

Post-constitutional developments in the interpretation of contracts

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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 therefor 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.

Opsomming

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 kontrakreg 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 hof 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 hof sukkel om die doel van die ooreenkoms tesame met die bedoelings van die partye vas te stel, mag die hof 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 hof 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 hof 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 kontrakreg, 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 interpretasie van kontrakte toegepas word nie.

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

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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>.

³ Section 2 of the Constitution of the Republic of South Africa, Act 108 of 1996 (herein after referred to as the *Constitution 108 of 1996*).

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.

⁸ Du Plessis *et al The Law of Contract in South Africa* 11.

⁹ Du Plessis *et al The Law of Contract in South Africa* 11.

This also emphasised the accepted principle that all informal agreements were binding as long as consensus was reached between the contracting parties.¹⁰

In the Cape Colony English law principles relating to the interpretation of contracts were introduced by the decision in *De Villiers v Cape Divisional Council*.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.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.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.¹⁴ This is also known as the Parol Evidence Rule. This approach has moved on somewhat by the introduction of the *Constitution of South Africa, 1996*.

The *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 *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*¹⁵ by stating that:

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

¹⁰ Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition* 219.

¹¹ *De Villiers v Cape Divisional Council* 1875 Buch 50.

¹² *Union Government v Vianini Pipes (Py) Ltd* 1941 AD.

¹³ Chrisie *The Law of Contract in South Africa* 159.

¹⁴ Cornelius *Principles of the Interpretation of Contracts in South Africa* 30.

¹⁵ *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016(1) SA 518 (SCA).

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.¹⁶

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.¹⁷ Interpretation of a contract must be objectively based¹⁸ even if modern courts tend to interpret contractual language contextually and in accordance with the surrounding circumstances of the agreement.¹⁹ 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.

¹⁷ As examples: *Bhasin v Hrynew* (2014), 2014 CarswellAlta 2046 (S.C.C.) (Canadian common law imposing duty on parties to perform their contractual obligations honestly); *Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.* (1997) 1997 CarswellNfld 207 (S.C.C.); *Hill v Nova Scotia* (Attorney General) (1997) 1997 CarswellNS 10 (S.C.C.); *Manulife Bank of Canada v Conlin* (1996) 1996 CarswellOnt 3941 (S.C.C.); *BG Checo International Ltd. v British Columbia Hydro & Power Authority* (1993) 1993 CarswellBC 1254 (S.C.C.); reconsideration refused (1993) 14 C.C.L.T. (2d) 233 (note) (S.C.C.); *Hillis Oil & Sales Ltd. v Wynn's Canada Ltd.* (1986), 1986 CarswellNS 147 (S.C.C.).

¹⁸ *Chandos Construction Ltd. v. Alberta* (Minister of Infrastructure) (2006), 2006 ABCA 41 (Alta. C.A.); *MacDonald v. University of British Columbia* (2005), 2005 CarswellBC 1616 (B.C. C.A.); *Geoffrey L. Moore Realty Inc. v Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.).

¹⁹ *Dumbrell v Regional Group of Cos.* (2007), 2007 CarswellOnt 407 (Ont. C.A.).

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 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.²⁰

Historically, Roman contracts were considered as formal contracts.²¹ The contracts were only considered as valid when they were expressed in a prescribed manner.²² 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.²³ It was furthermore irrelevant whether the parties reached consensus or not.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.²⁵ The contract was a convention where the formalities and solemnities performed, constructed the binding nature.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.²⁷ In other words, Roman law had "a law of contracts," rather than a law of contract as stated by some authors.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.²⁹ The words used in formal transactions came to be given the meaning which the declarant actually had in mind.³⁰ The law relating to the interpretation of contracts has also developed along similar lines.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.³² This made

²³ Van Niekerk 2011 *De Jure* 368.

²⁴ Cornelius *Principles of the Interpretation of Contracts in South Africa* 12.

²⁵ Buckland and Steyn *A Textbook of Roman Law from Augustus to Justinian* 415.

²⁶ Olariu *Contracts in Roman Law* 1.

²⁷ Du Plessis *et al The Law of Contract in South Africa* 11.

²⁸ Du Plessis *et al The Law of Contract in South Africa* 11.

²⁹ Buckland *A Textbook of Roman Law from Augustus to Justinian* 412.

³⁰ Kaser *Das Romische Privatrecht* 1 8 1 2.

³¹ Kaser *Das Romische Privatrecht* 1 8 1 2.

³² Molcuț Oancea, *Drept roman [Roman Law]* 244.

the writings and commentary thereon the most important sources of Roman Law.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.³⁴

Roman law placed much emphasis on the literal meaning of words.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.³⁶ The literal interpretation was moved away from and was increased by the trade with non-Romans.³⁷ There was an increase to informal kinds of transactions³⁸ and it was judged on the basis of good faith, thus interpretation became less strict and formal.³⁹

Zimmermann⁴⁰ stated that the turning point for this was the *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.⁴¹ Therefore, other factors than the mere words were allowed to determine the interpretation thereof.⁴² Even the course of negotiations between the parties was an admissible aid in the interpretation of the contract.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.⁴⁴ The rules for the interpretation of contracts devised by these jurists were consequently derived from the rules applied for this purpose by

³³ Schylz F *History of the Roman Legal Science* 5.

³⁴ DH Van Zyl *History and Principles of Roman Private Law* 9.

³⁵ Cornelius *Principles of the Interpretation of Contracts in South Africa* 7.

³⁶ Kaser *Das Römische Privatrecht* 8 1 2a; Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition* 622-625.

³⁷ Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition*.

³⁸ Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition* 625-628.

³⁹ Kaser *Das Römische Privatrecht* 8 2 2b.

⁴⁰ Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition*.

⁴¹ Kaser *Das Römische Privatrecht* 8 2 2b. Also see Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition* 631.

⁴² Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition* 631.

⁴³ Buckland *A Textbook of Roman Law from Augustus to Justinian* 415.

⁴⁴ Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* 25-26.

Roman law as stated by Cornelius.⁴⁵ Therefore, reliance was placed on Roman authorities⁴⁶ who looked at the role of equity in interpretation.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 *ommissio*, in other words excluding something that should have been there and that the parties meant what they contracted and chose their words with care.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 apparent in the acceptance of the *bona fidei*⁴⁹ principle in all contracts and the role that reasonableness played in the interpretation of contracts in general.⁵⁰

Contracts were concluded in formalistic verbal statements. If a party denied their statement, they were liable under the law of the Twelve Tables⁵¹ and had to pay twice the amount originally owned. However Thomas⁵² stated that:

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.⁵³

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.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.⁵⁵

⁴⁵ Cornelius *Principles of the Interpretation of Contracts in South Africa* 8.

⁴⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* 8.

⁴⁷ Cornelius *Principles of the Interpretation of Contracts in South Africa* 8.

⁴⁸ Cornelius *Principles of the Interpretation of Contracts in South Africa* 18.

⁴⁹ *Bona fidei*: Latin for 'good faith.'

⁵⁰ Van der Linden *Regtsgeleerd, Practicaal en Koopmans Handboek* 1 1 6 1 6.

⁵¹ Cornelius *Principles of the Interpretation of Contracts in South Africa* 10.

⁵² Thomas *Textbook of Roman Law* 226.

⁵³ Kaser *Das Römische Privatrecht* 5 2.

⁵⁴ Kaser *Das Römische Privatrecht* 8 2 2d.

⁵⁵ Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition* 634.

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.⁵⁶

As contended by Kellaway,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,⁵⁸ the emphasis was placed on the Roman authorities who seemed to favor the strict interpretation, ignoring the warnings⁵⁹ of placing too much value on the ‘literal meaning of the text’.⁶⁰

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 (*pacta sunt servanda*).⁶¹ Simon van Leeuwen was the first Dutch jurist to introduce the term ‘Roman-Dutch law’.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.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.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

⁵⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* 8.

⁵⁷ Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* 22.

⁵⁸ Jolowicz *Roman Foundations of Modern Law* 12.

⁵⁹ Cornelius *Principles of the Interpretation of Contracts in South Africa* 8.

⁶⁰ Cornelius *Principles of the Interpretation of Contracts in South Africa* 8.

⁶¹ Elselen *Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme* 518-519, 532-533.

⁶² Thomas et al *Historical Foundations of South African Private Law* 70.

⁶³ Hosten *Romeinse reg, Regsgeskiedenis en regsvergelyking* 12.

⁶⁴ Cornelius *Principles of the Interpretation of Contracts in South Africa* 9.

agreements were binding as long as consensus was reached between the contracting parties.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.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.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.⁶⁸ This developed according to Baker⁶⁹ 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."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 than the subjective intention, which is being determined.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.⁷² Voet,⁷³ stated that the principles relating to such interpretation of statutes could also be applied to

⁶⁵ Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition* 219.

⁶⁶ Van Leeuwen *Het Roomsche-Hollandsche Recht* 4 20 2.

⁶⁷ Wessels *History of the Roman-Dutch Law* 566.

⁶⁸ Jolowicz *Roman Foundations of Modern Law* 12.

⁶⁹ Baker *An Introduction to English Legal History*.

⁷⁰ Baker *An Introduction to English Legal History* 239.

⁷¹ Cornelius 2013 *De Jure* 1088.

⁷² Cornelius *Principles of the Interpretation of Contracts in South Africa* 12.

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.⁷⁴ Thus, the intention of the parties is how the contracts were interpreted.⁷⁵ "It is true that a man must be taken to mean what he says,"⁷⁶ therefore the intentions of the parties were important. The distinction between *stricti iuris*⁷⁷ and *bonae fidei* contracts also started to fade away and gained less importance.⁷⁸

All contracts came to be regarded as *bonae fidei* and thus reasonableness played its part in the interpretation of contracts.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.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.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.⁸² The law of contract tries to achieve a balance between relevant principles and policies to satisfy the requirements of reasonableness and fairness.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

⁷⁴ Grotius 6 6 2; Van der Linden 1 14 2. Also see Wessels *History of the Roman-Dutch Law* 566.

⁷⁵ Vinnius 20 1; Van Bijkershoek 2 15 7.

⁷⁶ R.W. LEE, D.C.L., F.B.A. *An Introduction to Roman-Dutch Law* 268.

⁷⁷ Latin term which means according to strict right of law. It is a legal rule of interpretation.

⁷⁸ Van der Keessel 1041. Also see Glover 2005 *Fundamina* 28.

⁷⁹ Van der Linden 1 1 6 1 6.

⁸⁰ Cornelius *Principles of the Interpretation of Contracts in South Africa* Cornelius 22. Also see Voet 34 5 4 5.

⁸¹ Louw *The Plain Language Movement and Legal Reform in South African Law of Contract* 18.

⁸² Voet 34 5 4 5; Cornelius *Principles of the Interpretation of Contracts in South Africa* 22.

⁸³ Van der Merwe et al *Contract: General Principles* 11.

the Cape and not the law of the Netherlands.⁸⁴ The Roman-Dutch law principles that were applied did not only consist of legislation, but also of the work of authors.⁸⁵

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.⁸⁶

As seen in *Van Pletsen v Henning*⁸⁷ and *Union Government v Smith*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. Cornelius⁸⁹ 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."⁹⁰ However, The South African law of interpretation is still Roman-Dutch law.⁹¹

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

⁸⁴ Venter, van der Walt and Pienaar *Regsnavoring* 130.

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).

⁸⁶ Baker *An Introduction to English Legal History* 329.

⁸⁷ *Van Pletsen v Henning* 1913 AD 82 99.

⁸⁸ *Union Government v Smith* 1935 AD 232 240-241.

⁸⁹ Cornelius *Principles of the Interpretation of Contracts in South Africa* 10.

⁹⁰ Cornelius *Principles of the Interpretation of Contracts in South Africa* 10.

⁹¹ *Lawsa* Vol 12 168.

⁹² Cornelius *Principles of the Interpretation of Contracts in South Africa* 9.

⁹³ Cornelius *Principles of the Interpretation of Contracts in South Africa* 9.

⁹⁴ 1875 Buch 50.

⁹⁵ Cornelius *Principles of the Interpretation of Contracts in South Africa* 9.

relating to interpretation of contracts were introduced by this decision.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.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.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,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.¹⁰⁰

The agreement itself between the parties did not receive much attention in the early English law, as best explained by Teeven.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.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.¹⁰³

⁹⁶ 1875 Buch 50.

⁹⁷ Steyn 1937 *THRHR* 42.

⁹⁸ Steyn *Uitleg van Wette – Statutes* xxvi.

⁹⁹ *Von Wiellig v The Land and Agricultural Bank of South Africa* 1924 TPD 62 66.

¹⁰⁰ Cornelius *Principles of the Interpretation of Contracts in South Africa* 9.

¹⁰¹ Teeven *A History of the Anglo-American Common Law of Contract* 180.

¹⁰² Louw *The Plain Language Movement and Legal Reform in South African Law of Contract* 12.

¹⁰³ Cornelius *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*.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...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 restricted¹⁰⁶ 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.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.¹⁰⁸

In the case of *Pieters & Co v Solomon*,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 *bona fide* in that sense, then there is a concluded contract. He cannot be heard to say that he meant his promise to be

¹⁰⁴ *Union Government v Vianini Pipes (Py) Ltd* 1941 AD.

¹⁰⁵ *Union Government v Vianini Pipes (Py) Ltd* 107 43-47.

¹⁰⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* 97.

¹⁰⁷ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1983 3 SA 191 (O).

¹⁰⁸ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1983 3 SA 191 (O).

¹⁰⁹ *Pieters & Co v Solomon* 1911 AD 121.

subject to a condition which he omitted to mention and of which the other party was unaware.¹¹⁰

When an offer is made as stated in the above case law and it is accepted in a *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.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.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.¹¹³

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.¹¹⁴ Furthermore, in the areas where there is no precise certainty, the Roman-Dutch law is seen as the common law.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 v Solomon* 1911 AD 121 130.

¹¹¹ Cornelius *Principles of the Interpretation of Contracts in South Africa* 31.

¹¹² *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) 767E-768E.

¹¹³ Cornelius *Principles of the Interpretation of Contracts in South Africa* 16.

¹¹⁴ Venter, van der Walt and Pienaar *Regsnavorsing* 204. Also see Fagan in Zimmermann and Visser *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 *Regsnavorsing* 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,¹¹⁶ 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.¹¹⁷ On 27 April 1994, a new dispensation of constitutional sovereignty was introduced for South Africa with the Interim Constitution.¹¹⁸

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.¹¹⁹ 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.¹²⁰ This is also applicable when contracts are interpreted.

The South African Constitution¹²¹ had a profound influence on the interpretation of contracts since 1993, after the abolishment of apartheid.¹²² 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*.

¹¹⁷ Sharrock *Business Transactions Law* 170.

¹¹⁸ Constitution of the Republic of South Africa 200 of 1995 (the Interim Constitution).

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.¹²³ 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.¹²⁴ Sharrock explained the "natural meaning of words" is used as a starting point when contracts are interpreted.¹²⁵

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.¹²⁶ 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.¹²⁷ 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,¹²⁸ 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

¹²³ Sharrock *Business Transactions Law* 170.

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.

¹²⁸ Barnard *Chapter 4: Transformation, The Constitution and Contract Law* 140.

application, it can occur either directly or indirectly.¹²⁹ The common law may also be developed when applying a provision of the Bill of Rights to a natural or juristic person,¹³⁰ 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.¹³¹ 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.¹³²

Since the promulgation of the Interim Constitution¹³³ 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.¹³⁴ 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.¹³⁵

There are a few sections summarised by Van der Walt,¹³⁶ regarding the horizontal application of the Constitution.¹³⁷ 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.”¹³⁸ 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).

¹³³ Hawthorne 1995 *THRHR* 157 160-162.

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 Napier*¹⁴⁰ 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.

¹⁴² The *Constitution* 108 of 1996.

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.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.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.¹⁴⁵ It was furthermore also confirmed in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*.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.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 *Skibya Property Investments* case.¹⁴⁸

¹⁴³ Section 2 of the *Constitution* 108 of 1996.

¹⁴⁴ Basson and Viljoen *South African Constitutional Law* 14.

¹⁴⁵ Cornelius *Principles of the Interpretation of Contracts in South Africa* 76.

¹⁴⁶ *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.'"

¹⁴⁷ Examples hereof: *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; *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) paras 22-30; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* [1999] ZASCA 72; 2000 (1) SA 113 (SCA) para 21.

¹⁴⁸ *Skibya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) 391.

Purposive interpretation is appropriate, not only when the wording of the contract is ambiguous and not understood, as in *Venter v Credit Guarantee*,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*.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.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.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

¹⁴⁹ *Venter v Credit Guarantee* 1996 (3) SA 966 (SCA).

¹⁵⁰ *Turner Morris (Pty) Ltd v Riddell* 1996 4 SA 397 (E) 404H-J.

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.

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.”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 *Bothma Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*:¹⁵⁴

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.¹⁵⁵

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.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

¹⁵³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

¹⁵⁴ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).

¹⁵⁵ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

¹⁵⁶ Hutchison and Pretorius *The Law of Contract in South Africa* 400.

departure 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 word, 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.¹⁶³ It is advisable to not try and change the agreement and go behind the terms thereof, but to rather read it as it.

3.4 The Parol Evidence Rule and how interpretation is applied

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...”¹⁶⁴ and this was explained by the South African Law Commission 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 *bonae fidei*,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.¹⁶⁶

Unlike civilian counterparts, English contract law adopts the four-corner rule¹⁶⁷ as a starting point and the Parol Evidence Rule,¹⁶⁸ thus the contract is to be viewed as containing an entire agreement between the parties.¹⁶⁹ As seen in the *Johnson-case*,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.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

¹⁶³ *V v V* (A5021/12) [2016] ZAGPJHC 311 para 7.

¹⁶⁴ Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts, South African Law Commission, Project 47, April 1998, clause 4(1).

¹⁶⁵ *bonae fidei*: “Without intention to deceive or genuine and real.” See Zimmermann *The Law of Obligations – Roman Foundations of Civilian Tradition* 220.

¹⁶⁶ *Union Government v Vianini Pipes (Py) Ltd* 107 43-47.

¹⁶⁷ Duhl 2010 *University of Pittsburgh Law Review* 71.

¹⁶⁸ Richards *Law of contract* 132.

¹⁶⁹ Galletti *Contract interpretation and relational contract theory: a comparison between common law and civil law approaches* 249.

¹⁷⁰ *Johnson v Leal* 1980 (3) SA 927 (A).

¹⁷¹ *Johnson v Leal* 1980 (3) SA 927 (A).

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.¹⁷²

No evidence may contradict or detract from or redefine the terms of a contract.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.¹⁷⁴ This rule only applies when the entire agreement is in writing as stated by case law.¹⁷⁵

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

...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.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.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.¹⁷⁹ Such evidence

¹⁷² Louw *The Plain Language Movement and Legal Reform in South African Law of Contract* 44.

¹⁷³ *Lowry v Steedman* 1914 AD 532; *Venter v Birchholtz* 1972 (1) SA 276 (A).

¹⁷⁴ Louw *The Plain Language Movement and Legal Reform in South African Law of Contract* 47.

¹⁷⁵ *Chrysafis v Katsapas* 1988 4 SA 818 (A).

¹⁷⁶ *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) 768D-E.

¹⁷⁷ *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) 455A-C, *Van Rensburg's case* 303A-C, *Swart's case* 201B, *Total South Africa (Pty) Ltd v Bekker* NO1992 (1) SA 617 (A) E {dictum 624G appl} 624G, *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A) {dictum at 10C-D appl} 10C-D.

¹⁷⁸ Contract Law: Parol Evidence Rule 2013 <http://www.polity.org.za/article/contract-law-parol-evidence-rule>.

¹⁷⁹ *KPMG Chartered Accountants 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.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*."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.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.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 Corp'n 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 Pletzen 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."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 in front of them. Thus there is no need to lead external evidence.

In one of the recent and most important judgements, *Natal Joint Municipal Pension Fund v Endumeni Municipality*,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 its coming into existence. The process is objective, not subjective. The inevitable point of departure is the language of the provisions itself.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 *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*,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 2008.¹⁸⁸ After this agreement was signed by

¹⁸⁴ *Worman v Hughes and Others* 1948 (3) SA 495 (A) 505.

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).

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.

¹⁸⁷ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* (2013) 3 All SA 291 (SCA).

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*¹⁸⁹ and therefore not enforceable.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."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.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*.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.¹⁹⁴ Both of the parties let the tanks to third parties and dispute arose between the parties.

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

¹⁹⁰ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* (2013) 3 All SA 291 (SCA) 2-4.

¹⁹¹ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* (2013) 3 All SA 291 (SCA) para 26.

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

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

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.¹⁹⁵ The Supreme Court in this case held that the present state of the law can be summarised as mentioned previously in case law.¹⁹⁶

The court once again confirmed in the *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.”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 *North East Finance* case¹⁹⁸ 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 *Bothma – Batho* case,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

¹⁹⁵ *Bothma – Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk* 2014 (1) All SA 517 (SCA) para 4.

¹⁹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 10 and confirmed in *Bothma - Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 10 with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18. *North East Finance* case para 12.

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

¹⁹⁸ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* (2013) 3 All SA 291 (SCA).

¹⁹⁹ *Bothma - Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA).

the language used should also be considered as stated above.²⁰⁰ 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*.²⁰¹ This development in the above mentioned case is described as a shift from “text to context.”²⁰²

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.²⁰³

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.

²⁰⁰ Confirmed in *Bothma - Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 10 with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

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

²⁰² Lane 2016 *Without Prejudice* 39. *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/201) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) 603.

²⁰³ Sharrock *Business Transactions Law* 170.

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."

²⁰⁶ Canada (Federation). Department of Justice. 2013. *Rights and Freedoms in Canada: The role of the Canadian Charter of Rights and Freedoms* <http://www.justice.gc.ca/eng/csjsjc/just/06.html>.

²⁰⁷ Asprey *Plain Language for Lawyers* 7.

²⁰⁸ Butt and Castle *Modern Legal Drafting: A Guide to Using Clearer Language* 81.

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.²¹¹ From what the authors explained, it is clear that a general theory of contract only emerged in the nineteenth century.²¹²

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.²¹³ 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*,²¹⁴ 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.²¹⁵ 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.

²¹⁴ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633.

²¹⁵ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633 paras 3-6.

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*,²¹⁶ 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")).²¹⁷

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.).²¹⁸ 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.²¹⁹ 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.²²⁰

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.²²¹

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.²²² Some Canadian courts have abandoned the historical approach and now treat

²¹⁶ Section 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55 [formerly *Commercial Arbitration Act*].

²¹⁷ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633 para 9.

²¹⁸ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633 para 2.

²¹⁹ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633 para 2.

²²⁰ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633 para 21.

²²¹ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633.

²²² *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633 para 43. Also see *The Interpretation of Contracts* (2011 & Supp. 2013) 173-76; and G. R. Hall *Canadian Contractual Interpretation Law* 125-26.

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.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 *Sattva* case.²²⁴ The second development is the difference between questions of law and questions of mixed fact and law and how it is explained.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”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.²²⁷

Words can’t be looked individually; they have to be used in context to ascertain the greater meaning, as stated by *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

²²³ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 45. Also see as examples: *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, para 11; *Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, para 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 para 44.

²²⁴ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 46. Also see J. D. McCamus *The Law of Contracts* 749-51.

²²⁵ *Director of Investigation and Research v. Southam Inc.* [1997] 1 S.C.R. 748 para. 35 and *Housen v. Nikolaisen* 2002 SCC 33 [2002] 2 S.C.R. 235 paras 26 and 31-36.

²²⁶ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 47. Also see *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 [2006] 1 S.C.R. 744 para 27.

²²⁷ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 47. Also see *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* 2010 SCC 4 [2010] 1 S.C.R. 69 paras 64-65.

this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.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.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.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 *Housen* and *Southam*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.²³² This appears closer to a question of mixed fact and law, defined in *Housen* as quoted “applying a legal standard to a set of facts.”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 *Ledcor v*

²²⁸ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633 para 47. *Reardon Smith Line* 574.

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].”

²³⁰ *Hayes Forest Services Ltd. v. Weyerhaeuser Co.* 2008 BCCA 31 289 D.L.R. (4th) 230; *Bell Canada v. The Plan Group* 2009 ONCA 548 96 O.R. (3d) 81.

²³¹ *Housen v Nikolaisen* 2002 SCC 33 [2002] 2 S.C.R. 235.

²³² *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633 para 49.

²³³ *Housen v Nikolaisen* 2002 SCC 33 [2002] 2 S.C.R. 235 para 26.

Northbridge Indemnity Insurance Compnay.²³⁴ 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.²³⁵

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.²³⁶

When there is no ambiguity, the plain, ordinary, popular, natural, or literal²³⁷ meaning of the words, read in light of the entire agreement and its surrounding circumstances,²³⁸ should be adopted,²³⁹ except when to do so would result in a commercial absurdity or create some inconsistency with the rest of the contract.²⁴⁰

²³⁴ *Ledcor v Northbridge Indemnity Insurance Compnay Co.* 2016 SCC 37.

²³⁵ *Ledcor v Northbridge Indemnity Insurance Compnay Co.* 2016 SCC 37 para 25.

²³⁶ As examples: *Bhasin v. Hrynew* (2014) 2014 CarswellAlta 2046 (S.C.C.) (Canadian common law imposing duty on parties to perform their contractual obligations honestly); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1997) 1997 CarswellNfld 207 (S.C.C.); *Hill v Nova Scotia* (Attorney General) (1997), 1997 CarswellNS 10 (S.C.C.); *Manulife Bank of Canada v Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.); *BG Checo International Ltd. v British Columbia Hydro & Power Authority* (1993) 1993 CarswellBC 1254 (S.C.C.); reconsideration refused (1993), 14 C.C.L.T. (2d) 233 (note) (S.C.C.); *Hillis Oil & Sales Ltd. v Wynn's Canada Ltd.* (1986) 1986 CarswellNS 147 (S.C.C.).

²³⁷ *Indian Molybdenum Ltd. v R.* (1951), 1951 CarswellNat 280 (S.C.C.); *Brinkerhoff International Inc. v Numac Energy Inc.* (1997) 1997 CarswellAlta 821 (Alta. C.A.); *Gilchrist v Western Star Trucks Inc.* (2000) 2000 CarswellBC 176 (B.C. C.A.).

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.).

²³⁹ *Non-Marine Underwriters, Lloyd's London v Scalera* (2000), 2000 CarswellBC 885 (S.C.C.); *Eli Lilly & Co. v Novopharm Ltd.* (1998) 1998 CarswellNat 1061 (S.C.C.).

²⁴⁰ *Manulife Bank of Canada v Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.); *ConsolidatedBathurst Export Ltd. C. Mutual Boiler & Machinery Insurance Co.* (1979) 1979 CarswellQue 157 (S.C.C.).

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.²⁴¹ Interpretation of a contract must be objectively based,²⁴² even if the courts tend to “interpret contractual language contextually and in accordance with the surrounding circumstances of the agreement,”²⁴³ which is also consistent with the reasonable understanding and expectations of the parties.”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.”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.”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.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

²⁴¹ *Hendry v. Zimmerman* (1947), 1947 CarswellMan 35 (Man. K.B.); affirmed (1948), 1948 CarswellMan 7 (Man. C.A.); *Mac Mortgage Approval Corp. v. MMB Management Corp.* (2013) 2013 CarswellBC 3606 (B.C. S.C.).

²⁴² *Chandos Construction Ltd. v Alberta* (Minister of Infrastructure) (2006), 2006 ABCA 41 (Alta. C.A.); *MacDonald v University of British Columbia* (2005), 2005 CarswellBC 1616 (B.C. C.A.); *Geoffrey L. Moore Realty Inc. v Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.).

²⁴³ *Dumbrell v Regional Group of Cos.* (2007), 2007 CarswellOnt 407 (Ont. C.A.).

²⁴⁴ *Miglin v Miglin* (2003), 2003 CarswellOnt 1374 (S.C.C.).

²⁴⁵ *Creston Moly Corp. v Sattva Capital Corp* (2014) 2014 CarswellBC 2267 (S.C.C.).

²⁴⁶ *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1997) 1997 CarswellNfld 207 (S.C.C.).

²⁴⁷ *BG Checo International Ltd. v British Columbia Hydro & Power Authority* (1993), 1993 CarswellBC 1254 (S.C.C.).

gathered from the agreement as a whole.²⁴⁸ The principles governing the interpretation of contracts are essentially the same as for statutory interpretation.²⁴⁹

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

The important decision in *Bhasin v Hrynew*²⁵⁰ 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.²⁵¹ 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.²⁵² 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.²⁵³

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.

Fridman²⁵⁴ 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 *R. v MacLean* (1882) 1882 CarswellNat 10 (S.C.C.).

²⁴⁹ *Manulife Bank of Canada v Conlin* (1996) 1996 CarswellOnt 3941 (S.C.C.).

²⁵⁰ *Bhasin v Hrynew* 2014 SCC 71.

²⁵¹ *Bhasin v Hrynew* 2014 SCC 71 paras 74-77.

²⁵² *Swan Group v Bishop* 2013 ABCA 29.

²⁵³ *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 Fridman *The Law of Contract in Canada* 78.

amount to fraud by the other party.²⁵⁵ There is no obligation for the parties to negotiate in good faith.²⁵⁶ Principles of unfairness developed in equity, such as the doctrine of undue influence, specific performance and injunction are also found in Canadian law.²⁵⁷

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

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.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 *Sattva* case.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.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.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.²⁶³ That is the

²⁵⁵ Van der Walt 1987 *De Jure* 321 323.

²⁵⁶ Fridman *The Law of Contract in Canada* 78.

²⁵⁷ Van der Walt 1987 *De Jure* 321 323.

²⁵⁸ Fridman *The Law of Contract in Canada* 340.

²⁵⁹ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 57.

²⁶⁰ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 60.

²⁶¹ *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 para 14.

²⁶² *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62.

²⁶³ *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 paras 66 & 70.

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."²⁶⁴ This also includes correspondence leading up to the making of the agreement,²⁶⁵ informal documents predating the final contract²⁶⁶ and earlier superseded agreements executed by the parties.²⁶⁷

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,²⁶⁸ thereby making a new contract for the parties.²⁶⁹ 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.²⁷⁰

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.²⁷¹ The rule thus excludes subjective intentions of the parties, as seen the objective intentions should be considered.²⁷² The Parol Evidence Rule does not apply to preclude evidence of the surrounding circumstances.²⁷³

²⁶⁴ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 58.

²⁶⁵ *Creston Moly Corp. v Sattva Capital Corp* (2014) 2014 CarswellBC 2267 (S.C.C.).

²⁶⁶ *Clark's-Gamble of Canada Ltd. v Grant Park Plaza Ltd* (1967) 1967 CarswellMan 48 (S.C.C.).

²⁶⁷ *McKnight v Robertson* (1910) 1910 CarswellOnt 530 (Ont. C.A.).

²⁶⁸ *Manulife Bank of Canada v Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.).

²⁶⁹ *Guarantee Co. of North America v Gordon Capital Corp.* (1999) 1999 CarswellOnt 3171 (S.C.C.).

²⁷⁰ *Yarrows Ltd. v France (Republic)* (1949) 1949 CarswellBC 70 (B.C. S.C.); *McKean v Dalhousie Lumber Co* (1910), 1910 CarswellNB 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.

²⁷² *Eli Lilly & Co. v Novopharm Ltd.* [1998] 2 S.C.R. 129 paras 54-59.

²⁷³ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 60.

Canadian courts have traditionally adopted the Parol Evidence Rule²⁷⁴ 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.²⁷⁵ Interpretation of a contract must be objectively based²⁷⁶ even if courts tend to interpret contractual language contextually and in accordance with the surrounding circumstances of the agreement.²⁷⁷

Before the case of *Sattva Capital Corp v Creston Moly Corp*,²⁷⁸ 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.

²⁷⁵ As examples: *Bhasin v Hrynew* (2014), 2014 CarswellAlta 2046 (S.C.C.) (Canadian common law imposing duty on parties to perform their contractual obligations honestly); *Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.* (1997) 1997 CarswellNfld 207 (S.C.C.); *Hill v Nova Scotia* (Attorney General) (1997) 1997 CarswellNS 10 (S.C.C.); *Manulife Bank of Canada v Conlin* (1996) 1996 CarswellOnt 3941 (S.C.C.); *BG Checo International Ltd. v British Columbia Hydro & Power Authority* (1993) 1993 CarswellBC 1254 (S.C.C.); reconsideration refused (1993) 14 C.C.L.T. (2d) 233 (note) (S.C.C.); *Hillis Oil & Sales Ltd. v Wynn's Canada Ltd.* (1986), 1986 CarswellNS 147 (S.C.C.).

²⁷⁶ *Chandos Construction Ltd. v. Alberta* (Minister of Infrastructure) (2006), 2006 ABCA 41 (Alta. C.A.); *MacDonald v. University of British Columbia* (2005), 2005 CarswellBC 1616 (B.C. C.A.); *Geoffrey L. Moore Realty Inc. v Manitoba Motor League* (2003), 2003 CarswellMan 229 (Man. C.A.).

²⁷⁷ *Dumbrell v Regional Group of Cos.* (2007), 2007 CarswellOnt 407 (Ont. C.A.).

²⁷⁸ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633.

that may not have been apparent to an ordinary person, as each person might do it differently.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.²⁸⁰

²⁷⁹ *Hendry v. Zimmerman* (1947), 1947 CarswellMan 35 (Man. K.B.); affirmed (1948), 1948 CarswellMan 7 (Man. C.A.); *Mac Mortgage Approval Corp. v. MMB Management Corp.* (2013) 2013 CarswellBC 3606 (B.C. S.C.).

²⁸⁰ *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1997) 1997 CarswellNfld 207 (S.C.C.).

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.²⁸¹ 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*²⁸² had a profound influence on the law of contract as *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁸³ 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.²⁸⁴

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.²⁸⁵

²⁸¹ The Interim Constitution.

²⁸² *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633.

²⁸³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/201) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

²⁸⁴ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R 633 para 60.

²⁸⁵ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

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.²⁸⁶ 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.²⁸⁷

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.²⁸⁸

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.²⁸⁹ 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*,²⁹⁰ 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,

²⁸⁶ *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62.

²⁸⁷ *Manulife Bank of Canada v Conlin* (1996), 1996 CarswellOnt 3941 (S.C.C.).

²⁸⁸ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

²⁸⁹ *Dumbrell v Regional Group of Cos.* (2007) 2007 CarswellOnt 407 (Ont. C.A.).

²⁹⁰ *Singh v The Commonwealth* [2004] HCA 43 para 19.

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.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.²⁹² The words of the contract are considered as a whole and by taking into account the nature and purpose of the contract.²⁹³

In an article entitled "*What's in a word: Interpretation through the eyes of ordinary readers*,"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.²⁹⁵

In South Africa the process is "objective, not subjective and the inevitable point of departure is the language of the provisions itself."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.

²⁹¹ *Bhasin v Hrynew* (2014) 2014 CarswellAlta 2046 (S.C.C.).

²⁹² 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.

²⁹³ *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').

²⁹⁴ Wallis 2010 *SALJ* 673.

²⁹⁵ *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.

²⁹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 ALL SA 262, 2012 (4) SA 593 (SCA) [19] para 18.

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 Hrynew*³⁰¹ 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 become 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 good 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 Nagtegaal 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 countries 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 good faith and *ubuntu* in order to make way for a constitutionally

³¹² *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) paras 27-28.

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.³¹⁵ 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.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.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.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.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.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.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.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

³¹⁶ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 4 & 91.

³¹⁷ Bauling and Nagtegaal 2015 *De Jure* 161.

³¹⁸ Bauling and Nagtegaal 2015 *De Jure* 163. Also see Pillay *The Impact of pacta sunt servanda in the law of contract* 10.

³¹⁹ The *Constitution* 108 of 1996.

³²⁰ The *Constitution* 108 of 1996.

³²¹ Hutchison and Pretorius *The Law of Contract in South Africa* 400.

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 not 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

³²³ Cornelius *Principles of the Interpretation of Contracts in South Africa* 30.

³²⁴ Sharrock *Business Transactions Law*.

³²⁵ Sharrock *Business Transactions Law* 170.

³²⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* 12.

³²⁷ Louw *The Plain Language Movement and Legal Reform in South African Law of Contract* 7.

³²⁸ Cornelius *Principles of the Interpretation of Contracts in South Africa* 7.

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.³³⁰ This also emphasised the accepted principle that all informal agreements were binding as long as consensus was reached between the contracting parties.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.³³²

The Bigge and Colebrooke report of 1826³³³ 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.³³⁴ One of the most important principles of interpretation of the English law introduced into South Africa is the Parol Evidence Rule.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 *Finbro* case.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

³³⁰ Van Zyl *History and Principles of Roman Private Law* 256.

³³¹ Zimmermann *Good faith and equity in modern Roman-Dutch law* 219.

³³² Cornelius *Principles of the Interpretation of Contracts in South Africa* 7.

³³³ Christie *The Law of Contract in South Africa* 8.

³³⁴ Du Plessis *et al The Law of Contract in South Africa* 17-18.

³³⁵ Cornelius *Principles of the Interpretation of Contracts in South Africa* 16.

³³⁶ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds Bloemfontein* 1983 3 SA 191 (O).

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.³³⁷ 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.³³⁸ 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.³³⁹

This traditional approach was re-evaluated in the Supreme Court of Appeal case of *Natal Joint Municipal Pension Fund V Endumeni Municipality*.³⁴⁰ 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.³⁴¹ 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 were used to determine the intention of the parties, but only if the words were ambiguous.³⁴² In the years before the case of *Sattva Capital Corp v Creston Moly Corp*,³⁴³ 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.

³⁴⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/201) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

³⁴¹ Section 52(1) of the Constitution Act 1982.

³⁴² *SeaWorld Parks & Entertainment LLC v. Marineland of Canada Inc.* 2011 ONCA 616.

³⁴³ *Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53 [2014] 2 S.C.R. 633.

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.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.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.

Futhermore as discussed in Chapter five, 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*".³⁴⁶ The freedom of contract may be limited by public policy or the *boni mores*.³⁴⁷ It has also been said that public policy is closely related to good faith in the law of contract.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.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.

³⁴⁴ *Bhasin v Hrynew* 2014 SCC 71 para 33.

³⁴⁵ As examples: *Bhasin v Hrynew* (2014), 2014 CarswellAlta 2046 (S.C.C.) (Canadian common law imposing duty on parties to perform their contractual obligations honestly); *Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.* (1997) 1997 CarswellNfld 207 (S.C.C.); *Hill v Nova Scotia* (Attorney General) (1997) 1997 CarswellNS 10 (S.C.C.); *Manulife Bank of Canada v Conlin* (1996) 1996 CarswellOnt 3941 (S.C.C.); *BG Checo International Ltd. v British Columbia Hydro & Power Authority* (1993) 1993 CarswellBC 1254 (S.C.C.); reconsideration refused (1993) 14 C.C.L.T. (2d) 233 (note) (S.C.C.); *Hillis Oil & Sales Ltd. v Wynn's Canada Ltd.* (1986), 1986 CarswellNS 147 (S.C.C.).

³⁴⁶ Hawthorne 2006 *THRHR* 48 53.

³⁴⁷ *Barkhuizen v Napier* 2007 7 BCLR (CC) para 14.

³⁴⁸ Davis 2011 *Stell LR* 845 847.

³⁴⁹ This is discussed in Chapter 3.

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