morgenstem Family Estates (Pty) Ltd* 1980 (1) SA 796 (A).
159 Pillay *The Impact of pacta sunt servanda in the law of contract* 21.
160 *Cinema City (Pty) Ltd v Morgenstem Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) 803.
161 *Cinema City (Pty) Ltd v Morgenstem Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) 803G-806A.
162 *V v V*(A5021/12) [2016] ZAGPJHC 311.
evidence where there has been no application for rectification.\textsuperscript{163} It is advisable to not try and change the agreement and go behind the terms thereof, but to rather read it as it.

\textbf{3.4 The Parol Evidence Rule and how interpretation is applied}

\textit{Pacta sunt servanda} explains that “a party is bound to fulfill his or her obligations under the contract even if performance has become more onerous...”\textsuperscript{164} and this was explained by the South African Law Commision in 1998 in a draft bill to address unfairness in contracting. Adopting the canonist position, all contracts were said to be an exchange of promises that were consensual and \textit{bonae fidei},\textsuperscript{165} i.e. based simply on mutual assent and good faith. As discussed in Chapter two, this is an important rule that was introduced by the English law.\textsuperscript{166}

Unlike civilian counterparts, English contract law adopts the four-corner rule\textsuperscript{167} as a starting point and the Parol Evidence Rule,\textsuperscript{168} thus the contract is to be viewed as containing an entire agreement between the parties.\textsuperscript{169} As seen in the \textit{Johnson-case},\textsuperscript{170} it was properly stated that since parties are responsible for the integration of their agreement, the theoretical foundation of the rule is that extrinsic evidence regarding the negotiations and context is misleading and irrelevant.\textsuperscript{171}

It makes sense to not waste time on leading evidence which is not necessary when parties’ true intentions are already clear. It will only be a waste of time and money to lead evidence on something that is not necessary and required. The purpose of this

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{163} \textit{V v V}(A5021/12) [2016] ZAGPJHC 311 para 7.
\item \textsuperscript{164} Reporton Unreasonable Stipulations in Contracts and the Rectification of Contracts, South African Law Commision, Project 47, April 1998, clause 4(1).
\item \textsuperscript{165} \textit{bonae fidei}: “Without intention to deceive or genuine and real.” See Zimmermann \textit{The Law of Obligations – Roman Foundations of Civilian Tradition} 220.
\item \textsuperscript{166} \textit{Union Government v Vianini Pipes (Py) Ltd} 107 43-47.
\item \textsuperscript{167} Duhl 2010 \textit{University of Pittsburg Law Review} 71.
\item \textsuperscript{168} Richards \textit{Law of contract} 132.
\item \textsuperscript{169} Galletti \textit{Contract interpretation and relational contract theory: a comparison between common law and civil law approaches} 249.
\item \textsuperscript{170} \textit{Johnson v Leal} 1980 (3) SA 927 (A).
\item \textsuperscript{171} \textit{Johnson v Leal} 1980 (3) SA 927 (A).
\end{itemize}
\end{footnotesize}
rule is to prevent any party from presenting extrinsic evidence when a specific contract is interpreted and imposes the question of whether it is allowed or not.\textsuperscript{172}

No evidence may contradict or detract from or redefine the terms of a contract.\textsuperscript{173} If parties decide that they have the intention to integrate a contract in a certain way, it makes no sense to lead evidence to contradict that and once again preference is given to the intentions of the parties. Also, to ensure that where the parties have decided to reduce the contract to writing, which it is, they considered the only memorial of the contract.\textsuperscript{174} This rule only applies when the entire agreement is in writing as stated by case law.\textsuperscript{175}

When going back to evidence, in \textit{Coopers & Lybrand} at 768D-E,\textsuperscript{176} the court limited the extrinsic evidence that could be considered to:

\ldots previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.\textsuperscript{177}

The Parol Evidence Rule applies to all written contracts, whether stated in the contract or not. Parol Evidence, is evidence outside of the written contract. It is evidence comprising of what parties did or said before, during or even after the conclusion of the contract. The Parol Evidence Rule has two components, namely the integration rule and the interpretation rule.\textsuperscript{178}

Furthermore to the circumstances that can be used, the distinction between background circumstances and surrounding circumstances has been abandoned by the Supreme Court of Appeal, i.e. where the contract does not give a clear meaning of the terms of the contract, the court may take notice of evidence.\textsuperscript{179} Such evidence

\textsuperscript{172} Louw \textit{The Plain Language Movement and Legal Reform in South African Law of Contract} 44.

\textsuperscript{173} Lowry \textit{v Steedman} 1914 AD 532; \textit{Venter v Birchholtz} 1972 (1) SA 276 (A).

\textsuperscript{174} Louw \textit{The Plain Language Movement and Legal Reform in South African Law of Contract} 47.

\textsuperscript{175} Chrysafis \textit{v Katsapas} 1988 4 SA 818 (A).

\textsuperscript{176} Coopers \& Lybrand \textit{v Bryant} 1995 (3) SA 761 (A) 768D-E.

\textsuperscript{177} Delmas Milling Co Ltd \textit{v Du Plessis} 1955 (3) SA 447 (A) 455A-C, \textit{Van Rensburg’s case} 303A-C, \textit{Swart’s case} 201B, \textit{Total South Africa (Pty) Ltd v Bekker NO1} 1992 (1) SA 617 (A) E \{dictum 624G appl\} 624G, \textit{Pritchard Properties (Pty) Ltd v Kouis} 1986 (2) SA 1 (A) \{dictum at 10C-D appl\} 10C-D.


\textsuperscript{179} KPMG Chartered Accountants \textit{v Securefin Ltd} 2009 (4) SA 399 (SCA) para 39.
pertain to the surrounding circumstances to ascertain the meaning of those terms of the contract, as there are no clear meanings to rely on. Evidence may help to give a clear indication of what is meant. This approach must be used as conservatively as possible and can't be used just because the party feels like it.

If these rules do not enable the court to decide what the proper interpretation is as required, it will have to declare the contract void for vagueness as contemplated in case law.\(^\text{180}\)

Regarding the interpretation rule the court looks to ascertain the meaning of the terms. "Interpretation is a matter of law and not a matter of fact and, accordingly, interpretation is a matter for the court and not for witnesses as stated in the KPMG-case."\(^\text{181}\)

If the contract is able to clearly and unambiguously define the terms of the contract, the court will interpret those terms according to the contract as they are. Where the contract does not give a clear meaning of the terms of the contract, the court may engage in the surrounding circumstances as previously stated to ascertain the meaning of those terms. However, this approach must be used as conservatively as possible.\(^\text{182}\)

This rule can’t be used as an excuse. The words as the parties intended them to be should first be used and when we really struggle to understand the true meaning and intentions of the parties, other factors may be looked at, for assistance, the surrounding circumstances.

Thus the intentions of the parties needs to be ascertained, it must be gathered from their language, not from what they may have had in mind as stated by Solomon J in case law.\(^\text{183}\) Greenberg furthermore described this rule as: "It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the

\(^{180}\) Namibian Minerals Corpn v Benguela Concessions Ltd 1997 2 SA 548 (A) 557E-563C.

\(^{181}\) KPMG Chartered Accountants v Securefin Ltd 2009 (4) SA 399 (SCA) para 39.

\(^{182}\) Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) 455.

\(^{183}\) Van Pletsen v Kenning 1913 A D 82 99.
parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract."\textsuperscript{184}

When interpreting contracts there are a few important things that should be kept in mind. If the contract clearly and unambiguously sets out its terms of the contract, the court will interpret those terms according to the contract. Then there are no difficulties in understanding it as it is. There is no need to wonder about the terms as it is clear enough for the court to use it as it is seen infront of them. Thus there is no need to lead external evidence.

In one of the recent and most important judgements, \textit{Natal Joint Municipal Pension Fund v Endumeni Municipality};\textsuperscript{185} interpretation is described as:

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract having regard to the context provided by reading the particular provisions in light of the document as a whole and the circumstances attendant upon it's coming into existence. The process is objective, not subjective. The inevitable point of departure is the language of the provisions itself.\textsuperscript{186}

This groundbreaking judgement written by Malcolm Wallis JA, brought hope to a new broader approach. It gave effect to significant developments in the law relating to the interpretation of contracts in South Africa and in other countries which follow rules similar to ours.

In the case of \textit{North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd};\textsuperscript{187} the appellant’s business was financing the acquisition of goods by concluding rental agreements with applicable end users. A cession agreement was concluded in 2001 and in 2008 and dispute arose about which was settled amicably by way of a settlement agreement in September 2008.\textsuperscript{188} After this agreement was signed by

\textsuperscript{184} Worman v Hughes and Others 1948 (3) SA 495 (A) 505.
\textsuperscript{185} Natal Joint Municipal Pension Fund v Endumeni Municipality (920/201) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).
\textsuperscript{186} Natal Joint Municipal Pension Fund v Endumeni Municipality (920/201) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
\textsuperscript{187} North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd (2013) 3 All SA 291 (SCA).
\textsuperscript{188} North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd (2013) 3 All SA 291 (SCA) para 2.
both parties, it came to the bank’s attention that it was induced by fraudulent misrepresentation and non-disclosure on the part of the appellant. The respondent argued that the agreement was *void ab initio*\textsuperscript{189} and therefore not enforceable.\textsuperscript{190}

The High Court found there was sufficient proof of the allegations and that the bank was not compelled to submit the dispute for arbitration. The SCA considered and applied many principles, but the one important for this study’s purposes was “in interpreting a contract, a court must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as whole and whether or not there is any possible ambiguity in the meaning, the court must consider the context in which the contract was concluded.”\textsuperscript{191}

This confirms once again what was stated previously that the contract should be considered as it is to give effect to the parties’ intentions. A contract must also be interpreted to give it a commercially sensible meaning.\textsuperscript{192} The importance is shown that the intentions of the parties at the time of contracting must be considered.

The second case looked at again is *Bothma – Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk*.\textsuperscript{193} In this case two brothers divided the family business handed down to them by their father, with the effect that they had to deal with a tank farm which the respondent was hiring from Omnia. In accordance with their agreement, the respondent would have use of three tanks and the appellant six tanks.\textsuperscript{194} Both of the parties let the tanks to third parties and dispute arose between the parties.

\textsuperscript{189} Meaning: Not legally binding. A document that is void is useless and worthless; as if it did not exist.

\textsuperscript{190} *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* (2013) 3 All SA 291 (SCA) para 26.


\textsuperscript{192} *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* (2013) 3 All SA 291 (SCA) para 16.

\textsuperscript{193} *Bothma – Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk* 2014 (1) All SA 517 (SCA) para 1.

\textsuperscript{194} *Bothma – Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk* 2014 (1) All SA 517 (SCA) para 3.
The High Court rejected the submission of the appellant, that he was entitled to receive the entire benefit according to the interpretation of a clause, whereby the respondent argued that he was entitled to a pro rata portion of the benefit.\textsuperscript{195} The Supreme Court in this case held that the present state of the law can be summarised as mentioned previously in case law.\textsuperscript{196}

The court once again confirmed in the \textit{Bothma-Botha Transport-case} that “While the starting point remains the words of the document...the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being ...Interpretation is no longer a process that occurs in stages but is “essentially one unitary exercise.”\textsuperscript{197}

Thus, taking the document and the circumstances into consideration, a contract can be interpreted to its best, thus giving rise to the purpose thereof. We don't just look at the meaning of the words, but consider all relevant contexts to give rise to the purpose of the agreement.

As seen in the \textit{North East Finance} case\textsuperscript{198} above, the courts indicated that the intention of the parties needs to be considered as well as the context in which the words are being used. In this study, it has become clear that the intentions of the parties are of fundamental importance when we look at contracts and that contracts should be regarded as a whole and not be isolated. As in the \textit{Bothma – Batho} case,\textsuperscript{199} it is also confirmed by the courts that, when words are being interpreted they need to be considered by ‘reading the particular provision in its context and that

\textsuperscript{195} \textit{Bothma – Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk} 2014 (1) All SA 517 (SCA) para 4.


\textsuperscript{197} \textit{Bothma - Botha Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk} [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12. Also see \textit{AktiebolagetHassie & another v Triomed (Pty) Ltd} 2003 (1) SA 155 (SCA) paras 8 and 9.

\textsuperscript{198} \textit{North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd} (2013) 3 All SA 291 (SCA).

\textsuperscript{199} \textit{Bothma - Botha Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk} [2013] ZASCA 176; 2014 (2) SA 494 (SCA).
the language used should also be considered as stated above."

When that is done, there will be no need to lead evidence such as surrounding circumstances to give assistance when the intentions of the parties are unclear.

Other relevant authorities are summarised and can be found in Bastian Financial Services v General Hendrik Schoeman Primary School. This development in the above mentioned case is described as a shift from "text to context." 

3.5 Conclusion

In light of the above, it has become clear that over the last couple of years in the new democratic South Africa, there have been significant developments in the law relating to the interpretation of contracts as stated above. This brought about significant changes to the law of contract and in particular the interpretation of contracts. The Constitution of South Africa plays a very important role as all law, including the interpretation of contracts should be in line with the Constitution for it to be valid.

The court tries to determine the ordinary and grammatical meaning of the words used by the parties as the words should be used as they are intended to give rise to the intentions of the parties. For this reason, the assumption is that this meaning accurately reflects the common intention of the parties and what they intend to achieve, in other words the purpose of the agreement and what they try to achieve through it.

The clearer the natural meaning the more difficult it is to justify departing from it. Sometimes when this clear meaning can’t be found, the courts’ may get assistance and look at the surrounding circumstances to try and aid them in this problem.


201 Bastian Financial Services v General Hendrik Schoeman Primary School 2008 (5) SA 1 (SCA) paras 16-19.


As with the *pacta sunt servanda* rule, evidence should be led when it’s reasonably necessary and the evidence can assist the court to arrive at the common intention of the parties. Such evidence may not contradict or try to create a new agreement. We should look at the context of the document as a whole and what the purpose of the agreement was so that the intentions of the parties and what they wanted to achieve may manifest itself. Thus, we should give attention to all relevant context and not just the meaning of the words.

A few cases in this chapter showed very important principles and decisions and provided very important guidance to use when interpreting contracts.
4 The Canadian legal position in respect of interpreting contracts

4.1 Introduction

Canada is seen as a federal domination which was established by virtue of the *British North America Act 1867* and was amended by the supreme law of Canada,\(^204\) the *Constitution Act 1982*. All legislation in Canada needs to comply with the *Constitution Act 1982*\(^205\) and this includes the Canadian Charter of Rights and Freedoms.\(^206\) Canada’s *Constitution Act* also has an influence on their law of contracts, similar to the South African Constitution having a fundamental influence on the law of contracts.

The Bank of Nova Scotia rewrote its loan forms in a manner that was more of an understandable language in 1979 and at the same time the Royal Insurance of Canada produced a plain language insurance policy as explained by Asprey.\(^207\)

These two projects created very influential and important research into the plain use of language and the law in Canada.\(^208\) The *Decline and fall of Gobbledygook: Report on Plain Language Documentation* was issued in 1990 by the Canadian Bar Association and the Canadian Bankers Association which also had a big impact on their change relating to the law of contract.\(^209\)

In recent literature it was explained that, the shift emphasised from legal relationships based on reliance and the receipt of benefits to contractual obligations with a consensual basis.\(^210\)

---

\(^{204}\) Section 52(1) of the *Constitution Act 1982*. Canada Constitution Acts, 1867 to 1982.

\(^{205}\) Section 52(1) of the *Constitution Act 1982* reads as follows: “The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is to the extent of the inconsistency, of no force or effect.”


\(^{207}\) Asprey *Plain Language for Lawyers* 7.


\(^{209}\) The Decline and fall of Gobbledygook: Report on Plain Language Documentation.

\(^{210}\) Cooke and Oughton *The common law of obligations* 41-42.
Changes developed from the eighteenth century to the nineteenth century whereas individuals who did not have much rights to enter into legally enforceable agreements, changed to their own choosing and without the interference of the state. From what the authors explained, it is clear that a general theory of contract only emerged in the nineteenth century.

External signs of agreement which would lead a reasonable person to assume that they had agreed were more of an actual fact than whether the parties had intentions to do so or not, as stated by Mason and Gageler. The Supreme Court of Canada’s jurisprudence continued to support an interpretive process by which courts first focused on the clear language of a contract to arrive at the intention of the parties, as it is known by now by giving consideration to the parties intention and the clear meaning is very important.

If the clear meaning could not be determined, surrounding circumstances were used to determine the intention of the parties. This is very similar to how it is applied in South Africa and once again it is clear that it is not always a bad thing to revert to other factors for assistance when necessary. It is fair to say that in the years before the case of *Sattva Capital Corp v Creston Moly Corp*, there was some uncertainty about exactly when the surrounding circumstances ought to be considered in the interpretive process when clear language could not be used.

To briefly explain what happened in this case, two parties entered into an agreement that required the one party to pay the other a finder’s fee in relation to the acquisition of a molybdenum mining property. The parties agreed that the one party was entitled to a finder’s fee and it would be paid in shares to the other party. However, they disagreed on which date should be used to price the shares and therefore also the number of shares to which the owed party was entitled.

---

211 Adams and Brownsword *Understanding contract law* 33-44.
212 Cooke and Oughton *The common law of obligations* 17. Also see Adams and Brownsword *Understanding contract law* 26.
213 Mason and Gageler *The Contract in Essays on contract* Finn 4-5.
There were arguments regarding how the share price was determined and how much should be paid accordingly. They entered an arbitration agreement and it was also appealed on the basis of section 31(2) of the *Arbitration Act*, but leave was denied on the basis that the question on appeal was not a question of law. Creston successfully appealed this decision and was granted leave to appeal the arbitrator’s decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (“CA Leave Court”).

Thus, the issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder’s fee to Sattva Capital Corporation (formerly Sattva Capital Inc.). The parties agreed that Sattva was entitled to a finder’s fee of US1.5 million and was entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagreed on which date should be used to price the Creston shares and therefore the number of shares to which Sattva was entitled. The Court of Appeal reversed the decision and the application for leave to appeal, finding that the arbitrator’s failure to address the meaning of the agreement’s “maximum amount” provision raised a question of law.

The superior court judge on appeal dismissed the appeal, holding that the arbitrator’s interpretation of the agreement was correct. In the case at bar, the Court of Appeal erred in finding that the construction of the finder’s fee agreement constituted a question of law. Such an exercise raises a question of mixed fact and law, and therefore, the Court of Appeal erred in granting leave to appeal.

According to determining the legal rights and obligations of the parties under a written contract with regard to the historical approach was considered a question of law. Some Canadian courts have abandoned the historical approach and now treat

---

the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law as stated in the above mentioned case.\textsuperscript{223}

There has been a change where the historical approach has faded away in Canada and it is based on two developments. Firstly, the courts tend to look at the surrounding circumstances, also referred to as the factual matrix, which is based on the approach being a contractual interpretation as seen in the \textit{Sattva} case.\textsuperscript{224} The second development is the difference between questions of law and questions of mixed fact and law and how it is explained.\textsuperscript{225}

The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to establish “the intent of the parties and the scope of their understanding”\textsuperscript{226} as determined in a very important Canadian case mentioned above. For that to be done, a decision-maker must read the contract as a whole as it is, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.\textsuperscript{227}

Words can’t be looked individually; they have to be used in context to ascertain the greater meaning, as stated by \textit{Lord Wilberforce}:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and

\begin{footnotesize}
\begin{enumerate}
\end{enumerate}
\end{footnotesize}
this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.\textsuperscript{228}

The above is once again very similar to the position in South Africa. The meaning of words is often derived from a number of factors, including the purpose of the agreement and the nature of the relationship created by the agreement between the parties as explained in case law.\textsuperscript{229}

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement.\textsuperscript{230}

The surrounding circumstances should not take away the meaning of the parties and what was meant by the agreement. Thus, it should be kept as it is to try not to take away the intended meanings of the parties.

A pure question of law as identified in \textit{Housen} and \textit{Southam}\textsuperscript{231} does not fit with the second development of the historical approach to contractual interpretation. Yet the purpose of contractual interpretation is to get the objective intentions of the parties where we apply the legal principles of interpretation to do so.\textsuperscript{232} This appears closer to a question of mixed fact and law, defined in \textit{Housen} as quoted "applying a legal standard to a set of facts."\textsuperscript{233} Many learned experts are of the opinion that this historical approach should not be used anymore.

Another important change and discussion that had its influence in September 2016, was when the Supreme Court of Canada released the decision in \textit{Ledcor v

\textsuperscript{229} Sattva Capital Corp v Creston Moly Corp 2014 SCC 53 [2014] 2 S.C.R 633 para 48. Also see Moore Realty Inc. v Manitoba Motor League 2003 MBCA 71 173 Man. R. (2d) 300 para 15 and as stated by Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1998] 1 All E.R. 98 (H.L.): “The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115].”
Northbridge Indemnity Insurance Company. This case clarified the standard that the courts should use when interpreting contracts and did not just have an importance in the insurance industry, but also in the law of contract in general. This also implied that parties involved in a dispute over interpretation could get a meaningful appellate review. The court in the Ledcor case cautioned that its statements in Sattva on the standard of review of contractual interpretation had to be considered in their full context.

4.1.1 How Interpretation is then applied

In Canada, to discover and give effect to the parties' true intention as expressed in the written document as a whole at the time the contract was made is the main purpose and objective of interpreting a contract.

When there is no ambiguity, the plain, ordinary, popular, natural, or literal meaning of the words, read in light of the entire agreement and its surrounding circumstances, should be adopted, except when to do so would result in a commercial absurdity or create some inconsistency with the rest of the contract.

---

238 Wood Buffalo Housing & Development Corp. v Flett (2014) 2014 CarswellAlta 1532 (Alta. Q.B.) (surrounding circumstances disclosing facts known to parties at time of contracting is part of interpretive process); Seven Oaks Inn Partnership v Directcash Management Inc. (2014) 2014 CarswellSask 636 (Sask. C.A.).
When contracts are interpreted, the objective meaning is essentially looked for and in the light of absent proof that all parties interpreted the contract in the same way that may not have been apparent to an ordinary person, as each person might do it differently.\textsuperscript{241} Interpretation of a contract must be objectively based,\textsuperscript{242} even if the courts tend to “interpret contractual language contextually and in accordance with the surrounding circumstances of the agreement,\textsuperscript{243} which is also consistent with the reasonable understanding and expectations of the parties.”\textsuperscript{244}

The highest court in Canada recently ruled that “contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.”\textsuperscript{245}

Particular provisions of an agreement are not to be read in isolation, it should be read together with the entire agreement as a whole and this is especially true when we deal with contractual interpretation under the modern so-called "contextual approach.”\textsuperscript{246} We need to look at the entire agreement as a whole to reach the true intentions of the parties and this is similar to how it is applied in South Africa.

A court must strive to harmonize apparently conflicting terms by attempting to reasonably give meaning to each of the terms in question.\textsuperscript{247} Those terms can’t be ignored and should be dealt with to reach a conclusion. When different parts of the agreement are in conflict, effect will be given to the real intention of the parties as

\textsuperscript{244} Miglin v Miglin (2003), 2003 CarswellOnt 1374 (S.C.C.).
\textsuperscript{245} Creston Moly Corp. v Sattva Capital Corp (2014) 2014 CarswellBC 2267 (S.C.C.).
\textsuperscript{247} BG Checo International Ltd. v British Columbia Hydro & Power Authority (1993), 1993 CarswellBC 1254 (S.C.C.).
The principles governing the interpretation of contracts are essentially the same as for statutory interpretation.  

4.1.2 Good faith and the role it plays in the interpretation of contracts in Canada

The important decision in Bhasin v Hrynew identified good faith as an “organizing principle of the law of contract” and created a new duty of honest contractual performance into Canadian contract law when interpreting contracts. An example of how this approach to contract interpretation might be applied can be seen in the case of Swan Group v Bishop, as heard before the Alberta Court of Appeal. Before the judgment of Bhasin there was no general duty that contracts should be performed in good faith, meaning this was a big step in the law of contracts in Canada.

It is a principle which manifests itself through the existing doctrines of the types of situations that the law requires in certain aspects, namely honest, candid, forthright or reasonable contractual performance, as explained in this important case.

Contractual interpretation in Canada involves determining the objective intentions of the parties at the time of contract formation and it is clear that Canada’s Constitution has influenced the principle of good faith when dealing with the interpretation of contracts. Here it is seen again how important the role of their Constitution is and this can be drawn back to the fact that South Africa’s Constitution also has such important role in the law of contracts and law in general.

Fridman indicated that good faith is only relevant in connection with performance in terms of a contract which has already been concluded. Thus, a party can rescind a contract on the grounds of unconscionability if enforcement of that contract would

\[248 \text{ R. v MacLean (1882) 1882 CarswellNat 10 (S.C.C.).} \\
250 \text{ Bhasin v Hrynew 2014 SCC 71.} \\
251 \text{ Bhasin v Hrynew 2014 SCC 71 paras 74-77.} \\
252 \text{ Swan Group v Bishop 2013 ABCA 29.} \\
253 \text{ Bhasin v Hrynew 2014 SCC 71 para 66. Also see The Supreme Court of Canada in Potter v New Brunswick Legal Aid Services Commission, 2015 SCC 10 [2015] 1 SCR 500 para 99.} \\
254 \text{ Fridman The Law of Contract in Canada 78.} \]
amount to fraud by the other party.\textsuperscript{255} There is no obligation for the parties to negotiate in good faith.\textsuperscript{256} Principles of unfairness developed in equity, such as the doctrine of undue influence, specific performance and injunction are also found in Canadian law.\textsuperscript{257}

For the protection of consumers, the unconscionable contracts are further regulated by legislation such as \textit{British Columbia Trade Practice Act}, the \textit{Alberta Unfair Trade Practices Act}, the \textit{Manitoba Unconscionable Transactions Act}, the \textit{Newfoundland Unconscionable Transactions Relief Act} and the \textit{Ontario Business Practices Act}.\textsuperscript{258}

\textbf{4.2 The role of 'surrounding circumstances' in the interpretation of contracts in Canada}

The goal should be to help the decision maker and not take away what is actually meant and intended to be achieved by the agreement. As explained previously, the whole contract must be taken into account when contracts are interpreted.\textsuperscript{259} As with the South African law of contract, the Parol Evidence Rule can also be taken into account as it does not apply to preclude evidence of the surrounding circumstances, once again explained in the \textit{Sattva} case.\textsuperscript{260} It is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words as explained above.\textsuperscript{261} While the surrounding circumstances are relied on in the interpretive process, courts cannot use them to deviate from the text, especially not to create a new agreement.\textsuperscript{262}

What circumstances may be looked at as evidence? The nature of the evidence will differ from case to case, but it should only consist of objective evidence of the background facts at the time of the execution of the contract.\textsuperscript{263} That is the

\begin{footnotesize}
\textsuperscript{255} Van der Walt 1987 \textit{De Jure} 321 323.
\textsuperscript{256} Fridman \textit{The Law of Contract in Canada} 78.
\textsuperscript{257} Van der Walt 1987 \textit{De Jure} 321 323.
\textsuperscript{258} Fridman \textit{The Law of Contract in Canada} 340.
\textsuperscript{262} \textit{Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.} (1997), 101 B.C.A.C. 62.
\textsuperscript{263} \textit{King v. Operating Engineers Training Institute of Manitoba Inc.}, 2011 MBCA 80, 270 Man. R. (2d) 63 paras 66 & 70.
\end{footnotesize}
knowledge that would have been with both parties, or ought to be with both parties before the agreement was concluded. Knowledge referred to that they reasonable had or ought to have. As stated in the Sattva case, “whether or not something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.”

This also includes correspondence leading up to the making of the agreement, informal documents predating the final contract and earlier superseded agreements executed by the parties.

A court’s duty is to interpret a contract in accordance with the language used by the parties, rather than to alter the wording in accordance with what the court thinks the parties may or ought really to have intended, thereby making a new contract for the parties. If there is a clear contractual intention exhibited in the contract that conflicts with its literal wording, effect may be given to the overriding intention by departing from or qualifying particular terminology as stated in case law.

The Parol Evidence Rule precludes admission of evidence outside the words of the written contract that would add to, take away from or be in conflict with a contract that has been wholly reduced to writing as explained in an important case. The rule thus excludes subjective intentions of the parties, as seen the objective intentions should be considered. The Parol Evidence Rule does not apply to preclude evidence of the surrounding circumstances.

---

267 McKnight v Robertson (1910) 1910 CarswellOnt 530 (Ont. C.A.).
270 Yarrows Ltd. v France (Republic) (1949) 1949 CarswellBC 70 (B.C. S.C.); McKean v Dalhousie Lumber Co (1910), 1910 CarswellINB 73 (N.B. C.A.).
271 King v Operating Engineers Training Institute of Manitoba Inc., 2011 MBCA 80, 270 Man. R. (2d) 63 para 35.
Canadian courts have traditionally adopted the Parol Evidence Rule and follow objectively interpretation as the English courts do.

4.3 Conclusion

In Canada, to discover and give effect to the parties' true intention as expressed in the written document as a whole at the time the contract was made is the main purpose and objective of interpreting a contract. Interpretation of a contract must be objectively based even if courts tend to interpret contractual language contextually and in accordance with the surrounding circumstances of the agreement.

Before the case of *Sattva Capital Corp v Creston Moly Corp*, there was some uncertainty about exactly when the surrounding circumstances ought to be considered in the interpretive process when clear language could not be used. This was a very important decision that led to important changes.

Good faith was identified from important case law as an “organizing principle of the law of contract” and created a new duty of honest contractual performance into Canadian contract law and when interpreting contracts. It is fair to say that the Canadian *Constitution Act* also has a profound influence on their law on contract and in particular the interpretation of contracts.

When contracts are interpreted, the objective meaning is essentially looked for and in the light of absent proof that all parties interpreted the contract in the same way.

---

274 GR Hall *Canadian Contractual Interpretation Law* 41.


that may not have been apparent to an ordinary person, as each person might do it differently.\textsuperscript{279} Particular provisions of an agreement are not to be read in isolation, it should be read together with the entire agreement as a whole.\textsuperscript{280}

Chapter 5: Comparison between the current South African and Canadian position regarding the interpretation of contracts

5.1 Introduction

Canada and South Africa are both Constitutional states and influenced through a Constitution Act. As it is known today and seen in this research, there has been a significant change in South Africa since 1996, which is now referred to as a new dispensation of constitutional sovereignty. In both countries, there have been significant changes that had an influence on the way contracts are being interpreted.

5.2 How surrounding circumstances in both countries are used regarding the interpretation of contracts

Regarding Canada, the case of Sattva Capital Corp v Creston Moly Corp had a profound influence on the law of contract as Natal Joint Municipal Pension Fund v Endumeni Municipality had in South Africa. Both these cases showed that courts’ focus on the clear language of a contract to arrive at the parties intentions and when that can’t be done, surrounding circumstances can be used to determine such intentions. As with the South African law of contract, the Parol Evidence Rule can also be taken into account in Canadian law as it does not apply to preclude evidence of the surrounding circumstances.

In both countries preference is given to the meaning of the words and the contract is to be read as a whole, especially when there is no ambiguity. When that can’t be done, surrounding circumstances may assist in situations like this, to try and find what the parties have intended as their true meanings and intentions and to deal with the ambiguity.

---

281 The Interim Constitution.
Also in both countries, the surrounding circumstances can be relied on in the interpretive process, but the courts cannot use them to deviate from the text, especially not to create a new agreement when there is no ambiguity. Once again, a court’s duty is to interpret a contract in accordance with the language used by the parties themselves, rather than to alter the wording in accordance with what the court thinks the parties may or ought really to have intended.

With reference to the *Bothma-Batho Transport* case as discussed in Chapter three, it is important to once again take note:

> Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.

The text of the written agreement must be read as whole and in context of circumstances existing when the agreement was created, including the facts known or reasonably capable of being known by parties at such time. Consideration of the contract’s context being an integral part of the interpretative process and not to be resorted to only where the words, when viewed in isolation, suggesting some ambiguity. Thus, the agreement should not be changed when there is no reason to do so and it should be kept as it is when the true intentions can be determined through the agreement itself.

To add even more to the above, Gleeson CJ in *Singh v The Commonwealth*, said:

> ...references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background,

---

288 *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.
purpose and object and surrounding circumstances, that the legislature expresses its intention and is from the text, read in that light, that intention is inferred.

In Canada, as explained in Chapter four, to discover and give effect to the parties' true intention as they are expressed in the written document as a whole at the time the contract was made, is the main purpose and objective of interpreting a contract.\textsuperscript{291} The fundamental consideration in determining the terms and effect of a written contract in South Africa, is not much different from what is done in Canada. Therefore, the intention of the parties are discern from the words used in the context of the document as a whole, thereafter the factual matrix surrounding the conclusion of the agreement and its purpose.\textsuperscript{292} The words of the contract are considered as a whole and by taking into account the nature and purpose of the contract.\textsuperscript{293}

In an article entitled "\textit{What's in a word: Interpretation through the eyes of ordinary readers},\textsuperscript{294} the learned author Dr. Malcom Wallis suggests, with reference to the 'new' approach to interpretation by English Courts (and followed to some extent in Australia and Canada), that it is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. It is what each party by word and conduct would have led a reasonable person in the position of the other party to believe. It is very similar to the 'reasonable person' test.\textsuperscript{295}

In South Africa the process is "objective, not subjective and the inevitable point of departure is the language of the provisions itself."\textsuperscript{296} Subjective beliefs or understandings when contracts are interpreted are therefore not firstly looked at and the language of the provision is thus important to start with.

\textsuperscript{291} \textit{Bhasin v Hrynew} (2014) 2014 CarswellAlta 2046 (S.C.C.).

\textsuperscript{292} \textit{With reference to KPMG Chartered Accountants (SA) v Securefin Ltd and Another} 2009 (4) SA 399 (SCA) para 39 and \textit{Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd} 2016(1) SA 518 (SCA) paras 27, 28, 30 and 35.

\textsuperscript{293} \textit{Swart en 'n Ander v Cape Fabrix (Pty) Ltd} 1979 (1) SA 195 (A) 202C and \textit{List v Jungers} 1979 (3) SA 106 (A) 118G-H the Supreme Court of Appeal ("the SCA").

\textsuperscript{294} \textit{Wallis} 2010 \textit{SALJ} 673.

\textsuperscript{295} \textit{Healthcare at Home Limited v The Common Services Agency}, [2014] UKSC 49. The reasonable person belongs to a family of hypothetical figures in law including and not limited to, the "right-thinking member of society" the figure of the bonus paterfamilias.

In the above-mentioned article, he goes further and states:

... The idea that what is being sought is a notional common intention is abandoned. Interpretation no longer has subjective overtones. When we speak of the intention of the parties we really mean the meaning objectively manifested in the words that embody their agreement.297

The above confirms that the objective intentions of the parties manifest in their words and that the subjective intentions is not the determining factor when interpretation of contracts are needed.

The foundation of the South African common law of contract has therefor been identified as freedom of contract, or "the idol that is pacta servanda sunt".298 The freedom of contract may be limited by public policy or the boni mores.299 It has also been said that public policy is closely related to good faith in the law of contract.300

5.3 Good faith applied in both countries which relates to the interpretation of contracts

An important case namely Bhasin v Hrynew201 identified good faith as an “organizing principle of the law of contract” and created a new duty of honest contractual performance into Canadian contract law when interpreting contracts.302 In South Africa, good faith is also very important and can be seen in the decision of the Constitutional Court in Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd as an example where good faith is used in the interpretation of contracts.303

The above mentioned important case in South Africa, Everfresh Market reiterates the importance of the relationship between ubuntu’s focus on the worth of the community and the principle of good faith in contractual dealings.304 The importance of this case is that it has became time for the background (common law) rules of the

297 Wallis 2010 SALJ 685.
298 Hawthorne 2006 THRHR 48 53.
299 Barkhuizen v Napier 2007 7 BCLR (CC) para 14.
300 Davis 2011 Stell LR 845 847.
301 Bhasin v Hrynew 2014 SCC 71.
302 Bhasin v Hrynew 2014 SCC 71 paras 74-77.
303 Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd [2011] ZACC 30; 2012 (1) SA 256 (CC).
304 Bauling and Nagtegal 2015 De Jure 163.
law of contract to be infused with the principles of goof faith and *ubuntu* in order to make way for a constitutionally conscious contracting epoch.\(^{305}\) It was stated by the court that courts need to start considering good faith in contracts as constitutionally imperative due to its potentially immense impact on the public.\(^{306}\) Another important point raised by the court is that it would most likely benefit the community to incorporate the principle of good faith into the law of contract.\(^{307}\)

It has often been asserted by the courts that in South African law all contracts are subject to good faith. Taken at face value that means that the requirement of good faith underlies and informs the South African law of contract.\(^{308}\) As stated in Chapter three, the fact that the Constitution and the Bill of Rights apply horizontally between private individuals and therefore, examining the law of contract in this light becomes the reason why we are morally and legally obliged to contract in good faith.\(^{309}\)

Another important case in South Africa is the *Afrox Healthcare* case,\(^{310}\) where the Court stated that, in terms of the common legal approach, exclusionary and indemnity clauses should be interpreted restrictively. The Court highlighted that the same standard that is applied to other contractual terms applies in respect of such clauses. Clauses that are found to be contrary to public policy, however, are ordinarily declared invalid.\(^{311}\) Thus, if something is contrary to public policy it should be declared invalid.

Contractual interpretation in Canada has involved determining the objective intentions of the parties at the time of contract formation as stated previously and it is clear that Canada’s Constitution influenced the principle of good faith when dealing

\(^{305}\) *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 36.

\(^{306}\) *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 22.

\(^{307}\) *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 23.

\(^{308}\) *Botha and Another v Rich N.O. and Others* 2014 (4) SA 124 (CC) para 64.

\(^{309}\) Bauling and Nagtegal 2015 *De Jure* 161.

\(^{310}\) *Afrox Healthcare (Pty) Ltd. v Strydom* 2002 (6) SA 21 (SCA)

\(^{311}\) *Afrox Healthcare (Pty) Ltd. v Strydom* 2002 (6) SA 21 (SCA) para 27.
with interpretation of contracts. In the South African case namely *South African Forestry Co Ltd v York Timbers Ltd* (“York”)\(^{312}\) it was stated as follows:

> [A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder.\(^{313}\)

The role of these abstract values was illustrated in above case law, with reference to, for example, deciding whether or not a particular term should be implied, in the interpretation of contracts.\(^{314}\)

### 5.4 Conclusion

In the light of the above, it is fair to say that regarding the interpretation of contracts, the Canadian and South African law is not that much different from each other. As both counties are influenced through a Constitution, the way contracts are being interpreted are in many ways similar. Both need to comply with the Constitution or else it would not be valid. Both countries find it important to read the contract as a whole and look at the natural meaning of the words to honour the intentions of the parties.

When that can’t be done, surrounding circumstances may be used to assist, but may not contradict the agreement. Thus surrounding circumstances are only used when the true intentions of the parties’ can’t be ascertained from the agreement itself.

Good faith is also important in both countries, but is not the most determining factor when contracts are interpreted. The law of contract should be infused with the principles of goof faith and *ubuntu* in order to make way for a constitutionally


\(^{313}\) *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) para 27.

\(^{314}\) Brand 2016 *StellLR* 239-240.
conscious contracting epoch. It can be seen that although the interpretation of contracts can deliver problems, there are countries similar to South Africa and that the principles used have a big impact on the law of contract in general in many countries. Applying good faith may also benefit the community as a whole. It is fair to say that the legal position regarding the interpretation of contracts in South Africa and Canada is very similar.

---

315 Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) para 36.
6 Conclusion

The interpretation of contracts should be in line with the Constitution of South Africa and the values of the Constitution must be reflected in the interpretation of contracts as public policy is now rooted in the Constitution.\textsuperscript{316} Although it is not the most determining factor, it is still very important. As discussed in Chapter three, the fact that the Constitution and the Bill of Rights apply horizontally between private individuals and therefore, examining the law of contract in this light is of paramount importance. This horizontally becomes the reason why we are morally and legally obliged to contract in good faith.\textsuperscript{317}

It can thus be said, in a constitutional democracy, the common law of contract has to become infused with the values contained in the Constitution as the common law co-exists with the Constitution.\textsuperscript{318} The Constitution requires that all law, including the common law, must conform to it as the Constitution is the highest law in the land.\textsuperscript{319} The interpretation of contracts should also be in line with the Constitution. The primary values of the South African Constitution have a significant effect on the law of contract.\textsuperscript{320}

Many contracts are drafted and recorded to facilitate proof of the agreement today as well as stipulating the rights and obligations of the parties to the agreement as stated by well learned authors.\textsuperscript{321} The main focus of interpretation of contracts is to ascertain the intention of the parties from the written instrument and give effect to the parties’ intention as best explained by Christie.\textsuperscript{322} Thus being said, the intentions of the parties are determined or tried to be determined through the agreement itself.

The intention of the parties is very important, that is how we have to enforce the agreement by giving rise to their wishes. Therefore the courts look at the written

\textsuperscript{316} Brisley v Drotsky 2002 (4) SA 1 (SCA) paras 4 & 91.
\textsuperscript{317} Bauling and Nagtegal 2015 De Jure 161.
\textsuperscript{318} Bauling and Nagtegaal 2015 De Jure 163. Also see Pillay The Impact of pacta sunt servanda in the law of contract 10.
\textsuperscript{319} The Constitution 108 of 1996.
\textsuperscript{320} The Constitution 108 of 1996.
\textsuperscript{321} Hutchison and Pretorius The Law of Contract in South Africa 400.
\textsuperscript{322} Christie The Law of Contract in South Africa 159.
agreement first and under certain instances to the surrounding circumstances to determine the intention of the parties when it can’t be ascertained from the written agreement itself. In certain circumstances, the intentions can’t be determined through the agreement and other factors need to be considered to try and assist. This was well explained by Cornelius in one of his recent books.323

As explained in Chapter three and throughout the research, over the last couple of years in the new democratic South Africa, there have been significant developments in the law relating to the interpretation of contracts. In our constitutional dispensation, as explained best by Sharrock,324 the courts tend to take an open approach when it comes to the interpretation of a contract. This means that the natural meaning of words is used as a starting point when interpreting contracts.325 Thus, we firstly look at the natural meaning of the agreement itself and should that no be sufficient enough to determine the intentions of the parties, other factors are used to assist.

The oldest Roman contracts were formal contracts and were valid due to the fact that they were expressed in a certain way, it did not matter whether the parties reached consensus as long as the words were expressed according to their prescribed form.326 There was no room for plain language, as language took a step back to formal rituals and specific utterances.327 Furthermore, Cornelius explained that the Romans therefore followed a very literal interpretation of the words used by the parties and the slightest mistake in the utterance of the formal words would invalidate a contract.328

In the Roman-Dutch law contracts were based on the principle of good faith, but more emphasis was placed on consensus between the parties during negotiations.329 This was because of the general principle which developed, taking the principle of

324 Sharrock Business Transactions Law.
325 Sharrock Business Transactions Law 170.
329 van der Sijde The role of good faith in the South African law of contract 4.
good faith into account and that more regard should be given to the intention or the will of the parties rather than the external appearance created by their words.\textsuperscript{330} This also emphasised the accepted principle that all informal agreements were binding as long as consensus was reached between the contracting parties.\textsuperscript{331} Because of the above and as stated by Cornelius, this led to the application of the subjective theory, meaning parties subjective intentions became more important than objective words used.\textsuperscript{332}

The Bigge and Colebrooke report of 1826\textsuperscript{333} recommended that the Roman-Dutch law should gradually be replaced by English law in the Cape Colony. The forces which gave rise to the influence of English law on the law of the Cape and later the law of South Africa generally were active in the sphere of contract, as in other spheres we know.

South African law, with its Roman-Dutch roots, but strongly influenced by English law. It vacillated between a subjective and an objective approach to contract.\textsuperscript{334} One of the most important principles of interpretation of the English law introduced into South Africa is the Parol Evidence Rule.\textsuperscript{335}

This rule mentioned above, places strict limits on the evidence that may be adduced in aid of interpretation and formed a background to all other rules of interpretation. When using the Parol Evidence Rule to logically interpret a word or clause when there is a disputed meaning, the question is whether to read in isolation or in its context, and if the latter, where the line is to be drawn between context and extraneous matter as raised in the \textit{Finbro} case.\textsuperscript{336}

In South Africa, the purpose of interpretation of contracts immediately before 1994 remained to ascertain the common intention of the parties as previously stated in Chapter three. The correct approach to the application of interpretation after having

\begin{footnotes}
\item[330] Van Zyl \textit{History and Principles of Roman Private Law} 256.
\item[331] Zimmermann \textit{Good faith and equity in modern Roman-Dutch law} 219.
\item[332] Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 7.
\item[333] Christie \textit{The Law of Contract in South Africa} 8.
\item[335] Cornelius \textit{Principles of the Interpretation of Contracts in South Africa} 16.
\item[336] \textit{Finbro} Furnishers (Pty) Ltd v Registrar of Deeds Bloemfontein 1983 3 SA 191 (O).
\end{footnotes}
ascertained the literal meaning of the word or phrase in question is, to have regard to the context in which the word or phrase is used. The background circumstances to be applied and extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous. Therefore those factors assist when on face value it seems ambiguous.

The courts use the common law principles subject to the Constitution to assist when interpreting contracts. If these rules do not enable the court to decide what the proper interpretation is, it will have to declare the contract void for vagueness.

This traditional approach was re-evaluated in the Supreme Court of Appeal case of Natal Joint Municipal Pension Fund v Endumeni Municipality. This SCA judgment brought about great development in the interpretation of contracts in South-Africa – especially with regards to the approach to interpreting contracts in South Africa. Canada has experienced similar developments in respect of the interpretation of contracts.

Canada’s Constitution also had an influence on their law of contracts, in particular the interpretation thereof. The Supreme Court of Canada’s jurisprudence continued to support an interpretive process by which courts first focused on the clear language of a contract to arrive at the intention of the parties. If the clear meaning could not be determined, surrounding circumstances where used to determine the intention of the parties, but only if the words were ambiguous. In the years before the case of Sattva Capital Corp v Creston Moly Corp, there was some uncertainty about exactly when the surrounding circumstances ought to be considered in the interpretive process when clear language could not be used.

---

337 Coopers & Lybrand v Bryant 1995 3 SA 761 (A) 767E-768E.
338 Currie and De Waal The Bill of Rights Handbook 7-8. Also see The Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC) para 62.
339 Namibian Minerals Corp v Benguela Concessions Ltd 1997 2 SA 548 (A) 557E-563C.
341 Section 52(1) of the Constitution Act 1982.
342 SeaWorld Parks & Entertainment LLC v. Marineland of Canada Inc. 2011 ONCA 616.
Contractual interpretation in Canada has involved determining the objective intentions of the parties at the time of contract formation and it is clear that Canada’s Constitution influenced the principle of good faith when dealing with interpretation of contracts.\textsuperscript{344} In Canada, to discover and give effect to the parties' true intention as expressed in the written document as a whole at the time the contract was made is the main purpose and objective of interpreting a contract.\textsuperscript{345}

The Canadian legal position with regards to the interpretation of contracts is very similar to the position in South Africa and both countries tend to believe the agreement should be read as a whole to give effect to the true intentions of the parties.

Furthermore as discussed in Chapter five, the foundation of the South African common law of contract has therefore been identified as freedom of contract, or "the idol that is pacta servanda sunt".\textsuperscript{346} The freedom of contract may be limited by public policy or the boni mores.\textsuperscript{347} It has also been said that public policy is closely related to good faith in the law of contract.\textsuperscript{348} When something is contrary to public policy, including the interpretation of contracts, it will be invalid.

The study also looked at the principles of the interpretation after the abolishment of Apartheid and how pacta sunt servanda plays a role.\textsuperscript{349} It can thus be seen from this study that the courts approach to the interpretation of contracts changed since 1996 and the Constitution of South Africa had a profound influence on the mentioned change.

\textsuperscript{344} Bhasin v Hrynew 2014 SCC 71 para 33.
\textsuperscript{346} Hawthrone 2006 THRHR 48 53.
\textsuperscript{347} Barkhuizen v Napier 2007 7 BCLR (CC) para 14.
\textsuperscript{348} Davis 2011 Stell LR 845 847.
\textsuperscript{349} This is discussed in Chapter 3.
Bibliography

Literature

Adams and Brownsworld *Understanding contract law* 33-44

Adams and Brownsworld *Understanding contract law* (2000)

Atiyah *Rise and Fall of freedom of contract* 219-568

Atiyah *Rise and Fall of freedom of contract* (1979)

Asprey *Plain Language for Lawyers* 7


Baker *An Introduction to English Legal History* 239

Baker JH *An Introduction to English Legal History* 2ed (Butterworths London 1979)

Basson and Viljoen *South African Constitutional Law* 14

Basson DA and Viljoen HP *South African Constitutional Law* (Juta & Co Ltd Cape Town 1988)

Bauling and Nagtegal 2015 *De Jure* 161


Bhana 2013 *SAJHR* 351-375

Bhana D “The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution” 2013 *SAJHR* 351-375

Buckland *A Textbook of Roman Law from Augustus to Justinian* 412
Buckland WW A Textbook of Roman Law from Augustus to Justinian 3rd Ed (Cambridge University Press Cambridge 1963)

Christie The Law of Contract in South Africa 8


Cooke and Oughton The common law of obligations 41-42

Cooke PJ and Oughton D W The common law of obligations (Butterworths 1993)

Cornelius Principles of the Interpretation of Contracts in South Africa 30


Currie and De Waal The Bill of Rights Handbook 7-8


Davis 2011 Stell LR 845 847

Davis “Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution” 2011 Stell LR 845 847

Du Plessis et al The Law of Contract in South Africa 11


Fagan in Zimmermann and Visser Roman-Dutch Law in its South African Historical Context 62

Fridman The Law of Contract in Canada 78.


Venter, van der Walt and Pienaar Regsnavorsing 130

Venter F, van der Walt CFC, and Pienaar GJ Regsnavorsing 1st ed (Juta en Kie, BPK Cape Town 1990)

G. R. Hall Canadian Contractual Interpretation Law 125-26

G. R. Hall Canadian Contractual Interpretation Law 2nd ed (LexisNexis: Publishers, Canada 2012)

Hawthorne 1995 THRHR 157 160-162

Hawthorne “The principle of equality in the law of contract” 1995 THRHR 157

Hawthorne 2006 THRHR 48 53

Hawthorne “Distribution of wealth, the dependency theory and the law of contract” 2006 THRHR 48

Hosten Romeinse reg, Regsgeskiedenis en regsvergelyking 12


Hutchison and Pretorius The Law of Contract in South Africa 400

J. D. McCamus  *The Law of Contracts*  749-51


Jolowicz  *Roman Foundations of Modern Law* 12


Kaser  *Das Romische Privatrecht*  1812

Kaser M  *Das Romische Privatrecht* 10ed CH Beck’sche Verlagsbuchhandlung Munich 1975

Kellaway  *Principles of Legal Interpretation of Statutes, Contracts and Wills* 25-26

Kellaway EA  *Principles of Legal Interpretation of Statutes, Contracts and Wills* (Butterworths Durban 1995)


Mason and Gageler  *The Contract in Essays on contract* Finn 4-5


Molcuț E. Oancea,  *Drept roman [Roman Law]* 244


Rautenbach  *South Africa: Teaching an 'Old Dog' New Tricks* 185-209

Richards *Law of contract* 132


R.W. LEE, D.C.L., F.B.A. *An Introduction to Roman-Dutch Law* 268


F Schylz *History of the Roman Legal Science* 5


Sharrock *Business Transactions Law* 170

Sharrock R *Business Transactions Law 9th Ed* (Juta 2017)

Steyn *Uitleg van Wette*

Steyn LC *Uitleg van Wette* 5ed (Juta & Co Ltd Cape Town 1990)


Thomas *Textbook of Roman Law* 226

Thomas JAC *Textbook of Roman Law* (North Holland Publishing Co Amsterdam 1976)

Thomas et al *Historical Foundations of South African Private Law* 70

Van Bijnkershoek 2 15 7

Van Bijnkershoek C *Quaestionum Iuris Privati* (Samuel Luchtmans en Seuns Amsterdam 1752)

Van der Keessel 1041

Van der Keessel DG *Praelectiones Iuris Hodernie ad Hugo Grotii Introductionem ad Iurisorudentiam Hollandicam* – DG van der Keessel Voorlesinge oor die Hedendaagse Reg na aanleiding van De Groot se "Inleiding tot de Hollandsche Rechtsgeleerdheyd" (AA Balkema Cape Town 1961)

Van der Linden *Rechtsgeleerd, Practicaal en Koopmans Handboek* 1 1 6 1 6

Van der Linden J *Rechtsgeleerd, Praticaal en Koopmans Hanboek* (Frederik Muller & Cie Amsterdam 1861)

Van Leeuwen *Het Roomsch-Hollandsch Recht* 4 20 2

Van Leeuwen S *Het Roomsch-Hollandsch Recht* (Jan ten Houten, Amsterdam 1780)

Van Zyl *History and Principles of Roman Private Law* 256

Van Zyl DH *History and Principles of Roman Private Law* (Butterworths, Durban 1983)

Vinnius 20 1

Vinnius A *Tractatus de Pactis* (Ultracekti 1679)

Voet 34 5 4 5

Voet J *Commentarius ad Pandectas* (Gauthier Bros Paris 1829)
Wessels *History of the Roman-Dutch Law* 566

Wessels J.W *History of the Roman-Dutch Law* (Grahamstown Cape Colony African Book Co 1908)

Fagan in Zimmermann and Visser *Roman-Dutch Law in its South African Historical Context* 62

Zimmerman R “Good faith and equity in modern Roman-Dutch law” in Zimmerman and Visser (Eds) *Southern Cross: Civil and common law in South Africa* (Cape Town: Juta 1996)


Bauling and Nagtegaal 2015 *De Jure* 163


Cornelius 2013 *De Jure* 1088

Cornelius S.J “Tacit terms and the common unexpressed intention of the parties to a contract: recent case law” 2013 *De Jure* 1088

Duhl 2010 *University of Pittsburg Law Review* 71

Duhl Conscious ambiguity: slaying Cerberus in the interpretation of contractual inconsistencies 2010 *University of Pittsburg Law Review* 71

Elselen *Konakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme* 518-519, 532-533
Elselen “Konakteervryheid, kontrakttuele geregtigheid en die ekonomiese liberalisme” 1989 1HRHR 516

Brand 2016 StellLR 239-240


Galletti Contract interpretation and relational contract theory: a comparison between common law and civil law approaches 249

Galletti “Contract interpretation and relational contract theory: a comparison between common law and civil law approaches” XLVII 2014 CILSA 249

Glover 2005 Fundamina 28

Glover G “DURESS IN THE ROMAN-DUTCH LAW OF OBLIGATIONS” 2005 Fundamina 28

Lane 2016 Without Prejudice 39

Lane H “New Developments in Interpretation” 2016 Without Prejudice 39

Lawsa Vol 12 168

Lubbe 2004 SALJ 395

Lubbe G “Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law” 2004 121(2) SALJ 395

Olariu Contracts in Roman Law 1

OLARIU M Contracts in Roman Law 1

Steyn 1937 THRHR 42
Steyn LC “Volgens Welke Reg Moet ons Wette Uitgelê word?” 1937 THRHR 42

Pretorius The basis of contractual liability in English law and its influence on the South African law of contract XXXVII CILSA 2004 98

Pretorius C The basis of contractual liability in English law and its influence on the South African law of contract University of South Africa XXXVII CILSA 2004

D Tladi 2002 De Jure 306

Tladi D ”Breathing constitutional values into the law of contract: Freedom of contract and the Constitution” 2002 35(2) De Jure 306

Van Niekerk 2011 De Jure 368


Van der Walt 1987 De Jure 321, 323

Van der Walt CFC “Die Hantering van Onbillike Kontraksb德inge in Kanada” 1987 De Jure 321, 323

Van der Walt 2001 SAJHR 341 361

Van der Walt J “Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence” 2001 17 SAJHR 341, 361

Wallis 2010 SALJ 673

Wallis M ”What’s in a word: Interpretation through the eyes of ordinary readers” 2010 SALJ 673

Barnard Chapter 4: Transformation, The Constitution and Contract Law 140

Louw *The Plain Language Movement and Legal Reform in South African Law of Contract* 7


Pillay *The Impact of pacta sunt servanda in the law of contract* 20

Pillay MM *The Impact of pacta sunt servanda in the law of contract* (LLM-dissertation University of Pretoria 2015)

van der Sijde *The role of good faith in the South African law of contract* 4

van der Sijde E *The role of good faith in the South African law of contract* (LLM-dissertation University of Pretoria 2012)

Van Warmelo *Vrywaring teen gebreke by koop in Suid Africa* 58, 70

Van Warmelo P *Vrywaring teen gebreke by koop in Suid-Afrika* (LLD dissertation Leiden 1941)

**Case law**

*Afrox Healthcare (Pty) Ltd. v Strydom* 2002 (6) SA 21 (SCA)

*African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC)

*Aktiebolaget Hassle & another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA)

*Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98

*Bastian Financial Services v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA)
Barkhuizen v Napier 2007 7 BCLR (CC)

Barkhuizen v Napier 2007 (5) SA 323 (CC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (2004) ZACC 15; 2004 (4) SA 490 CC

Beadica 231 CC and others v Trustees; Oregon Unit Trust and Others 2018 (1) SA 549 (WCC)

Bell Canada v. The Plan Group, 2009 ONCA 548, 96 O.R. (3d) 81

BG Checo International Ltd. v British Columbia Hydro & Power Authority (1993), 1993 CarswellBC 1254 (S.C.C.)

Bhasin v Hrynew 2014 SCC 71

Botha and Another v Rich N.O. and Others 2014 (4) SA 124 (CC)

Bothma – Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk 2014 (1) All SA 517 (SCA)


Brisley v Drotsky 2002 (4) SA 1 (SCA)

Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC)

Cf Fidelity Guards Holdings (Pty) (Ltd) v Peannain 1997 10 BCLR 1443 (SE)

Chandos Construction Ltd. v Alberta (Minister of Infrastructure) (2006), 2006 ABCA 41 (Alta. C.A.)
Chrysafis v Katsapas 1988 4 SA 818 (A)

Cinema City (Pty) Ltd v Morgenstem Family Estates (Pty) Ltd 1980 (1) SA 796 (A)

Clark’s-Gamble of Canada Ltd. v Grant Park Plaza Ltd (1967) 1967 CarswellMan 48 (S.C.C.)

Consolidated Bathurst Export Ltd. C. Mutual Boiler & Machinery Insurance Co. (1979) 1979 CarswellQue 157 (S.C.C.)

Coopers & Lybrand v Bryant 1995 3 SA 761 (A)


Daniels v Campbell NO and Others [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC)

De Villiers v Cape Divisional Council 1875 Buch 50

Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A)

Director of Investigation and Research) v. Southam Inc. [1997] 1 S.C.R. 748

Dumbrell v Regional Group of Cos. (2007), 2007 CarswellOnt 407 (Ont. C.A.)

Ekurhuleni Municipality v Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA)


Eli Lilly & Co. v Novopharm Ltd. [1998] 2 S.C.R. 129

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd [2011] ZACC 30; 2012 (1) SA 256 (CC)

Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another (CCT28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (21 May 2002)
Finbro Furnishers (Pty) Ltd v Registrar of Deeds Bloemfontein 1983 3 SA 191 (O)


Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc. (1997), 101 B.C.A.C. 62


Hayes Forest Services Ltd. v. Weyerhaeuser Co., 2008 BCCA 31, 289 D.L.R. (4th) 230


Hillis Oil & Sales Ltd. v Wynn's Canada Ltd. (1986), 1986 CarswellNS 147 (S.C.C)


Indian Molybdenum Ltd. v R. (1951), 1951 CarswellNat 280 (S.C.C.)

Investors Compensation Scheme Ltd. v. West Bromwich Building Society [1998] 1 All E.R. 98 (H.L.)


Johnson v Leal 1980 (3) SA 927 (A)

King v. Operating Engineers Training Institute of Manitoba Inc., 2011 MBCA 80, 270 Man. R. (2d) 63

Knox D’Arcy Ltd v Shaw 1996 2 SA 651 ON

77
KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA)

Ledcor v Northbridge Indemnity Insurance Company Co. 2016 SCC 37

List v Jungers 1979 (3) SA 106 (A) 118G-H the Supreme Court of Appeal (‘the SCA’)

Lowry v Steedman 1914 AD 532

MacDonald v University of British Columbia (2005), 2005 CarswellBC 1616 (B.C. C.A.)


McKean v Dalhousie Lumber Co (1910), 1910 CarswellNB 73 (N.B. C.A.)

McKnight v Robertson (1910) 1910 CarswellOnt 530 (Ont. C.A.)


Miglin v Miglin (2003), 2003 CarswellOnt 1374 (S.C.C.)

Moore Realty Inc. v Manitoba Motor League 2003 MBCA 71 173 Man. R. (2d) 300

Namibian Minerals Corp v Benguela Concessions Ltd 1997 2 SA 548 (A)

Natal Joint Municipal Pension Fund v Endumeni Municipality (920/201) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA)


North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd (2013) 3 All SA 291 (SCA)

Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016(1) SA 518 (SCA)

Pieters & Co v Solomon 1911 AD 121
Potter v New Brunswick Legal Aid Services Commission, 2015 SCC 10 [2015] 1 SCR 500

Pritchard Properties (Pty) Ltd v Koulis 1986 (2) SA 1 (A)

R v Goseb 1956 (2) SA 698; 1959 (1) SA 839

R. v MacLean (1882) 1882 CarswellNat 10 (S.C.C.)


SeaWorld Parks & Entertainment LLC v Marineland of Canada Inc 2011 ONCA 616

Seven Oaks Inn Partnership v Directcash Management Inc. (2014) 2014 CarswellSask 636 (Sask. C.A.)

Skibya Property Investments (Pty) Ltd [2004] 1 All SA 386 (SCA) 391

South African Forestry Co Ltd v York Timbers Ltd 2005 3 SA 323 (SCA)

Stopforth v Minister of Justice and Others

Singh v The Commonwealth [2004] HCA 43

Swan Group v Bishop 2013 ABCA 29

Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A)

Swart v Shaw t/a Shaw Racing Stables 1996, 1, SA, 202 (CPD)


The Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC)

Turner Morris (Pty) Ltd v Riddell 1996 4 SA 397 (E)

Union Government v Smith 1935 AD 232
Union Government v Vianini Pipes (Py) Ltd 1941 AD

Van Pletsen v Kenning 1913 A D 82

Veenendaal v Minister of Justice and Others [1999] ZASCA 72; 2000 (1) SA 113 (SCA)

Venter v Birchholtz 1972 (1) SA 276 (A)

Venter v Credit Guarantee 1996 (3) SA 966 (SCA)

Von Wieligh v The Land and Agricultural Bank of South Africa 1924 TPD 62

V v V (A5021/12) [2016] ZAGPJHC 311

WCI Waste Conversion Inc. v. ADI International Inc., 2011 PECA 14, 309 Nfld. & P.E.I.R. 1

Wood Buffalo Housing & Development Corp. v Flett (2014) 2014 CarswellAlta 1532 (Alta. Q.B.)

Worman v Hughes and Others 1948 (3) SA 495 (A)

Yarrows Ltd. v France (Republic) (1949) 1949 CarswellBC 70 (B.C. S.C.)

Legislation

The Constitution Act 1982


The Constitution


**Internet sources**


https://legaldictionary.net

**Statutes**


Financial Consumer Act of Alberta, Second Session, 22nd Legislature, 39 Elizabeth II