Harmonising Legal Values and *uBuntu*: The Quest for Social Justice in the South African Common Law of Contract

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Abstract

In this article, a comparison is drawn between the role of good faith in the development of the Roman law of contract and the emerging role of *ubuntu* in the South African common law of contract. Firstly, it is shown how the idea of good faith as an open norm in Roman law was inspired by Greek philosophy and it is argued that *ubuntu* as an underlying value of the customary law can infuse good faith in the common law of contract in similar fashion. Secondly, an important distinction between the two concepts is identified. Although both concepts promote contractual justice between the contracting parties, *ubuntu* entails a further duty to promote the social and economic well-being of the parties as well as that of the greater community. Hence, in contrast to good faith, *ubuntu* is concerned with the promotion of substantive equality in private dealings.

Keywords

Bona fides; common law of contract; contractual fairness; good faith; legal historical comparison; legal pluralism; Roman law of contract; *ubuntu*.

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> The values of *ubuntu* … if consciously harnessed can become central to the process of harmonising all existing legal values and practices with the Constitution. *Ubuntu* can therefore become central to a new South African jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance.[1]

1 Introduction

In the previous article,[2] it was shown how the Romans realised that their existing formal and rigid laws could not address the community's changing legal needs due to the influx of foreign traders into Rome. They introduced flexible legal procedures and a more normative approach to these legal transactions to ensure better contractual justice. This worked so well that the new flexible procedures and normative principles were transferred to the existing formalistic law. Gradually, the existing *ius civile* became subject to a more normative interpretation in the interests of justice through the use of the open norm of good faith. It was argued that in a similar way, *ubuntu* can be used to address legal pluralism in the South African legal system and its application as an underlying value of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) could result in the better use of the open norm of good faith in the common law of contract.

In this article, two further themes are explored. The first theme is the harmonisation of values from different legal systems and the second theme deals with the concretisation of open norms intended to realise contractual justice. As in the previous article, with each theme the Roman law developments are discussed, followed by a comparison with the emerging role of *ubuntu* in the South African common law of contract. Finally, this article concludes by summarising the findings in both articles.

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1 Mokgoro 1998 *PELJ* 11.

2 Du Plessis 2019 *PELJ https://journals.assaf.org.za/index.php/per/article/view/6456*

2 Harmonising values from different legal systems

2.1 Good faith: Harmonisation between Roman and Greek ideas?

It is generally accepted that Greek culture exerted some influence on Roman life during the later Republic[3] including the Roman legal system.[4] However, the extent to which Roman law was influenced by Greek ideas remains a controversial issue, and this is also the case when determining the origin and development of *bona fides* (good faith) in Roman contract law. One theory is that *bona fides* originated from the Roman concept of *fides* and is therefore indigenous to Roman law, but it has also been argued that Greek influences can be identified in the development of *bona fides*, especially in its role in correcting and adapting the *ius civile*. The next section attempts to trace the development from *fides* to *bona fides,* after which the following section considers the possible foreign influences on *bona fides* as used to correct and adapt the *ius civile*.

2.1.1 From fides *to* bona fides

Law (*ius*) was not the only code that governed Roman society. Outside the law, there were various customs (*mores*)[5] that determined the social status of each Roman and prescribed his rights and duties.[6] Zimmerman[7] explains that Roman law tended to interfere with these social aspects of Roman life as little as possible because they were already governed by their own regulatory devices, one of which was *fides*. According to legend, *fides* was the first virtue in Rome to be personified as a goddess.[8] Roman literary tradition dates the cult of *Fides* to the early monarchy, when it was introduced by the second king of Rome, Numa Pompilius (around 700 BC).[9] A temple was also built in her honour in the city of Rome at around 250 BC.[10] The religious origin of *fides* illustrates the importance of *fides* to the

3 Kaser *Roman Private Law* 3-4; Nicholas *Introduction to Roman Law* 8.
4 Kaser *Roman Private Law* 4; Schulz *Roman Legal Science* 38-39 refers to this period in Roman law as the "Hellenistic period". For a general account of possible Greek influences on Roman law see Kunkel *Roman History* 98-105.
5 Berger *Encyclopedic Dictionary of Roman Law* 587 sv "Mores (mos)".
6 Schulz *Principles of Roman Law* 21. Also see Kaser *Roman Private Law* 28-29.
7 Zimmerman *Law of Obligations* 350.
8 Verboven "*Fides*" 2670. Also see Schermaier "*Bona Fides* in Roman Contract Law" 78-79 n 96 argues that the goddess "*Fides* was probably an idolisation of the concept of *fides*".
9 Verboven "*Fides*" 2670; Gruen 1982 *Athenaeum* 59.
10 Verboven "*Fides*" 2670; Schulz *Principles of Roman Law* 224.

Romans.[11] Furthermore, *fides* played an important role in the Roman monarchy and continued to do so during the republican period.[12]

It has been argued that despite its religious origins *fides* developed into a moral and social construct[13] which manifested in various aspects of Roman society.[14] As a result, it had various meanings depending on the context in which it was used.[15] At its most essential, *fides* was described as "keeping one's word" or being “bound by one's word".[16] In this context, Cicero is often quoted:

> Moreover, the keeping of faith [*fides*] is fundamental to justice, that is constancy and truth in what is said and agreed. Therefore … let us trust that keeping faith (*fides*) is so called because what has been said is actually done (*fiat*).[17]

Fides was considered a central virtue in Roman society[18] and it was of the utmost importance for a Roman citizen to keep his or her word.[19] Fidelity was one of the standard principles of Roman life[20] and failure to remain faithful to one's word would result in a social blot against one's reputation.[21] In this context *fides* recognises the moral duties of fidelity and faithfulness.[22]

A more social construction of *fides* maintains that *fides* combines two meanings, namely trust and trustworthiness.[23] A relationship based on *fides* denoted a relationship between two parties where "the one trusted and

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11 Lind "The Republic and Roman Morality" 59.

12 Verboven "*Fides*" 2670; Schermaier "*Bona Fides* in Roman Contract Law" 77-79; Lind "The Republic and Roman Morality" 6-7.

13 Sič 2008 *Zbornik Radova* 164-165; Litvinoff 1997 *Tul L Rev* 1651; Lind "The Republic and Roman Morality" 6. The original meaning of *fides* is uncertain and various theories exist (Gruen 1982 *Athenaeum* 51).

14 Lind "The Republic and Roman Morality" 7.

15 Verboven "*Fides*" 2670; Schermaier "*Bona Fides* in Roman Contract Law" 78; Schulz *Principles of Roman Law* 223.

16 Schulz *Principles of Roman Law* 223, who describes this definition of *fides* as the essential meaning of *fides*. Also see Schermaier "*Bona Fides* in Roman Contract Law" 78; Kaser *Roman Private Law* 33.

17 Cicero *De Officiis* 1 23 (quoted from Griffin and Atkins *Cicero on Duties*).

18 Verboven "*Fides*" 2670; Lind "The Republic and Roman Morality" 8; Schulz *Principles of Roman Law* 223.

19 Zimmerman *Law of Obligations* 115.

20 Schulz *Principles of Roman Law* 223.

21 Verboven "*Fides*" 2670; Schulz *Principles of Roman Law* 224.

22 Sič 2008 *Zbornik Radova* 165; Schermaier "*Bona Fides* in Roman Contract Law" 77; Schulz *Principles of Roman Law* 223.

23 Sič 2008 *Zbornik Radova* 165 esp n 67, 168; Schermaier "*Bona Fides* in Roman Contract Law" 79; Griffin and Atkins *Cicero on Duties* xlvi; Lind "The Republic and Roman Morality" 7.

relied upon the other".[24] In this context, *fides* required that a person should keep his word and display consideration and leniency towards those under his protection[25] or towards those to whom he had a social obligation.[26] Accordingly, *fides* prescribed expected behaviour in daily life, and in particular what behaviour was expected in specific social relationships.[27] As both parties were bound by the principles of *fides* a mutual confidence existed between them, which was reciprocal in nature.[28] In this framework *fides* manifested as a principle that underlay social relations.[29] An example of a Roman relationship that was governed by *fides* was the relationship between a patron and his clients (*clientela*).[30] Clients were poor Roman citizens (for example peasants, artisans or workers) who entered into a special relationship with a wealthy Roman citizen (a patron) for whom they executed work and from whom in turn they received social and legal protection.[31] The relationship based on *clientela* created reciprocal duties which were governed by *fides* rather than law.[32] This meaning of *fides* was also accentuated in the old fiduciary relationships (for example, between guardian and ward) which later developed into legal actions with the development of the *bonae fidei iudicia*.[33] These relationships prescribed a specific standard of behaviour that was required from both parties. For example, the guardian had to administer his ward's affairs as if they were his own.[34]

It has been asked how the indigenous Roman principle of *fides*[35] that applied between Romans became a principle of the *ius gentium* which could be applied where foreigners were involved. Especially, as in early Rome, Roman *fides* was contrasted to the *fides* of other nations (including the Greeks).[36] One argument is that Roman *fides* developed into a universal

24 Griffin and Atkins *Cicero on Duties* xlvi. Also see Schermaier "*Bona Fides* in Roman Contract Law" 79.
25 Schermaier "*Bona Fides* in Roman Contract Law" 79.
26 Verboven "*Fides*" 2670.
27 Sič 2008 *Zbornik Radova* 165.
28 Lind "The Republic and Roman Morality" 6.
29 Verboven "*Fides*" 2670.
30 Schermaier "*Bona Fides* in Roman Contract Law" 79; Zimmerman *Law of Obligations* 350-351; Berger *Encyclopedic Dictionary of Roman Law* 391 sv "Clientes".
31 Winkel 2010 *Fundamina* 582; Zimmerman *Law of Obligations* 350-351; Berger *Encyclopedic Dictionary of Roman Law* 391 sv "Clientes".
32 Zimmerman *Law of Obligations* 351. Also see Berger *Encyclopedic Dictionary of Roman Law* 391 sv "Clientes".
33 Schermaier "*Bona Fides* in Roman Contract Law" 80.
34 Schermaier "*Bona Fides* in Roman Contract Law" 80.
35 Lind "The Republic and Roman Morality" 6.
36 Sič 2008 *Zbornik Radova* 165 n 68; Lind "The Republic and Roman Morality" 8; Schulz *Principles of Roman Law* 223. Buckland and McNair *Roman Law* 280

principle that applied to all nations, as evidenced by its use in international treaties, where the parties took a solemn oath to keep to the covenants of the treaty faithfully and without malice.[37] This use of *fides* emphasised the essential meaning of *fides*, namely to keep one's word.[38] Furthermore, those who surrendered to a Roman conqueror would place themselves under his *fides* (and thus his protection), which incorporated both the ideas of keeping one's word, and leniency and consideration to those under one's protection.[39] As the principle of *fides* was used in international relations it has been argued that it developed into a universal principle that applied to all nations (and not only Romans) and became part of the *ius gentium*. Thereafter the *ius gentium* exerted an influence on the Roman *fides* by transforming it from a moral obligation into a legally binding one:

> It was particularly in the contractual field that the *ius gentium* exercised its influence, primarily by strengthening the element of reciprocal confidence (*fides*) without which relations with foreigners were hardly possible.[40]

Finally, it remains to explain how the concept of *fides* developed into *bona fides*. There is much uncertainty in this respect,[41] but an attractive theory is proposed by Schermaier. He argues that the peregrine praetor probably modelled the *bona fidei iudiciae* on the Roman fiduciary relationships.[42] One of the fiduciary relationships, *fiducia,*[43] was legally enforceable and did not rely on *fides* alone.[44] The formula of the *actio fiduciae* demanded *bene agere* from the transferee (i.e. that he do well).[45] This required that the transferee should act "carefully and prudently" and with respect for the interests of the other party.[46] Schermaier argues that this standard of behaviour corresponds to that required under the *bonae fidei iudiciae,* which indicates that the *actio fiduciae* was most likely the forerunner of the *bonae*

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explains the difference between Roman *fides* and Greek *fides* as follows: "[N]o Greek trusted another unless he had the matter set down in writing."

37 Sič 2008 *Zbornik Radova* 165, esp n 71.

38 Schermaier "*Bona Fides* in Roman Contract Law" 78-78; Lind "The Republic and Roman Morality" 7.

39 Schermaier "*Bona Fides* in Roman Contract Law" 78-79.

40 Berger *Encyclopedic Dictionary of Roman Law* 529 sv "Ius Gentium". Also see Kaser *Roman Private Law* 3.

41 Sič 2008 *Zbornik Radova* 166 n 75.

42 Schermaier "*Bona Fides* in Roman Contract Law" 80.

43 *Fiducia* can be described as "[a]n agreement (*pactum fiduciae*) in addition to a transfer of property through *mancipatio* (or *in iure cessio*) by which the transferee assumes certain duties as to the property transferred or the later retransfer thereof to the transferor" (Berger *Encycopledic Dictionary of Roman Law* 471 sv "Fiduciae"). See further Kaser *Roman Private Law* 126-127.

44 Schermaier "*Bona Fides* in Roman Contract Law" 80.

45 Schermaier "*Bona Fides* in Roman Contract Law" 82.

46 Schermaier "*Bona Fides* in Roman Contract Law" 82. Also see Kaser *Roman Private Law* 126-127.

fidei iudicia.[47] He further argues that the term *bona fides* was probably used to emphasise the required standard of behaviour.[48] Therefore, it referred not only to the meaning of *fides* of "keeping one's word" but also required that one act in accordance with a required standard of behaviour.

2.1.2 Bona fides *as used to correct and adapt the* ius civile

Even if it is accepted that the *bonae fidei iudiciae* can be traced back to the Roman concept of *fides*, some Greek influences can be identified in the use of *bona fides* to correct and adapt the *ius civile*. At the beginning of the *Digest* it is stated "*ius est ars boni et aequi,*"[49] which can be translated as "the law is the art of goodness and fairness".[50] It has been argued that this text refers to the function of *aequitas* in the development of Roman law:

> When the legal norms established in earlier law, written or not written, became inadequate to the social and economic necessities of the later age, the *aequitas* went into operation both in private law and in civil procedure as well as in judicial practice.[51]

In this section the function of *bona fides* as an expression of *aequitas* to correct the injustices of the formal law (*summum ius*) is investigated. Specific consideration is given to Cicero's *De Officiis*. First, because it provides examples of this function of *bona fides* during the later republican period, and secondly, because it has been argued that Cicero's use of the term *aequitas* led to its use as a legal term.[52]

The phrase *summum ius* is an abbreviation of the maxim *summum ius summa iniuria,* which can be translated as "more law less justice".[53] It refers to the over-literal interpretation of laws that ultimately leads to injustice. In the first book of *De Officiis*, Cicero refers to the example of a man who, after agreeing to a thirty-day truce, destroys the enemy's fields at night and then justifies his behaviour by arguing that the truce referred to days and

47 Schermaier "*Bona Fides* in Roman Contract Law" 82.

48 Schermaier "*Bona Fides* in Roman Contract Law" 82. Also see Sič 2008 *Zbornik Radova* 166 n 75; Schulz *Principles of Roman Law* 228.

49 D 1 1 1*pr* (quoted from Mommsen and Krueger *Digest of Justinian*).

50 Quoted from Watson *Digest of Justinian*. Also see Berger *Encyclopedic Dictionary of Roman Law* 354 sv "Aequitas (aequum)".

51 Berger *Encyclopedic Dictionary of Roman Law* 354 sv "Aequitas (aequum)".

52 Tuori "*Aequitas*" 132. Thomas 2003 *De Jure* 105 further argues that the *De Officiis* is an important source on Roman moral philosophy.

53 Hiemstra and Gonin *Trilingual Legal Dictionary* 294.

therefore did not include nights.[54] This led Cicero to argue that strict adherence to the law could lead to injustice.[55]

Two further examples from Cicero have been used as evidence that the Romans treated *bona fides* as an expression of *aequitas* that was used to correct the injustices of the *summum ius*.[56] First, Cicero tells of a case where the augurs were going to take an augury on the citadel and they ordered Tiberius Claudius Centumalus, whose house was on the Caelian Hill, to demolish that part of his house that was obstructing the auspices.[57] Claudius advertised the house and then sold it to Publius Calpurnius Lanarius, after which the augurs made the same demand of Calpurnius and he complied.[58] When Calpurnius learned that Claudius had advertised the house after he was ordered to demolish a part of it, he compelled Claudius to go before an arbitrator as to "what compensation he ought to have made in accordance with the demands of good faith."[59] Calpurnius had to formulate the action on good faith, as the *ius civile* did not provide him with a remedy.[60] Cicero explains that in accordance with the Law of the Twelve Tables "it was enough that one [the buyer] should accept responsibility for those faults that were verbally specified" and "if the seller had denied these, he should face a double penalty".[61] This meant that the seller was responsible for only the defects whose existence he expressly denied.[62] Accordingly, Claudius would be responsible for Calpurnius' loss only if he denied that there was any demand by the augurs for the demolition of part of the house. The judge ordered Claudius to compensate Calpurnius for the loss he had incurred because Claudius had known the facts when he sold the house to Calpurnius and had not informed him.[63] In other words, if the seller knew about a fault or defect in the property but kept quiet about it, then he was responsible for it.[64] Consequently, Cicero argues that the judge "established that it was a part of good faith that the buyer should learn of any fault that the seller knew".[65] This example illustrates how *bona fides*

54 Cicero *De Officiis* 1 33 (Griffin and Atkins *Cicero on Duties*).
55 Tuori "*Aequitas*" 132.
56 Tuori "*Aequitas*" 132; Schermaier "*Bona Fides* in Roman Contract Law" 70.
57 Cicero *De Officiis* 3 66 (Griffin and Atkins *Cicero on Duties*).
58 Cicero *De Officiis* 3 66 (Griffin and Atkins *Cicero on Duties*).
59 Cicero *De Officiis* 3 66 (Griffin and Atkins *Cicero on Duties*).
60 Schermaier "*Bona Fides* in Roman Contract Law" 67.
61 Cicero *De Officiis* 3 65 (quoted from Griffin and Atkins *Cicero on Duties*). See further the discussion by Schermaier "*Bona Fides* in Roman Contract Law" 67.
62 Schermaier "*Bona Fides* in Roman Contract Law" 67.
63 Cicero *De Officiis* 3 66 (Griffin and Atkins *Cicero on Duties*).
64 Cicero *De Officiis* 3 65 (Griffin and Atkins *Cicero on Duties*).
65 Cicero *De Officiis* 3 67 (Griffin and Atkins *Cicero on Duties*).

was used to correct and adapt the *ius civile* by developing new rules to cater for new circumstances.

Then, in a further example, Cicero illustrates how a rule developed by the concept of *bona fides* could itself become unjust and require further development in terms of the *bona fides*.[66] He refers to the case where Marcus Marius Gratidianus sold a house to Gaius Sergius Orata, which he had bought from Orata a few years before.[67] The house was under a liability (i.e. a third person had some right over the property) but Marius did not state this in the contract of sale.[68] When the matter went to court, Orata's representatives argued that the court should adhere to the rule that the buyer should learn of any fault that the seller knew.[69] In other words, he was arguing that the court should merely apply the existing rule (which rule derived from the *bona fides*) in accordance with the words and without further reference to the concept of *bona fides*. However, Gratidianus' representative argued for the application of *aequitas* (fairness) in that Orata was not deceived because as the previous owner he knew that the property was subject to a liability.[70] In other words, he was arguing for the adaptation of the rule in accordance with the principle of *aequitas* in order to achieve justice.

Cicero's use of the term *bona fides* together with the term *aequitas* indicates that Cicero regarded *bona fides* as an expression of *aequitas* which could be used to correct and adapt the *ius civile* where it would otherwise lead to injustice.[71] Therefore, the use of *bona fides* in this context refers to the idea of *aequitas*. This is so because *aequitas* in the legal sense is usually described as a concept which refers to fairness and which is specifically contrasted with the strict following of the letter of the law.[72] In turn, the Roman concept of *aequitas* has its origin in the Greek concept of *epieíkeia* (equity).[73] Aristotle defined *epieíkeia* as "a correction of law where it is defective owing to its universality"[74] and stated that:

66 Schermaier "*Bona Fides* in Roman Contract Law" 68.
67 Cicero *De Officiis* 3 67 (Griffin and Atkins *Cicero on Duties*).
68 Cicero *De Officiis* 3 67 (Griffin and Atkins *Cicero on Duties*).
69 Cicero *De Officiis* 3 67 (Griffin and Atkins *Cicero on Duties*).
70 Cicero *De Officiis* 3 67 (Griffin and Atkins *Cicero on Duties*).
71 Schermaier "*Bona Fides* in Roman Contract Law" 70.
72 Tuori "*Aequitas*" 132; Berger *Encyclopedic Dictionary of Roman Law* 354 sv "Aequitas (aequum)".
73 Schermaier "*Bona Fides* in Roman Contract Law" 65 n 9; Schulz *Roman Legal Science* 74. However, the extent of the Greek influence on the Roman concept of *aequitas* is the subject of extensive academic debate (see for example Tuori "*Aequitas*" 132).
74 Artistotle *Ethica Nicomachea* 1137^{b}27 (quoted from Ross "*Ethica Nicomachea*").

> [It] makes up for the defects of a community's written code of law. This is what we call equity; people regard it as just; it is, in fact, the sort of justice which goes beyond the written law.[75]

Cicero and the other Roman orators understood *aequitas* as referring to *epieíkeia*.[76] Cicero uses *aequitas* to refer to "fairness", which he contrasts with the strict following of the letter of the law.[77] In other words, where *bona fides* was used to correct and adapt the *ius civile*, it was with reference to these Greek philosophical ideas. So while it would appear that the Romans used existing indigenous concepts to develop a more equitable law of contract, there is evidence that they borrowed from Greek philosophy in order to develop their existing rigid and formalistic legal system into a fairer and more flexible system that incorporated normative considerations based on fairness.

2.2 Harmonisation of good faith and ubuntu *in the South African common law of contract*

It has been argued that the South African common law of contract has shown resistance to the influence of *ubuntu*, because "[i]t could well be argued that contract law already has specific mechanisms to deal with the type of problems which *ubuntu* addresses".[78] This argument ignores the constitutional ideal of transforming the existing traditional conservative legal culture into one based on plural values. As pointed out by Midgley and Keep,[79] the transformation into a cohesive plural legal culture is needed in order to legitimise the new legal system under the Constitution. In other words, the legal system and legal culture in South Africa will be legitimate only if they reflect the values of all the diverse cultures existing within South Africa.[80] They argue that "the notion of inclusivity that is inherent in *ubuntu-botho* makes it an ideal overarching vehicle for expressing shared values".[81] Consequently, the recognition of *ubuntu* is intimately linked with the

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75 Aristotle *Rhetorica* 1374[a]24-27 (quoted from Roberts "*Rhetorica*").

76 Schulz *Roman Legal Science* 74. Jolowicz *Roman Foundations* 56 argues that Cicero and other rhetorical writers were aware of the indigenous origin of *aequitas* although he concedes that their thinking reflects a Greek influence.

77 Cicero *De Officiis* 3 67 (Griffin and Atkins *Cicero on Duties*) (see again the discussion in the text at n 70 above). Also see Kaser *Roman Private Law* 28, who maintains that *aequitas* "denoted justice, especially that justice which the praetor applied by using his magisterial law to overcome the rigidity of the *ius civile.*"

78 Bennett 2011 *PELJ* 44.

79 Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 48.

80 Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 30, 48.

81 Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 448. Also see Rautenbach "Exploring the Contribution of *Ubuntu*" 309.

Constitution's transformative ideals,[82] especially because *ubuntu* as a legal concept originated in the constitutional ideal of restorative justice.[83]

It may be asked how the common law of contract could reflect plural values and whether this is even possible. Midgley and Keep[84] argue that it is conceivable to harmonise what they call Western and African values because "there are universal values that transcend origins and boundaries". They refer to examples in South African jurisprudence where the Constitutional Court has harmonised values from different value systems.[85] More recently, Rautenbach cited further examples in support her argument that the courts have indeed shown a willingness "to include other (indigenous) legal norms into their reasoning".[86]

In the context of contract law, this harmonisation between common law and customary values can also be observed. As was argued in the previous article, the courts have linked both good faith and *ubuntu* to the aims of justice, reasonableness and fairness in contracts.[87]

Midgley and Keep[88] argue that "harmonisation is possible if one focusses not so much on the cultural origins of a particular value, but on what the value seeks to express or achieve". In other words, although both concepts refer to justice, fairness and reasonableness, the question should be what justice, fairness and reasonableness in contract law should mean in the South African context today. As such, good faith should refer not merely to justice, fairness and reasonableness as understood in the common law tradition but should also be interpreted in accordance with a transformative constitutional approach including the underlying constitutional value of *ubuntu*. In their recent book, Bennett *et al.*[89] specifically argue that *ubuntu* "imports a decidedly African understanding of right-doing to the law" and that the courts can use *ubuntu* to make the principle of good faith in contract law "more relevant to African conditions".[90]

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82 Himonga, Taylor and Pope 2013 *PELJ* 371.

83 See the discussion in Du Plessis 2019 *PELJ* 23-24.

84 Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 47.

85 Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 47-48. As an example, they cite *Dikoko v Mokhatla* 2006 6 SA 235 (CC), where the Court harmonised the values underlying the Roman law remedy of *amende honorable* with that of *ubuntu*. Also see Rautenbach 2015 *AJICL* 296-298; and Rautenbach "Exploring the Contribution of *Ubuntu*" 300-301.

86 Rautenbach "Exploring the Contribution of *Ubuntu*" 302.

87 See the discussion in Du Plessis 2019 *PELJ* 4.

88 Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 48.

89 Bennett, Munro and Jacobs *Ubuntu* 122.

90 This is explored in more detail in the next theme (see para 3.2 below).

The Romans developed *bona fides* from the indigenous Roman concept of *fides*, but as an expression of *aequitas* it was influenced by Greek ideas. In particular, this influence can be observed in the role of *bona fides* to correct and adapt the *ius civile* to achieve justice and keep pace with the changing political, social and economic environment. In a similar manner, good faith as an existing principle of the common law of contract could also be developed in line with the ideals of *ubuntu* (an inherent value of customary law but also an underlying value of the Constitution).[91] As will be argued below, infusing the concept of good faith with *ubuntu* will result in an improved promotion of substantive equality in the common law of contract.

3 Concretising open norms intended to realise contractual justice

3.1 Good faith: Balancing reciprocal individual rights and duties

Prior to the introduction of the *bonae fidei* contracts, the closest the early Roman law came to recognising an agreement was through the formal legal act of stipulation (*stipulatio*) which was already in use by the time of the law of the Twelve Tables.[92] Gaius[93] explains that it entailed a formal verbal exchange of questions and answers between the debtor and the creditor. He mentions the following forms:

> "Do you solemnly promise conveyance? I solemnly promise conveyance"; "Will you convey? I will convey"; "Do you promise? I promise"; "Do you promise on your honour? I promise on my honour"; "Do you guarantee on your honour? I guarantee on my honour?"; "Will you do? I will do."

As the *stipulatio* was a *stricti iuris* contract which formed part of the *ius civile*,[94] the validity of the *stipulatio* came from the form used and not the agreement itself.[95] For example, it was still valid where it was induced by fraud, fear or mistaken belief.[96] Also, if the debtor used the wrong verb the creditor could not rely on the underlying agreement.[97]

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91 Himonga, Taylor and Pope 2013 *PELJ* 371.

92 Nicholas *Introduction to Roman Law* 159; Zimmerman *Law of Obligations* 68.

93 Gaius *Inst* 3 92 (quoted from De Zulueta *Institutes of Gaius Part I*).

94 Zimmerman *Law of Obligations* 91; De Zulueta *Institutes of Gaius Part II* 151.

95 Zimmerman *Law of Obligations* 82-84; Kaser *Roman Private Law* 207. However, immoral, illegal or impossible stipulations were not valid (Watson *Law of the Ancient Romans* 60-61).

96 See the discussion in Du Plessis 2019 *PELJ* 21. For further examples see Gaius *Inst* 3 97-101 (quoted from De Zulueta *Institutes of Gaius Part I*).

97 Zimmerman *Law of Obligations* 70.

The *stipulatio* was a unilateral contract which can be defined as a contract "which creates only rights in one party and only duties in the other".[98] As Zimmerman[99] explains:

> One party (the debtor) would be bound to perform towards the other (the creditor), but could not, under the same stipulation, acquire a counterclaim. Or, the other way round: the stipulation granted the creditor a right, without, at the same time, imposing a duty on him.

Where the parties wanted to enter into a bilateral contract (for example a sale) the parties had to create two stipulations, i.e. two unilateral contracts, one where the buyer promised to pay the price and another where the seller promised to deliver the thing.[100] This meant that the buyer could claim the thing even though he had not paid the price and the seller would be obliged to deliver.[101] If the seller wanted to claim the price, he would need to institute a separate action and run the risk that the buyer could be insolvent at that time.[102] This meant that in an action based on the stipulation to pay the price, the judge would not be permitted to take any account of the other stipulation for the delivery of the thing. Later, with the introduction and development of the *exceptio doli*, the seller would be able to defend an action by the buyer.[103]

In contrast, a *bona fide* contract was bilateral in nature.[104] In other words, a contract "which gives rise to reciprocal obligations, each party having both rights and duties".[105] In addition, the judge in a *bona fide* action was directed to determine the case in accordance with the principle of good faith (*ex fide bona*).[106] This enabled the judge to strike a balance between the interests of the parties, which was not possible where a unilateral contract was used. Specifically, Gaius states that "this involves that he [the judge] may take into account any counter-obligation due from the plaintiff under the same

98 Nicholas *Introduction to Roman Law* 162. Also see Zimmerman *Law of Obligations* 91; Kaser *Roman Private Law* 169; De Zulueta *Institutes of Gaius Part II* 151.

99 Zimmerman *Law of Obligations* 91.

100 Zimmerman *Law of Obligations* 91; Nicholas *Introduction to Roman Law* 162.

101 Nicholas *Introduction to Roman Law* 162.

102 Nicholas *Introduction to Roman Law* 162.

103 Van Warmelo *Principles of Roman Civil Law* paras 424, 699-704; Watson *Law of the Ancient Romans* 6; Nicholas *Introduction to Roman Law* 162 n 3. However, as mentioned in the previous article, the *exceptio doli* was introduced in 66 BC when the *bona fide iudiciae* already existed (see Du Plessis 2019 *PELJ* 21).

104 Also referred to as synallagmatic contracts (Van Warmelo *Principles of Roman Civil Law* para 441).

105 Nicholas *Introduction to Roman Law* 162; Van Warmelo *Principles of Roman Civil Law* para 441.

106 See the discussion in Du Plessis 2019 *PELJ* 14-15.

transaction, and may condemn the defendant only in the difference."[107] Schermaier[108] argues that this required the judge to look at the relationship between the parties "in its origin and all its effects, within the framework of all surrounding circumstances and the conduct of the parties".

Although the judge would attempt to achieve justice and fairness between the parties, it is important to note that the judge would not consider the social and economic position or bargaining power of the parties when determining what would be considered fair and equitable:

> The Roman lawyers worked within the framework of the existing social and procedural structures. Problems resulting from unequal bargaining power fell outside their sphere of competence and experience – as did social reform or social engineering in general.[109]

Nevertheless, Winkel[110] argues that the concept of *bona fides* did provide the judge with the necessary discretion to "take forms of undue influence or duress into account and so protect a weaker party". Hence *bona fides* could be used to protect a weaker party against exploitation by a stronger party and ensure justice and fairness between the parties. However, good faith did not focus on addressing the greater political, social and economic inequalities prevalent in Roman society itself. In other words, although *bona fides* could be used to protect a weaker party against exploitation by a stronger party in specific instances, it was not used to address the underlying unequal relationship between the parties in order to achieve a more egalitarian society. As Kelly eloquently remarks:[111]

> [T]he end result was not to turn the Republic into an egalitarian democracy in the modern sense. In the late Republic, wide differences of wealth and prestige existed … and political power was shared and disputed among a relatively small number of important families, who exercised it by operating a complicated system of alliance and dependence.

3.2 uBuntu*: Bringing about a more humane and egalitarian society*

It has been argued that the concept of fairness in the common law of contract should encapsulate the values from both good faith and *ubuntu*.

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107 Gaius *Inst* 4 61 (quoted from De Zulueta *Institutes of Gaius Part I*). Also see Schermaier "*Bona Fides* in Roman Contract Law" 82; Nicholas *Introduction to Roman Law* 164.

108 Schermaier "*Bona Fides* in Roman Contract Law" 84 n 129. Also see Zimmerman *Law of Obligations* 140, 428; Kaser *Roman Private Law* 174-175.

109 Zimmerman *Law of Obligations* 349-350.

110 Winkel 2010 *Fundamina* 578-579.

111 Kelly *Roman Litigation* 1.

Hence it is necessary to investigate what values these two concepts share, as well as how their values differ.

One important similarity between good faith in Roman law and *ubuntu*'s emerging role in the common law of contract has already been identified. It has been shown how both concepts can be used as an open norm to correct and supplement the existing law where justice requires it. The court in *Botha v Rich* referred to this link between reciprocity and the principle of good faith and held that good faith "contains the necessary flexibility to ensure fairness."[112] The Court's statement is a confirmation of the historic nature of good faith to correct and adapt the existing laws where enforcing such laws would lead to injustice. It also aligns with the role of *ubuntu* as an open norm, as discussed in the previous article.[113]

However, there is one important aspect in which the values of these norms differ from each other. While good faith was employed to promote justice and fairness between the two contracting parties only, *ubuntu* goes further in that it also promotes the achievement of an egalitarian society. In other words, while good faith was not used to promote greater equality between the community members of Roman society, *ubuntu* does support the ideal of social justice and the promotion of a more egalitarian society in South Africa.[114]

The fact that *ubuntu*, as a legal concept, promotes both justice between the parties as well as a concern with the well-being of the community as a whole can be identified in Justice Langa's[115] description of *ubuntu* in *S v Makwanyane*:

> It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

112 *Botha v Rich* 2014 4 SA 124 (CC) para 45 (hereafter *Botha v Rich*).

113 Du Plessis 2019 *PELJ* 25-28.

114 More "Philosophy in South Africa" 156; Mokgoro 1998 *PELJ* 3.

115 *S v Makwanyane* 1995 3 SA 391 (CC) para 224 (hereafter *S v Makwanyane*). Louw 2013 *PELJ* 74 also refers to this definition of *ubuntu* when dealing with fairness in contracts.

Therefore, *ubuntu* (like good faith in Roman law) entails a balancing of the reciprocal rights and obligations between the contracting parties themselves. As such, it requires a court to analyse the relationship between the parties "in its origin and all its effects, within the framework of all surrounding circumstances and the conduct of the parties".[116] However, in contrast to good faith in Roman law,[117] *ubuntu* also encompasses a responsibility and duty of the individual to the greater community and aims to promote the political, social and economic interests of the community.[118] This can be identified where Justice Langa speaks of a corresponding duty towards each member of the community and the "sharing and co-responsibility and the mutual enjoyment of rights by *all.*"[119] In other words, *ubuntu* is also concerned with the realisation and promotion of the socio-economic well-being of all the community members.[120]

This idea of *ubuntu* can also be identified in *Port Elizabeth Municipality v Various Occupiers,* which deals with the interpretation and application of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 ("PIE").[121] Justice Sachs held that:

> The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.[122]

The fact that Justice Sachs states that *ubuntu* "combines individual rights with a communitarian philosophy" indicates that *ubuntu* would entail more

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116 Cf the quote by Schermaier on the role of good faith in Roman law at n 108 above. This is supported by Louw 2013 *PELJ* 66 n 92, who views *ubuntu* as "a mechanism for the infusion and promotion of a culture of co-operation in our contract law" and argues that such an approach "would be in line with the courts' recognition of an ethical standard of good faith based in *ubuntu*, and which would demand mutual respect for the interests and expectations of contracting parties." Also see Hawthorne 2008 *SAPL* 89-90.

117 Cf the discussion in the text at n 109 above.

118 Rautenbach "Exploring the Contribution of *Ubuntu*" 296.

119 *S v Makwanyane* para 224 (my emphasis). The inseparable link between *ubuntu* and social justice can also be identified in Justice Madala's description of *ubuntu* in *S v Makwanyane* para 237.

120 Also see *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) para 163 referring to *S v Makwanyane* para 224 as quoted in n 119 above.

121 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (hereafter *Port Elizabeth Municipality v Various Occupiers*).

122 *Port Elizabeth Municipality v Various Occupiers* para 37.

than a balancing of interests between the parties only, but would also be concerned with the interests of the greater community. Specifically, Justice Sachs speaks of the obligation to "balance competing interests in a principled way and to promote the constitutional vision of a caring society."[123] So, although good faith historically refers to justice, reasonableness and fairness between the parties (without reference to their political, social or economic status), *ubuntu* as an underlying constitutional value requires the promotion of fairness in contracts that takes account of the ideas of restorative justice and the move towards a more egalitarian society, which would include a consideration of the political, social and economic status of the parties. This means that *ubuntu* does not only require that justice should be done between the parties with reference to their specific relationship; it would also require cognisance of the greater political, social and economic environment in which the transaction took place (i.e. the constitutional framework). Louw argues that the intention of the parties should be in line with the constitutional value system and its ambitions for an ideal constitutional community.[124] Although he does not refer to *ubuntu*, it can be argued that his view accords with this idea of *ubuntu*, especially as he later argues that "[i]n the context of the constitutional values (and, especially *ubuntu*) this translates to Woolman's succinct observation that '[o]ne can contract only to do those things that are constitutionally permitted.'"[125]

The most prominent example of how *ubuntu* has influenced the common law of contract in this way can be found in *Barkhuizen v Napier.* In the introduction of the first article it was shown how the Constitutional Court linked the public policy consideration of simple justice between man and man to *ubuntu* rather than good faith.[126] The Court then laid down a two-part test for determining the fairness of a contract clause.[127] The first part of the test concerns the fairness of the clause itself and requires a balancing act between the policy considerations of freedom and sanctity of contract

123 Although these comments were made in connection with the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 ("PIE") only, it can be argued that they reflect the greater ideals of transformative constitutionalism in the private sphere.

124 Louw 2013 *PELJ* 69.

125 Louw 2013 *PELJ* 77 quoting Woolman 2008 *SALJ* 23. He further refers to Naudé's view that "'Fairness' entails not only fairness between the parties, but also doing justice in the eyes of the community as a whole. This requires the advancement of desirable goals of collective social welfare" (Louw 2013 *PELJ* 77-78 quoting Naudé 2003 *SALJ* 827-828).

126 *Barkhuizen v Napier* 2007 5 SA 323 (CC) (hereafter *Barkhuizen v Napier*) para 51 as discussed in Du Plessis 2019 *PELJ* 4.

127 *Barkhuizen v Napier* para 56.

which gives effect to the constitutional values of freedom and human dignity on the one hand, and another policy consideration as reflected in a constitutional right or value (*in casu* the right to access to justice) in support of the non-enforcement of the contract on the other.[128] This examination is objective in nature as it deals with these values on an abstract level, as reflected in the terms of the contract itself.[129] The Court further held that if the clause objectively does not violate public policy, it must be determined whether the clause itself violates public policy in the light of the relative situations of the contracting parties, which would include an assessment of the bargaining positions of the parties.[130] This determination is subjective in nature.[131] This subjective enquiry promotes socio-economic rights and substantive equality, and therefore it has been argued that this extension was inspired by *ubuntu*.[132] The second part of the test for fairness investigates whether, in spite of the fact that the clause itself does not violate public policy, enforcement of the clause would be fair in the light of the circumstances which prevented compliance therewith.[133] Again, the second part of the test is subjective in nature and promotes substantive equality.[134] Accordingly, it too is inspired by *ubuntu*.[135]

The concern for the promotion of social justice and a more egalitarian society can also be identified in *Botha v Rich*. The court referred to its constitutional obligation in terms of section 39(2) to develop any legislation in accordance with the spirit, purport and objects of the Bill of Rights as well as the constitutional ideal of transforming "a society based on injustice and exclusion from the democratic process to one founded on the supremacy of the Constitution, the rule of law and the values of human dignity and equality".[136] The court also argued for an interpretation that would promote equality between the parties, which would indicate that the court was conscious of the constitutional aim of a more egalitarian society.[137] Clearly,

128 *Barkhuizen v Napier* para 57.

129 *Barkhuizen v Napier* para 59 where the Court refers to the "objective terms" of the contract. Also see Hawthorne 2010 *De Jure* 398; Botha 2009 *Stell LR* 212.

130 *Barkhuizen v Napier* para 59.

131 Wallis 2016 *SALJ* 552-553; Hawthorne 2010 *De Jure* 398.

132 Bhana and Broeders 2014 *THRHR* 175; Cornell and Muvangua "Introduction" 24; Hawthorne 2010 *De Jure* 400.

133 *Barkhuizen v Napier* para 56.

134 *Barkhuizen v Napier* para 59. Also see Wallis 2016 *SALJ* 552-553; Bhana and Meerkotter 2015 *SALJ* 504; Bhana 2014 *SAPL* 509.

135 See again the sources listed in n 132 above. See further Bennett, Munro and Jacobs *Ubuntu* 69, where the authors argue that *ubuntu* was used by the minority court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) to promote substantive equality in the law of contract.

136 *Botha v Rich* para 28.

137 *Botha v Rich* para 40.

this is in line with the idea of *ubuntu* that promotes social justice. Hence the court's judgment can be seen as an example of the harmonisation of *ubuntu* and good faith in the common law of contract in accordance with constitutional values (despite the fact that *ubuntu* is not mentioned).

4 Conclusion

Four themes have been discussed in order to investigate a more contextual legal history of good faith in Roman contract law in a way that could inform the emerging role of *ubuntu* in the South African common law of contract. In the first place, it was shown how good faith in Roman law was used to address legal pluralism and political, social and economic changes in the society and that *ubuntu* can be used in a similar way to legitimise the new legal system in South Africa. Secondly, it was argued that like good faith, which was used as an open norm to correct and adapt the existing rules of Roman law, *ubuntu* also requires a normative approach to the interpretation and application of the existing law. Thirdly, it was shown how the idea of good faith as an open norm in Roman law was inspired by Greek philosophy, and it was argued that *ubuntu* as an underlying value of the customary law can infuse good faith in the common law of contract in a similar fashion. Finally, an important distinction between the two concepts was identified. Although both concepts promote contractual justice between the parties, *ubuntu* entails a further duty to promote the social and economic well-being of the parties as well as of the greater community. Hence, in contrast to good faith, *ubuntu* is concerned with the promotion of substantive equality in private dealings.

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List of Abbreviations

AJICL	African Journal of International Comparative Law
Fundamina	Fundamina: A Journal of Legal History
PELJ	Potchefstroom Electronic Law Journal
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
SALJ	South African Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
Tul L Rev	Tulane Law Review