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*AGREEMENTS TO AGREE IN SOUTH AFRICAN LAW – A BALANCING ACT
BETWEEN CERTAINTY AND FAIRNESS*

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DECLARATION

I, PEGGY SCHOEMAN, declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

The recent Western Cape High Court decision in Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd (NO 1) 2012 (6) SA 96 (WCC) has once again brought to the fore the longstanding tension that exists between certainty and substantive fairness in the South African law of contract. Indwe dealt with an agreement to agree and whether such could be rendered enforceable despite there not being agreement on a deadlock-breaking mechanism nor an express undertaking to negotiate in good faith. The court in Indwe held that there was an enforceable preliminary agreement by implying the standards of good faith and reasonableness despite the mass of judicial precedent against such a course of action. In this way, the Indwe judgment firstly changes the position as to when an agreement to agree will be enforceable and secondly adopts a collectivist approach in the midst of an individualist-dominated judicial landscape. This paper will critique the court's decision with a view to finding a solution to the imbalance that exists between certainty and substantive fairness in the context of agreements to agree in particular and in the law of contract in general.

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I INTRODUCTION

The recent Western Cape High Court's decision in *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd (NO 1)*¹ (*Indwe*) has once again brought to the fore the longstanding tension between the two ideological worldviews underpinning our law of contract, namely the individualist and the collectivist, which in turn primarily centre on the need for certainty and the need for fairness respectively. *Indwe* dealt with an agreement to agree and whether such could be rendered enforceable despite there not being agreement on a deadlock-breaking mechanism nor an express undertaking to negotiate in good faith. The court held that there was – by implying the standards of reasonableness and good faith. Arguably, the court relied on the concept of good faith as a free-standing equitable remedy, and in so doing, not only changed the position as to when an agreement to negotiate a further agreement in good faith will be enforceable, but also adopted a collectivist approach in the midst of an individualist-dominated judicial landscape. This paper will look at the two seemingly contrasting positions adopted in the law of contract and how these two positions can and should be reconciled.

In this paper, I analyse the decision in *Indwe* with a view to teasing out the imbalance that exists between certainty and substantive fairness in the law of contract. In this way, I shall argue for a more balanced approach in general and a more holistic and purposive interpretation and application of good faith in particular. In Part II, I will begin by setting out the High Court's decision in *Indwe*. Thereafter, in Part III, I will critique the decision in *Indwe* as follows: in a) I shall discuss the two ideological worldviews underpinning our law of contract in order to contextualise the tension between certainty and substantive fairness which the court in *Indwe* unearths and to further illustrate the slant in favour of a paradigm based on certainty. In b) I will outline the import of good faith as an effective conduit for substantive fairness. I will further give an overview of its unfortunate interpretation and application as a result of the imbalance that exists between certainty and fairness in our contractual jurisprudence. Against this backdrop, I will argue that Blignaut J's importation of good faith as a free-standing equitable mechanism, despite the mass of opposing precedent, is sound as it provides an effective

¹ 2012 (6) SA 96 (WCC).

solution to the complexities faced when dealing with agreements to agree – namely whether to uphold freedom of contract or its corollary – the freedom *not* to contract. In subsection c) I will discuss the law as it stands with regard to agreements to agree and analyse the contrasting application of good faith within the context of unilateral and bilateral discretions respectively. In this regard, I shall argue that the Western Cape High Court's extension of the position in unilateral discretions (which turns on the standards of reasonableness and good faith) to that of agreements to agree is logical and necessary. In d) I shall analyse the net effect of the *Indwe* judgment, namely its adoption of relational contract theory, as opposed to choice theory which is premised on certainty. I shall go on to argue that relational contract theory offers a viable solution to the current imbalance in our law. In e) I shall set out the recent decision of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*² (*Everfresh*) where the Constitutional Court suggested that the common law requires development so as to incorporate substantive fairness into the contractual sphere, pertinently in the area of agreements to agree. I shall discuss the import of this judgment for the *Indwe* decision, which will be heard in the Supreme of Appeal in due course. Finally, in subsection f) I shall sum up the implications of the *Indwe* decision in light of the discussions set out in Part III.

II *INDWE AVIATION V PETROSA*

Indwe Aviation Proprietary Limited (Indwe) provided aviation services solely to Petroleum Oil and Gas Corporation of South Africa (PetroSA) in terms of a contract which was due to expire on 30 June 2010. The contract had previously been extended for two 12 month periods. There were protracted negotiations between PetroSA and Indwe to extend the original contract for a third time, which began in March 2009 and culminated in May 2010. The following is of relevance in this regard: on 27 May 2010, PetroSA wrote a letter to Indwe in which PetroSA's Board advised Indwe that its management would negotiate a further one year contract and requested Indwe to send through its proposed terms for such a contract urgently. On 4 June 2010, Indwe accepted the extension of one year and proposed a one year contract on substantially the

² 2012 (1) SA 256 (CC).

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same terms as the original contract.³ There was no express contractual provision that the parties would negotiate in good faith and no dispute resolution mechanism was agreed upon in PetroSA's letter and the corresponding acceptance thereof. There was no response to Indwe's acceptance of the Board's proposal of a one year extension until 28 June 2010. On 29 June 2010 there was a back and forth of correspondence whereby PetroSA asked if Indwe would be willing to continue rendering services pending Board approval of the extension and Indwe agreed. On 30 June 2010 (the day of expiry), PetroSA informed Indwe that they should cease all operations by midnight, that there would be no extension and that the South African Air Force was to be the new service provider.⁴ Indwe brought an urgent interim interdict seeking the continuation of its services.

The court had to decide whether PetroSA's letter and Indwe's acceptance thereof constituted a valid and enforceable agreement to agree in order to establish a *prima facie* right for purposes of granting the interdict. This involved a two-stage enquiry. Firstly, the court had to assess whether the law could recognise such a preliminary agreement as a valid and enforceable agreement to agree where there was no express contractual undertaking to negotiate in good faith nor an agreed upon deadlock-breaking mechanism. Secondly, if the law did recognise such an agreement, the *Indwe* court had to decide whether there was in fact a binding preliminary agreement reached between Indwe and PetroSA.⁵

In respect of the first enquiry, Blignaut J accepted the position as laid down in the leading case of *Southernport Developments (Pty) Ltd v Transnet Ltd*⁶ (*Southernport*) – in limited instances an agreement to negotiate a further agreement may be rendered sufficiently certain in order to be enforceable. Blignaut J was of the view that the *Southernport* judgment denoted a more 'flexible approach' with apparent reference to previous judgments where it was held that agreements to agree were in general too vague and uncertain to be enforceable.⁷

³ Indwe however expressed concerns about the financial implications of a one year extension only, as opposed to four years which was previously negotiated, and proposed certain conditions (a higher rate, fee and other conditions).

⁴ The facts are set out comprehensively in *Indwe* (note 1 above) paras 4--18.

⁵ *Indwe* (note 1 above) paras 27, 28 and 31.

⁶ 2005 (2) SA 202 (SCA) para 17; *Indwe* (note 1 above) para 23.

⁷ *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 35.

In the *Southernport* decision, the Supreme Court of Appeal approved the principles expressed in the New South Wales Court of Appeal judgment of *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd*,⁸ which formed the basis of *Southernport*'s exceptions as to when agreements to agree would be rendered valid and enforceable.⁹ The exception applicable in *Southernport* was the focus of the discussion in *Indwe*, namely an agreement to agree will be elevated to a satisfactorily certain and therefore enforceable agreement where the parties have agreed on a dispute resolution mechanism. The rationale in this regard is that such a provision would refer any dispute as to the content or otherwise of the agreement to agree to an independent third party whose decision would be final and binding on the parties.¹⁰

In the same vein, the court in *Indwe* further dealt with the New South Wales Court of Appeal judgment of *United Group Rail Services Limited v Rail Corporation New South Wales*.¹¹ In this case the appeal court held that an agreement to agree was enforceable in certain circumstances – one of which was where a provision on dispute resolution was agreed upon by the parties.¹² Bignaut J held that this judgment also supports the general proposition, as laid down in the judgments of *Southernport* and *Coal Cliff Collieries v Sijehama (Pty) Ltd* – that in certain cases, an agreement to agree may be enforceable.¹³ On this basis, the *Indwe* court accepted the principles laid down in *United Group Rail Services*.

Having accepted that *United Group Rail Services* is in line with our law, *Indwe* distinguished its factual matrix from that in *United Group Rail Services*' in two respects. Whereas in the latter case the contract contained a clause in terms of which the parties agreed to negotiate in good faith¹⁴ as well as an agreed upon dispute resolution mechanism,¹⁵ these two aspects were not present in the *Indwe* case.

⁸ (1991) 24 NSWLR 1.

⁹ *Southernport* (note 6 above) para 16.

¹⁰ *Indwe* (note 1 above) para 23.

¹¹ 2009 NSWCA 177.

¹² *Indwe* (note 1 above) para 24.

¹³ *Indwe* (note 1 above) para 25.

¹⁴ *Indwe* (note 1 above) para 26.

¹⁵ *Indwe* (note 1 above) para 29.

In respect of the first distinguished aspect – the court in *Indwe* found that the lack of an express undertaking by the parties to negotiate in good faith was not fatal to Indwe’s case as the ‘[t]he standards of reasonableness and good faith can readily be implied in a suitable case’.¹⁶ In support of such a proposition, Blignaut J referred to the standard of the *arbitrium boni viri* (the judgment of a reasonable person) which has been applied by our courts to elevate an otherwise vague contractual clause to that of an enforceable provision.¹⁷ In this regard, the court relied on three cases – *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*,¹⁸ *NBS Boland Bank Ltd v One Berg River Drive CC*; *Deeb v ABSA Bank Ltd*; *Friedman v Standard Bank of SA Ltd*¹⁹ and *Erasmus and Others v Senwes Ltd and Others*²⁰ as authority for this proposition.²¹

The court quoted with approval a passage from *Benlou* to the effect that, where an agreement grants one party a discretionary entitlement, in this case to incur expenditure, such a discretion, unless expressly otherwise agreed, would be subject to the implied standard of *arbitrium boni viri*. In this way, a unilateral discretion is to be exercised according to the standards of that which a reasonable man in the same position would do.²² The court in *Indwe* went on to quote with approval *NBS Boland* where the court expressed the same sentiments as in the judgment of *Benlou*.²³ Blignaut J concluded by applying *Erasmus* in which case that court expanded on the content of such a standard – as the ‘decision of a good man’ and a ‘reasonable decision’.²⁴

Based on the reliance on the abovementioned case law, Blignaut J held that the standards of the *arbitrio bono viri* may, in principle, be applied to an agreement to agree or a bilateral discretion. As such, parties’ conduct in their negotiations must be tested against the standards of honesty and reasonableness, unless expressly agreed to the contrary.²⁵

¹⁶ *Indwe* (note 1 above) para 27.

¹⁷ *Indwe* (note 1 above) para 27.

¹⁸ 1993 (1) SA 179 (A).

¹⁹ 1999 (4) All SA 183 (A).

²⁰ 2006 (3) SA 529.

²¹ *Indwe* (note 1 above) para 28; see further *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) All SA 208 (A).

²² *Benlou* (note 18 above) 187J--188C.

²³ *NBS Boland* (note 19 above) para 25.

²⁴ *Erasmus* (note 20 above) 538E--F; see further *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 3 SA 544 (SCA) para 8.

²⁵ *Indwe* (note 1 above) para 28.

In respect of the second distinguished aspect, namely the absence of a dispute resolution mechanism, this was also held not to be fatal to Indwe's case. Blignaut J's reasoning was that an arbitrator or other third party's role would be to apply the standards of reasonableness and good faith to the parties' conduct and a court's application of these standards would not in principle differ.²⁶ The absence of a dispute resolution mechanism may therefore be remedied by the court's application of the standards of reasonableness and good faith which, as Blignaut J had already held, could be readily implied by a court in appropriate cases.²⁷

In the result, the court held that Indwe had met the threshold of establishing a *prima facie* right, in its pursuit of an interim interdict, namely that the present preliminary agreement was not too vague so as to be unenforceable.²⁸

In respect of the second enquiry, the court held that there was, on a *prima facie* basis, a binding preliminary agreement to negotiate based on the surrounding circumstances. These included the long-standing relationship, that the negotiations were at an advanced stage and the generally common cause facts – including that Indwe had accepted PetroSA's offer of a further one year contract, that none of the terms proposed by Indwe for such were objected to in PetroSA's papers, and that Indwe's one year contract offer was submitted to PetroSA's Board and recommended for approval.²⁹

Based on these findings, Blignaut J assessed the factual matrix before him and found that the negotiations on the part of PetroSA were not *bona fide*.³⁰ In this regard, the court did not accept PetroSA's argument that its Board was unable to pass the resolution containing Indwe's one year contract proposal timeously.³¹ The court held that the

²⁶ *Indwe* (note 1 above) para 30.

²⁷ *Indwe* (note 1 above) para 27.

²⁸ On the basis of this primary finding, namely that the standards of reasonableness can be imported into the arena of bilateral discretions in order to render the said agreement to agree certain enough to be valid and enforceable, the court held further that PetroSA's actions prior to the conclusion of the said valid preliminary agreement constituted administrative action as 'public money was being spent by a public body in the public interest' in *Indwe* (note 1 above) paras 44--45. This secondary finding forms part of the *ratio* of the case. It is however not the focus of this paper, and as it is a secondary finding, premised on the finding that the parties concluded a valid agreement to agree, this part of the *ratio* is separable and shall not be discussed.

²⁹ *Indwe* (note 1 above) paras 34--35.

³⁰ *Indwe* (note 1 above) para 36.

³¹ Namely that its Board was unable to meet before the date of expiry, and so a draft resolution containing the contract was sent by way of a round-robin resolution to all Board members requesting their responses.

Board's failed attempt to adopt this resolution did not constitute a rejection thereof and it was still open to the Board to adopt or reject the resolution.³² The fact that PetroSA managed to conclude a contract with the South African Air Force (which was only disclosed to Indwe at the very last moment) added to this lack of *bone fide* on the part of PetroSA, and the court drew the inference that this engagement was in fact the real reason behind the failure to approve Indwe's one year extension.³³

Accordingly, the court held that PetroSA's conduct in the negotiations had not met the standards of reasonableness and good faith³⁴ and Indwe was therefore successful in establishing a *prima facie* right to enforce the agreement to agree with PetroSA.³⁵ The court thereafter found that the remaining requirements of an interim interdict had been met and granted Indwe's its interim relief³⁶ – an interdict restraining PetroSA from employing an alternative service provider and further an order that PetroSA allow Indwe to continue providing aircraft services on the terms and conditions which applied at 30 June 2010.³⁷ Leave to appeal has been granted to the Supreme Court of Appeal.³⁸ As at the writing of this paper, the appeal had not been heard.

III CRITIQUE OF *INDWE*

a) The two ideological worldviews underpinning the South African law of contract. The court in *Indwe* dealt with an agreement to agree – a *pactum de contrahendo*, which is 'simply an agreement to make a contract in the future.'³⁹ Such a preliminary agreement can involve either a unilateral or a bilateral discretion – the court in *Indwe* dealing with the latter. In terms of our law of contract, both contractual discretions fall

PetroSA's corporate governance rules dictate that a round robin resolution must be agreed to by all members to be adopted. The resolution was not adopted as not all members consented thereto, and as a result the original contract came to an end, and no further contract came into being. *Indwe* (note 1 above) para 37.

³² *Indwe* (note 1 above) para 37.

³³ *Indwe* (note 1 above) para 36.

³⁴ *Indwe* (note 1 above) para 37.

³⁵ *Indwe* (note 1 above) para 39.

³⁶ *Indwe* (note 1 above) paras 53--54.

³⁷ *Indwe* (note 1 above) para 1.

³⁸ See *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa and Another* (unreported judgment) (A4610/2011, 14366/2010) [2011] ZAWCHC 457 (20 September 2011); see further *Indwe Aviation (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd and Another* 2012 (6) SA 110 (WCC).

³⁹ *Hirschowitz v Moolman* 1985 (3) SA 739 (A) 765I.

to be tested against the requirement of certainty in order to assess whether such a preliminary arrangement can be enforced by a court or not. Certainty, Bhana explains, entails that a court is able to ascertain the exact content of an agreement, and will not therefore enter the terrain of ‘making agreements for parties’.⁴⁰

It is trite that certainty is regarded as a central and fundamental principle underpinning the law of contract in South Africa – it informs many of the hailed cornerstones of our law, namely *pacta sunt servanda*, consensualism and freedom of contract.⁴¹ The decision in *Indwe* is significant as it questions the absolute nature of certainty in the context of bilateral discretions, and in this way, triggers an interrogation of the very ideology underlying our law of contract which favours certainty above all else.⁴² A discussion of the import of this ideological worldview – often referred to as individualism or classical liberalism and its counterpart, collectivism, is necessary in order to contextualise the tension between certainty and substantive fairness that the court in *Indwe* unearths.

The individualist paradigm, as the dominant worldview underpinning contract law, requires that the law be certain, predictable and structured.⁴³ It is based on the assumption that people are equal and capable of looking after themselves and therefore choices are voluntary. As such, the law’s role is simply to facilitate these freedoms.⁴⁴ Were the law to deviate from this function, so the classical logic goes, peoples’ freedom and autonomy would be undermined as courts would be ‘creating contracts for

⁴⁰ H Schulze 'What is a lease without rent?' (2005) *JBL* 51, 53; Bhana, D 'The contract of pre-emption as an agreement to agree' (2008) 71 4 *THRHR* 568, 576 and 582; Du Plessis, HM 'The Unilateral Determination of Price – A question of certainty or public policy?' (2013) 16 3 *PER* 67, 69.

⁴¹ Hawthorne, L 'Justice Albie Sachs' contribution to the law of contract: recognition of relational contract theory' (2010) 25 1 *SA Public Law* 80, 83--85.

⁴² Hawthorne, L 'Distribution of wealth, the dependency theory and the law of contract' (2006) 69 1 *THRHR* 48, 63 wherein the author submits that the classical model has been elevated to that of an ideology; see Naude, T 'The function and determinants of the residual rules of contract law' (2003) 120 4 *SALJ* 820, 821.

⁴³ Hawthorne (note 41 above) 83--85.

⁴⁴ This is aptly termed choice theory. Hawthorne, L 'Materialisation and Differentiation of Contract Law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention?' (2008) 71 3 *THRHR* 438, 441: 'equality (albeit formal equality) between contracting parties is one of the unwritten cornerstones of classical contract law'; Smith, SA 'Future Freedom and Freedom of Contract' (1996) 59 2 *MLR* 167, 177; Pretorius, C 'Individualism, Collectivism and the Limits of Good Faith' (2003) 66 4 *THRHR* 638, 640; Davis, D 'Transformation: the constitutional promise and reality' (2010) 26 1 *SAJHR* 85, 92--93.

parties'.⁴⁵ As Moseneke succinctly states: 'It is meant to be a value-neutral set of muscular but predictable rules that curb uncertainty whilst inspiring confidence in the market place. For that reason, rules of contract ordinarily permit little or no judicial discretion.'⁴⁶

Critically, the classical legal framework is perceived as being inherently equitable⁴⁷ and our courts have confirmed this – often praising the moral nature of a system founded on certainty.⁴⁸ The model does however justify limited judicial intervention so as to achieve formal or procedural justice and equity,⁴⁹ namely where there is duress, fraud, mistake or illegality.⁵⁰

At the other end of the ideological spectrum is the collectivist paradigm, which perceives the law's role in the contractual arena in a different light altogether: as a means of ensuring a substantively just, fair and equitable society. In recognition of a society which is characterized by the haves and the have-nots, and, particularly in South Africa, is built on substantive and systemic inequality, the collectivist worldview understands a person's autonomy as largely dependent on whether or not one is capable of pursuing valuable life choices.⁵¹ As such, this model values reciprocity, co-operation and a commitment to ethics in society. These values translate into a need for substantive fairness and reasonableness, as opposed to procedural or formal justice, in the law of contract. In this way, the theory advocates that the content of that which is agreed on is

⁴⁵ Pretorius (note 44 above) 640; Hawthorne (note 42 above) 48; Lewis, J 'Fairness in South African contract law' (2003) 120 2 *SALJ* 330, 330; Davis, D 'Private law after 1994: Progressive development or schizoid confusion?' (2008) 24 2 *SAJHR* 318, 324; Bhana, D & Pieterse, M 'Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited' (2005) 122 4 *SALJ* 865, 866--867.

⁴⁶ Moseneke, D 'Transformative Constitutionalism: Its implications for the law of contract' (2009) 20 1 *STELL LR* 3, 9; see further Bhana, D 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 2 *SAJHR* 300, 303--304.

⁴⁷ *Bank of Lisbon and South Africa Ltd v Ornelas* 1988 (2) All SA 393 (A) 409: 'Roman-Dutch law is itself inherently an equitable legal system.'

⁴⁸ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 23; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 87; *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* 1977 (4) SA 494 (N) 505F--G; Pretorius, C 'The basis of contractual liability in South African law (1)' (2004) 67 *THRHR* 179, 183; Kruger, M 'The role of public policy in the law of contract revisited' (2011) 128 4 *SALJ* 712, 737--738; Lubbe, G 'Taking fundamental rights seriously: the bill of rights and its implications for the development of contract law' (2004) 121 2 *SALJ* 395, 414.

⁴⁹ See generally Hawthorne, L 'The "new learning" and transformation of contract law: reconciling the rule of law with the constitutional imperative to social transformation' (2008) 23 2 *SA Public Law* 77.

⁵⁰ See Christie, RH *The Law of Contract in South Africa* 6 Ed (2011) LexisNexis: Durban chapters 7--10.

⁵¹ Albertyn, C 'Substantive equality and transformation in South Africa' (2007) 23 2 *SAJHR* 253, 254; Pieterse, M 'The interdependence of rights to health and autonomy in South Africa' (2008) 125 3 *SALJ* 553, 553.

substantively just and fair. As such, the theory is not as structured and predictable as the classical model but is rather more accommodating and flexible in nature.⁵² The collectivist worldview urges courts to adopt purposive normative reasoning which is contextualised and therefore sensitive to the facts and invoke equitable mechanisms so as to police substantively unfair contracts.⁵³

What is most significant with respect to the collectivist worldview is that it has constitutional weight – the Bill of Rights finds application vertically *and* horizontally⁵⁴ and therefore applies to both the public and private domains.⁵⁵ It is trite that the Constitution of the Republic of South Africa, 1996 represents a transformative agenda, underpinned by the pursuit of substantive justice and fairness in society.⁵⁶ As such, the Constitution mandates a change to the classical *status quo* which ensures procedural or formal justice only. However, as shall be discussed in section b) below, this constitutional mandate has not had a meaningful impact on the judicial approach – the courts have fervently continued to adopt classical reasoning.⁵⁷ Where collectivist tendencies have emerged, the courts have been clear in their resistance – were courts to introduce concepts such as substantive equity and fairness into contracts, there would be inconsistency in how this was done which would fundamentally erode certainty and result in a society which was unpredictable and disorderly.⁵⁸ This in turn, it is argued, would have a negative effect on the capitalist market which is based on a robust system

⁵² Naude (note 42 above) 823.

⁵³ Pretorius (note 44 above) 641.

⁵⁴ Sections 8, 39(2) and 173 of the Constitution. See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); see generally Woolman, S & Davis, D 'The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *SAJHR* 361; Van der Walt, J 'Progressive indirect horizontal application of the bill of rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *SAJHR* 341, 345; Klare, KE 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, 179--180; Bhana, D 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29 2 *SAJHR* 351, 351--354.

⁵⁵ Moseneke (note 46 above) 4.

⁵⁶ See Davis, DM & Klare, K 'Transformative constitutionalism and the common and customary law' (2010) 26 3 *SAJHR* 403, 404 and the authorities cited in footnotes 2--3; Davis (note 44 above) 88; Hawthorne (note 49 above) 78.

⁵⁷ See *Burger v Central SA Railways* 1903 TS 571 576 which set the classical tone and which has been followed, with few exceptions, ever since; Hawthorne (note 42 above) 50--51; Barnard, AJ 'A different way of saying: on stories, text, a critical legal argument for contractual justice and the ethical element of contract in South Africa' (2005) 21 2 *SAJHR* 278, 290; Lewis (note 45 above) 332; Barnard, AJ 'Death, mourning and melancholia in post-modern contract – a call for (re)establishing contracts connection with the ethical' (2006) 17 3 *STELL LR* 386, 387--388.

⁵⁸ Barnard (note 57 above) 282; Lewis (note 45 above) 344.

of contractual rules;⁵⁹ certainty should not be sacrificed on the altar of subjective concepts such as fairness.⁶⁰

Against this backdrop, the decision in *Indwe* is significant for three reasons. Firstly it imports substantive fairness into the contractual arena despite the marked judicial resistance against any erosion of certainty in our law of contract. The court achieves this by implying the doctrine of good faith as a free-standing equitable mechanism, which, I shall argue, provides an effective solution to the shortcomings of choice theory when dealing with agreements to agree – namely whether to uphold freedom of contract or its corollary – the freedom *not* to contract.⁶¹ Secondly, the *Indwe* decision changes the position as to when agreements to agree will be rendered valid and enforceable, and in so doing, extends the position vis-à-vis unilateral discretions to that of bilateral discretions. Thirdly the court in *Indwe* effectively implements relational contract theory or what is termed the ‘new learning’ in its reasoning.⁶² I shall argue that such a theory constitutes a viable solution to the seemingly irreconcilable need for certainty on the one hand and the constitutional demand for substantive fairness on the other hand in our law. Each of these aspects shall be dealt with separately.

- b) The evolution and treatment of good faith as a conduit for substantive fairness, and why good faith is well suited to solve the problems encountered by bilateral discretions

The *Indwe* court adopted and applied the standards of reasonableness and good faith to the preliminary agreement in question, despite there not being any agreement to negotiate in good faith nor there being agreement on a third party deadlock-breaking mechanism, which would apply these standards. This is noteworthy not only because the court did so despite the mass of judicial precedent rejecting this course of action, but also because the court in so doing implicitly recognises the failure of the classical framework to address the complexity inherent in bilateral discretions. In this section, I shall firstly I outline the content of good faith as an effective conduit for substantive

⁵⁹ Hawthorne (note 49 above) 80.

⁶⁰ The classical logic remains strong – see Brand J’s comment at Brand, FDJ ‘The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution’ (2009) 126 1 *SALJ* 71, 88.

⁶¹ Bhana (note 40 above) 582; du Plessis (note 40 above) 95 where the author refers to ‘forfeiting’ one’s autonomy in the context of unilateral discretions.

⁶² Hawthorne (note 41 above) 90.

fairness. Thereafter, I shall give an overview of the unfortunate judicial treatment of good faith, as an agent of the collectivist worldview. Lastly I shall examine why good faith is a suitable equitable mechanism to address the shortcomings of the classical framework when applied in the context of agreements to agree.

i) The doctrine of good faith as a conduit for substantive fairness

Good faith is an equitable mechanism or ‘open norm’⁶³ which seeks to infuse fairness and reasonableness into the contractual environment at a substantive, as opposed to procedural, level. At its most basic level, good faith is a collectivist concept which simply requires the parties to an agreement to act honestly and reasonably toward each other.⁶⁴ The minority judgment of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*⁶⁵ provides a holistic and progressive understanding of this doctrine,⁶⁶ which deserves repetition. Hutchison summarises Olivier JA’s analysis as follows:

There is a close link . . . between the concepts of good faith, public policy and the public interest in contracting. This is because the function of good faith has always been to give expression in the law of contract to the community’s sense of what is fair, just and reasonable. The principle of good faith is thus an aspect of the wider notion of public policy, and the reason why the courts invoke and apply the principle is because the public interest so demands. Good faith accordingly has a dynamic role to play in ensuring that the law remains sensitive to and in tune with the views of the community.⁶⁷

The judgment of Davis J in *Mort v Henry Shields-Chiat*⁶⁸ is further noteworthy in this regard. Here the court gave credence to the import of good faith in our new constitutional order. The court held that the court’s constitutional directive to develop the common law in line with the Bill of Rights has mandated that the content of good faith be interpreted in a manner consistent with the fundamental rights underpinning the

⁶³ Hawthorne (note 49 above) 85.

⁶⁴ Bhana & Pieterse (note 45 above) 890.

⁶⁵ 1997 (4) SA 302 (SCA).

⁶⁶ Bhana & Pieterse (note 45 above) 891.

⁶⁷ Hutchison, D ‘Non-variation clauses in contract: Any escape from the Shifren straitjacket?’ (2001) 118 4 *SALJ* 720, 742; see further Cockrell’s description as ‘the epitome of a legal standard that embodies communitarian values of altruism, care and concern’ in Cockrell in Pretorius (note 44 above) 643.

⁶⁸ 2001 (1) SA 464 (C).

Constitution.⁶⁹ Moreover, it has been argued that good faith equates closely to the concept of ubuntu, meaning ‘a person is only person through his relationship to others’,⁷⁰ which as an underlying value is further capable of bringing together the disconnected ideologies underpinning the common law.⁷¹ Overall, Bhana states that good faith is fundamentally premised on open value-based principles such as justice, fairness and reasonableness, and as a result, is capable of facilitating and fostering normative purposive reasoning.⁷² For the reasons set out above, it is my view that good faith stands as an effective potential agent for substantive fairness; an equitable mechanism capable of permeating the contractual sphere with substantive fairness.

For purposes of this paper, I shall use the concepts of public policy⁷³ and the *arbitrium boni viri*⁷⁴ as equivalent notions to that of good faith as interpreted in the cases referred to above – namely collectivist equitable mechanisms which seek to infuse substantive fairness into the contractual legal framework.⁷⁵

- ii) The judicial treatment of good faith as an open norm and its current standing in the law

A purposive interpretation and application of open norms, notably good faith, has been marked by much resistance in our courts.⁷⁶ This hesitance is no doubt explained by the historically entrenched classical understanding of the law of contract, as discussed above.⁷⁷ In the result, when courts have been faced with the question of substantively unfair and oppressive agreements, there has been a general failure to move away from

⁶⁹ *Mort* (note 68 above) 19--20; see further *Miller v Danneck* 2001 (1) SA 928 (C) 938; *NBS Boland* (note 19 above) paras 28--29; Hutchison ‘Good faith in the South African law of contract’ in MacQueen, HL ‘Delict, contract, and the Bill of Rights: a perspective from the United Kingdom’ (2004) 121 2 *SALJ* 359, 377.

⁷⁰ *Dikoko v Mokhatla* 2007 1 BCLR 1 (CC) 33C–E.

⁷¹ Hawthorne (note 42 above) 446; see Bennett, TW ‘Ubuntu: an African equity’ (2011) 14 4 *PER* 30, 45--56.

⁷² Bhana (note 40 above) 584.

⁷³ Public policy is described by Ngcobo J in *Barkhuizen* (note 48 above) para 51 as an umbrella concept which encapsulates the concepts of fairness, justice, equity and reasonableness and which draws content from the notion of ubuntu; see generally Kruger (note 48 above) 712; Sutherland, PJ ‘Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 2’ (2009) 20 1 *STELL LR* 50.

⁷⁴ *Erasmus* (note 20 above) 538E–F: the *arbitrium boni viri* means a ‘reasonable decision’; see generally *NBS Boland* (note 19 above).

⁷⁵ See generally Kruger (note 48 above) 712; Sutherland (note 73 above).

⁷⁶ Moseneke (note 46 above) 10.

⁷⁷ Hawthorne (note 49 above) 85; Bhana, D & Nortje, M ‘General principles of Contract’ (2005) *Annual Survey of South African Law* 196, 233.

the classical reasoning of the common law and give effect to the transformative agenda mandated by the new constitutional order. The net result for open norms has been that they have been interpreted and subsequently applied in a manner that has rendered them ‘blunt ... that no longer cut into, but actually shield the self-serving tendencies of the law.’⁷⁸ This has been most aptly demonstrated in the judgments of *Brisley v Drotzky*,⁷⁹ *Afrox Healthcare Bpk v Strydom*,⁸⁰ and *Barkhuizen v Napier*.⁸¹

It is important to examine how these equitable doctrines have been interpreted, as this explains their resultant limited application. In this regard, good faith has been correctly afforded an interpretation in line with the foundational values of the Constitution.⁸² This is true too for public policy, where the Constitutional Court held in *Barkhuizen* that the content of public policy is to be understood with reference to constitutional values.⁸³ However, what is implicit in this apparently constitutionally-mandated interpretation is that such an analysis has been done within an individualist framework.⁸⁴

The interpretation of the foundational values, which infuse public policy and good faith alike, as adopted in *Brisley* is apt – the court held that the classical conception of autonomy informed the constitutional values of freedom and dignity.⁸⁵ Building on this pronouncement, the court in *Afrox* elevated freedom of contract to a constitutional value⁸⁶ and held that such a ‘constitutional’ principle encompassed the maxim *pacta sunt servanda*.⁸⁷ *Barkhuizen* shared similar sentiments and held that ‘[p]acta sunt servanda is a profoundly moral principle, on which the coherence of any society relies.’⁸⁸ In this way, the courts have, in viewing the classical model as a principled and sound body of law, assigned a moral and ‘elevated’⁸⁹ character to certainty,⁹⁰ which has

⁷⁸ Van der Walt (note 54 above) 341.

⁷⁹ 2002 (4) SA 1 (SCA); see generally Bhana & Pieterse (note 45 above) 865.

⁸⁰ *Afrox* (note 48 above); see generally Bhana & Pieterse (note 45 above) 865.

⁸¹ 2007 (5) SA 323 (CC); see Woolman, S ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 4 *SALJ* 762, 772-781.

⁸² See *Mort* (note 68 above) 485.

⁸³ *Barkhuizen* (note 48 above) paras 29, 35, 87 and 5; *Brisley* (note 79 above) para 95.

⁸⁴ Hawthorne (note 41 above) 81; Kruger (note 48 above) 719; Sutherland (note 73 above) 50--52.

⁸⁵ *Brisley* (note 79 above) para 7.

⁸⁶ Lubbe (note 48 above) 414.

⁸⁷ *Afrox* (note 48 above) para 23.

⁸⁸ *Barkhuizen* (note 48 above) para 87; *Roffey v Catterall* (note 48 above) 505F--G; Pretorius (note 48 above) 183; Kruger (note 48 above) 737--738.

⁸⁹ Bhana & Pieterse (note 45 above) 895.

⁹⁰ Bhana (note 46 above) 303--304.

in turn come to inform their understanding of the foundational values of the Constitution.⁹¹

Accordingly, in terms of the application of open norms, the court in *Brisley* reasserted the formal foundations of contract law, namely consensualism,⁹² *pacta sunt servanda*⁹³ and freedom of contract.⁹⁴ On this basis, the court went on to reject *Saayman's* interpretation of good faith and held that good faith was not a free standing ground for the non-enforcement of contracts on the basis of substantive unfairness or unreasonableness.⁹⁵ *Afrox* confirmed *Brisley* by maintaining that notions such as substantive fairness and good faith are mere factors which may be of some use in moulding or influencing the common law, but are by no means autonomous and independent grounds for a party to escape from an agreement. *Afrox* therefore concluded that courts are not at liberty to intervene based on abstract concepts such as good faith, but are rather to follow the crystallized and well-established rules of contract law irrespective of the unjust outcome which may result⁹⁶ – after all, ‘public policy so demands.’⁹⁷ The crisp effect of *Brisley* and *Afrox's* application of open norms is their rejection of a direct and independent application of open norms as such would undermine contractual certainty to too great an extent.⁹⁸

In *Barkhuizen*, the majority of the Constitutional Court confirmed that good faith was not a self-standing rule, but rather ‘an underlying value that is given expression through existing rules of law.’⁹⁹ It is however noteworthy that *Barkhuizen* left the question open as to whether the limited role afforded to good faith is constitutional.¹⁰⁰ The Supreme

⁹¹ See *Ferreira v Levin NO 1996 (1) SA 984 (CC)* para 49 on the classical interpretation of freedom and the discussion thereon in Bhana & Pieterse (note 45 above) 877--879 and 881; see further Liebenberg, S 'The value of human dignity in interpreting socio-economic rights' (2005) 21 1 *SAJHR* 1, 9 on the interpretation of human dignity as a 'two-edged sword'.

⁹² *Brisley* (note 79 above) 15C--D.

⁹³ *Brisley* (note 79 above) 15G--16C.

⁹⁴ *Brisley* (note 79 above) 18F--G.

⁹⁵ *Saayman* (note 65 above); *Brisley* (note 79 above) 15E.

⁹⁶ *Afrox* (note 48 above) 41A--B; see Hawthorne, L 'Abuse of a right to dismiss not contrary to good faith' (2005) 17 2 *SA Merc LJ* 214, 217--218.

⁹⁷ See Innes CJ's remarks in *Wells v South African Alumenite Co* 1927 AD 69 73.

⁹⁸ Bennett (note 71 above) 14.

⁹⁹ *Barkhuizen* (note 48 above) para 82; see further *South African Forestry Co Ltd v York Timbers Ltd* 2004 (3) SA 253 (W) para 31; *Harper v Morgan Guarantee Trust Co of New York, Johannesburg & Another* 2004 (3) 253 (W) 261E--F and 261H--I.

¹⁰⁰ *Barkhuizen* (note 48 above) para 82; Hutchison, A 'Agreements to agree: can there ever be an enforceable duty to negotiate in good faith?' (2011) 128 2 *SALJ* 273, 282.

Court of Appeal's decision in *Bredenkamp v Standard Bank of South Africa Ltd*¹⁰¹ is further notable.¹⁰² *Bredenkamp* verifies the classical liberal position as set out above¹⁰³ and adds a cautionary directive to any court which seeks to differ – substantive equity and reasonableness have not been transplanted as the new foundational values in our law of contract.¹⁰⁴

The collective outcome has been that the judicial interpretation and application of open norms have only served to reinforce the historically entrenched individualist ideology which it sought to counterbalance. The end result has been that, in following the 'rule-book',¹⁰⁵ of contract law, 'redress [has been] limited to aberrational instances where there is a broader aspect of public interest which deserves protection as opposed to mere fairness between the parties.'¹⁰⁶

- iii) The doctrine of good faith as an appropriate solution to the complexity faced in bilateral discretions

Hawthorne explains that the *raison d'être* of open norms, such as good faith, is their inherent ability to accommodate and adapt to the ever-changing nature of modern society – a feat the classical rules and mechanisms have for the most part failed to achieve.¹⁰⁷ Good faith, where interpreted in a purposive manner,¹⁰⁸ not only opens the door to a reconciliation between the classical law of contract and the foundational values of the Constitution¹⁰⁹ but it also provides a viable solution to the shortcomings of the classical paradigm in the context of agreements to agree.

¹⁰¹ 2010 (4) SA 468 (SCA).

¹⁰² Leave to appeal was refused. See *Maphango (Mgidlana) and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (3) All SA 535 (SCA) para 25 which confirms *Bredenkamp*.

¹⁰³ *Bredenkamp* (note 101 above) para 53; see Nortje, M 'Unfair contractual terms – Effect on Constitution' (2010) 73 3 *THRHR* 517, 528.

¹⁰⁴ *Bredenkamp* (note 101 above) para 32; Lewis, C 'The uneven journey to uncertainty in contract' (2013) 76 1 *THRHR* 80, 82. The *Bredenkamp* judgment further qualifies *Barkhuizen* to some extent in that a court is only be empowered to intervene where a 'public policy consideration found in the Constitution or elsewhere is implicated'; *Bredenkamp* (note 101 above) para 50--53.

¹⁰⁵ Barnard (note 57 above) 388.

¹⁰⁶ Pretorius (note 44 above) 642.

¹⁰⁷ Hawthorne (note 49 above) 86; Bhana (note 40 above) 582: 'this traditional analysis is unable to resolve the issue'.

¹⁰⁸ See *Saayman* (note 65 above).

¹⁰⁹ Bhana & Pieterse (note 45 above) 889. Ubuntu, as an underlying value of good faith, further provides a bridge between the two ideological worldviews in Hawthorne (note 44 above) 446; see Bennett (note 71 above) 45--56.

The court in *Indwe* dealt with the deficiencies in a purely individualistic approach. In this way, the court was confronted with the double edged sword of freedom of contract inherent in the context of agreements to agree – on the one hand, a court is obliged to give effect to that which is agreed upon – *pacta sunt servanda*, while the other hand, the freedom not to contract requires that a court not recognise such an arrangement. An agreement to agree is by its very nature an uncertain beast. The *Indwe* court was therefore in limbo; without a formal solution and consequently was forced to look outside the classical parameters of the law of contract. *Indwe* is thus a noteworthy decision as it aptly illustrates the limitations of formal justice within the context of agreements to agree – as it is in this area of contract law that the formal intersects with the substantive and classical solutions are rendered unworkable.¹¹⁰

In the result, the court's application of good faith to the parties' conduct, despite there not being agreement on such, appears as an instinctively sensible reaction to the muddled circumstances. By applying good faith to the equation, the court was able to provide a balanced and effective solution – to enforce that which was agreed upon (as the facts showed there was in fact an undertaking to contract further) and to measure PetroSA's failure to do so against the standards of reasonableness. In this way, both certainty and fairness, as equal policy considerations, are incorporated into the court's reasoning. This reasoning, which I argue is the macro¹¹¹ solution to the imbalance in our law, shall be comprehensibly dealt with in section d).

c) Contractual discretions – unilateral discretions and agreements to agree

A *pactum de contrahendo* can involve either a unilateral or a bilateral discretion – the latter being dealt with in *Indwe*. In this section, I shall firstly set out the law as it stands with regard to bilateral discretions as contained in agreements to agree. Thereafter, I will examine the approach adopted in unilateral discretions and why a distinction in these two approaches is illogical. I shall conclude by arguing that *Indwe*'s extension of the position in unilateral discretions to that of bilateral discretions is sound.

¹¹⁰ Bhana (note 40 above) 582.

¹¹¹ I shall use the term 'macro' to refer to the failure to incorporate substantive fairness in the law of contract generally and I shall use the term 'micro' to refer to the application of this general position to the contractual subset of agreements to agree.

i) Agreements to agree: the law as it stands

An agreement to negotiate to conclude a further substantive agreement, or the exercise of a bilateral discretion, has not been recognised as an enforceable agreement in our law due to the uncertainty present in such arrangements. Such uncertainty is manifest in the ‘absolute discretion vested in the parties to agree or disagree’ as held in *Premier, Free State, and Others v Firechem Free State (Pty) Ltd*.¹¹² The leading judgment of Ponnan AJA in *Southernport*¹¹³ (which the court in *Indwe* referenced as authority) has however carved out two exceptions to the default position of unenforceability, namely where the agreements to agree are sufficiently certain to be elevated to enforceable agreements. Support for *Southernport*’s exceptions to the general rule is found in the Australian case of *Coal Cliff Collieries v Sijehama (Pty) Ltd*.¹¹⁴

The first and primary exception in *Southernport*, as dealt with *Indwe*, has two requirements.¹¹⁵ Firstly, a preliminary decision will be rendered enforceable where the parties have expressly agreed to engage in negotiations in good faith, the parties have reached agreement on all the material terms and the negotiations are merely intended to conclude secondary provisions within the minds of the contracting parties. The second requirement is that a dispute resolution mechanism is agreed on, which creates certainty in that, in the event of any dispute, the parties will refer the matter to an independent third party for a final and binding decision.¹¹⁶

Ponnan AJA held that where the above requirements are met, the content of the preliminary agreement is certain enough so as to ensure a court would not be making a contract for the parties¹¹⁷ (and therefore undermining freedom of contract) but would

¹¹² *Firechem* (note 7 above) para 35; see further *H Merks & Co (Pty) Ltd v the B-M Group (Pty) Ltd* 1996 (2) SA 225 (A) 233I–234A and 235C–D.

¹¹³ *Southernport* (note 6 above).

¹¹⁴ *Coal Cliff Collieries* (note 8 above); *Southernport* (note 6 above) para 16: ‘[c]ertainty, it would appear, is the touchstone of enforceability of agreements to negotiate in good faith in Australia’ and ‘the principles enunciated in *Coal Cliff Collieries* accord with our law’.

¹¹⁵ *Southernport* (note 6 above) para 16. In respect of the second exception to the default position, the court held that there are certain limited circumstances where, by referencing ‘a readily ascertainable external standard’, a court may be empowered to give content to a contractual undertaking, which, without such a referencing exercise, would be too unclear and vague to be rendered enforceable. Ponnan AJA did not expand further on this second exception. This exception was not relevant to the facts in *Indwe* and shall not be canvassed further.

¹¹⁶ *Southernport* (note 6 above) para 17; see further *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (AD) 775–776.

¹¹⁷ *Southernport* (note 6 above) para 17.

rather be enforcing that which was agreed upon. Further, the *Southernport* court held that the agreed upon third party would simply be giving effect to that which was agreed on in the event of a dispute.¹¹⁸ The court stressed that the parties' agreement to negotiate in good faith was not 'an isolated edifice' but was critically coupled with this dispute resolution mechanism, which latter provision ensured that this preliminary agreement met the threshold of certainty.¹¹⁹ As such, the court held that reliance on good faith alone is insufficient to render the agreement enforceable.¹²⁰

The law as it stands is clear – an agreement to agree must contain a deadlock-breaking mechanism, which coupled with an express undertaking to negotiate in good faith, will render a preliminary agreement certain enough to be recognised and accordingly enforced. What is critical to note is that the standards of good faith and reasonableness are not objective and therefore certain enough for a court, on this basis alone, to enforce a preliminary agreement.¹²¹ In my view, this reasoning falls squarely within the classical paradigm where certainty is king and reiterates good faith's resultant limited role in our contractual jurisprudence.

What is unusual is that the *Indwe* judgment acknowledges *Southernport* as the leading authority on agreements to agree, but contradicts its *ratio* by implying good faith as a stand-alone mechanism to render its preliminary agreement enforceable. The *Indwe* court justifies this by effectively extending the position as is applied in the context of unilateral discretions to that of agreements to agree, as I shall set out below.

ii) Unilateral discretions: *Indwe's* extension of this position to bilateral discretions

There have been pockets of normative reasoning in this area of the law – almost exclusively in the domain of unilateral discretions. In this regard, the Supreme Court of

¹¹⁸ *Southernport* (note 6 above) para 17 and para 11 in distinguishing the present matter from *Firechem* (note 7 above) – 'the agreement prescribes what further steps should be followed in the event of a deadlock between the parties. The engagement between the parties can therefore be analysed as requiring not merely an attempt at good faith negotiations to achieve resolution of any dispute but also the participation of the parties in a dispute resolution process that they have specifically agreed upon.'

¹¹⁹ *Southernport* (note 6 above) para 17 and para 8 where the court extended the position in *Letaba* (note 116 above) and held that '[t]he flexibility that *Letaba Sawmills* introduces must logically extend to other terms as well the formulation of which the parties to a contract may have chosen to delegate to a third party.'

¹²⁰ *Southernport* (note 6 above) para 17; Bhana (note 40 above) 578.

¹²¹ Bhana (note 40 above) 578.

Appeal's judgment of *NBS Boland*¹²² (which the court in *Indwe* primarily relied on) held that where there is a discretionary power afforded to one party so as to determine the other party's performance, unless expressly agreed to be an unlimited discretion, the court will imply that such a discretion is to be exercised according to the standards of *arbitrium boni viri*.¹²³ It is important to note that the court in *NBS Boland* went on *obiter* to state that the same argument may apply if one were to apply open norms such as public policy and substantive contractual fairness¹²⁴ and referred to *Saayman* in this regard with approval.¹²⁵

Bhana argues that the noteworthy developments in this area of the law fall within the realm of certainty and thus enforceability, as it is clear and ascertainable who exercises the discretion, what the performance entails and lastly in what manner such a discretion is to be exercised. As such *animus contrahendi* is not eliminated.¹²⁶ However, what is curious is how the manner of such performance, namely the standards of a reasonable person, falls within the preserve of classical certainty. As outlined above, this standard, as an open norm, seeks to introduce and apply substantive fairness, and as such has time and time again been held to be too abstract a notion to be relied on within the classical parameters of the law of contract.¹²⁷ There does not appear to be an answer to this apparent anomaly.

NBS Boland is nevertheless authority for the proposition that a unilateral contractual discretion is sufficiently certain as long as the exercise of such is subject to the standards of a reasonableness and good faith. In *Erasmus*, the High Court further upheld a unilateral contractual discretion to determine one's own performance¹²⁸ and Bhana argues that this will in all likelihood be confirmed by the Supreme Court of Appeal when next the issue is canvassed.¹²⁹

¹²² *NBS Boland* (note 19 above).

¹²³ *NBS Boland* (note 19 above) paras 25--24; see further *Erasmus* (note 20 above) 537--538; *Soteriou* (note 21 above) 218; see du Plessis (note 40 above) 67 for a comprehensive discussion of unilateral discretions.

¹²⁴ *NBS Boland* (note 19 above) para 28; see further du Plessis (note 40 above) 68.

¹²⁵ *Saayman* (note 65 above); *NBS Boland* (note 19 above) para 29; see further *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA).

¹²⁶ Bhana (note 40 above) 577.

¹²⁷ Bhana (note 40 above) 578.

¹²⁸ *Erasmus* (note 20 above) 537C--538H.

¹²⁹ Bhana (note 40 above) 577.

What is significant in the *Indwe* decision is that the court effectively extends the position in unilateral discretions to that of bilateral discretions. The court in *Indwe* dealt with an agreement to negotiate a further agreement, requiring both parties to exercise a discretion, but relied on *NBS Boland* as authority (where good faith was implied in a unilateral arrangement). While it is unfortunate that there is very little reasoning in the judgment so as to justify this extension, I agree with the crisp conclusion reached in *Indwe* as a distinction between unilateral and bilateral discretions is illogical, as I shall set out below.

Bhana argues that the distinction drawn in our law between unilateral discretions, such as in *NBS Boland*, where our courts have held that a party's conduct must accord with the standards of reasonableness, and bilateral discretions, as found in a typical agreement to agree, is superficial, illogical and unnecessary. In this way, Bhana argues that both contractual discretions contain uncertainty in that there is a likewise inherent danger of one party declining to exercise its contractual discretion, or if such is exercised, there is a gamble that such could be exercised dishonestly or unreasonably. As such, both contractual discretions should be treated in accordance with the same rules.¹³⁰

Bhana submits that that the underlying reason for the distinction having been drawn is founded on a failure to let go of the formal logic of the common law and its resultant interpretation and application of good faith.¹³¹ In this way, an agreement to agree is simply an agreement to negotiate in an amenable and well-intentioned manner so as to conclude a further substantive agreement, as opposed to the guaranteeing of a subsequent substantive agreement. It therefore requires no more than a facilitation of such co-operation,¹³² which is simply the parties' combined effort to fulfil their common intention of following through on their contractual obligations so as to maximise their interests.¹³³ I agree with this proposition, not only for the reasons stated by Bhana, but also on a macro level – as I have argued in this paper. As such, the standards of

¹³⁰ Bhana (note 40 above) 578.

¹³¹ Bhana (note 40 above) 579.

¹³² Bhana (note 40 above) 579.

¹³³ Hawthorne, L 'The First Traces of Relational Contract Theory: the Implicit Dimension of Co-operation' (2007) 19 2 *SA Merc LJ* 234.

substantive fairness and reasonableness, as adopted in unilateral discretions, should too shape the parameters of parties' conduct in bilateral discretions.¹³⁴

d) Relational contract theory – a solution

In my view, the real import of *Indwe* is the court's tacit adoption of relational contract theory or what has been described as the 'new learning',¹³⁵ as opposed to choice theory which informs the classicalist paradigm (as a basic assumption is that choices are voluntary). This approach, as I shall set out below, is an effective way in which to balance certainty and fairness, as broader policy considerations and ideals, in our law.

The constitutional mandate of transformation has unequivocally required that substantive fairness be brought into the realm of contractual relations. This involves value judgments and contextualised decision-making, which naturally entail a greater measure of ambiguity.¹³⁶ The hesitance on the part of the courts in adopting this new role is therefore understandable. However, this anxiety has not justified the resultant persistent slant adopted in favour of the classical approach.¹³⁷ Simply put – our courts are constitutionally mandated to 'confront the massively egalitarian commitments superimposed [by the Constitution] on a formalistic legal culture'¹³⁸ and in so doing, adopt a new thinking of the law of contract – as something more than a neat set of formalistic rules.¹³⁹

Kruger submits that the importance attached to classical values has been disproportionate and has had the effect of excluding other considerations, which has undermined the contextualised approach mandated by good faith and public policy.¹⁴⁰ I agree and propose that what is needed is a balancing of these two competing ideologies as neither extreme of the spectrum is adequate.¹⁴¹ Such a balancing, Kruger argues, could be achieved if certainty was to be factored in as but one of many policy

¹³⁴ Bhana (note 40 above) 579.

¹³⁵ Hawthorne (note 41 above) 90.

¹³⁶ Bhana (note 40 above) 583.

¹³⁷ Bhana (note 40 above) 583.

¹³⁸ Klare (note 54 above) 187--188.

¹³⁹ Barnard (note 57 above) 387; see Hawthorne (note 49 above) 79, where it is argued that the rule of law can be 'reconceived to accommodate' both paradigms; Davis & Karl (note 56 above) 509 refers to a 're-imagining'.

¹⁴⁰ Kruger (note 48 above) 736.

¹⁴¹ Lewis (note 45 above) 331 and 332--333.

considerations.¹⁴² In this way, these principles would be weighted in a context-and fact-specific manner according to their respective purposes and rationales, as opposed to classical policy considerations being given primacy as a matter of course.¹⁴³

Sachs J engaged in this ‘balancing’ exercise or what is termed the ‘new learning’¹⁴⁴ in his minority judgment in *Barkhuizen*. He succinctly sums up the position as follows: ‘Indeed, it could be contended that the question has moved from being one of whether judges should impose their own subjective and undefined preferences in this field, to one of whether their own vision has become so clouded by anachronistic doctrine as to prevent them from seeing objective reality.’¹⁴⁵

In this way, Sachs J examined relational contract theory, as an alternative to choice theory.¹⁴⁶ This former theory is described by Hawthorne as a theory which understands and encompasses:

the realities of life in its recognition that many contractual relationships are not specific and precise in allocating the respective risks; lack a great meeting of minds; and are shrouded in uncertainty concerning both their beginning as well as their end, since habit, custom, internal principles and rules, social exchange and other social principles, dependence and expectations are all interlinked and the realisation that co-operation is essential to achieve mutual goals is omnipresent.¹⁴⁷

The theory therefore values the interdependence of people in society and emphasises co-operation and solidarity,¹⁴⁸ or what is termed ubuntu in South African jurisprudence.¹⁴⁹

¹⁴² Kruger (note 48 above) 738: ‘certainty alone is not a consideration that can trump all other policy considerations in all circumstances.’

¹⁴³ Kruger suggests that a court should always question ‘the substantive reasons that underlie the existence and operation of *pacta sunt servanda*; and, to what extent ... these reasons [are] applicable to the circumstances of this case?’ and thereafter to attach a corresponding weight in Kruger (note 48 above) 736--737; Bhana (note 46 above) 310.

¹⁴⁴ Hawthorne (note 41 above) 90.

¹⁴⁵ *Barkhuizen* (note 48 above) para 155; see further *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 35--36 and 33; *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 151; Kruger (note 48 above) 736.

¹⁴⁶ Note that this theory is applicable to long-term agreements. However, ‘the importance of this paradigm is found in its recognition of the norms of solidarity and co-operation, which have the potential of facilitating transformation’ in Hawthorne (note 49 above) 96.

¹⁴⁷ Hawthorne (note 49 above) 97.

¹⁴⁸ Hawthorne (note 41 above) 86; see further *Jean Monnet’s* guiding principle of solidarity in Hawthorne (note 44 above) 438.

It is a theory which encompasses reasonableness, fairness and good faith.¹⁵⁰ As such, relational contract theory fundamentally questions the automatic prominence afforded to the classical values of freedom and sanctity of contract.¹⁵¹ Hawthorne describes relational contract theory as a 'social' enforcement mechanism while choice theory is a 'literal' enforcement mechanism as the former fundamentally recognises that law exists in the context of society and is not a socially and economically isolated practice.¹⁵² The importance of relational contract theory is that it is contextualised with the result that a court's judgment 'emphasises the facts and the outcome of the case rather than the rules'.¹⁵³

Sachs J held that in order to assess whether a time-bar clause violated public policy (as was the task in *Barkhuizen*), the court had to engage in what was reasonable in the circumstances of the case as well as undertake a normative inquiry of how one should behave in society. Such an undertaking mandates a court to move beyond a classical and mechanical deconstruction of the parties' intentions and to grapple rather with what society deems appropriate and right in the specific circumstances.¹⁵⁴ Sachs J went on to frame such proper conduct as a relational conceptualisation where people are required to conduct themselves according to the prevailing set of norms and standards in society.¹⁵⁵ In the realm of contracting, these behavioural standards were, according to Sachs J, reflected in the standards of fairness and reasonableness which simply require honesty, reasonableness and a respect for another party's interests.¹⁵⁶

In application, Sachs J's minority judgment is contextualised and recognises, as was pertinent in the facts before him, that there is often very little substantive equality in contractual bargaining power and consequently very little real freedom in the context of

¹⁴⁹ Hawthorne (note 41 above) 89--90.

¹⁵⁰ Hawthorne (note 133 above) 246.

¹⁵¹ Hawthorne (note 41 above) 90.

¹⁵² Hawthorne (note 133 above) 234--235 and 243; see further contract law as having 'a separateness from other aspects of life' and the law as 'intellectually isolated in that it can be analysed without reference to the actual conditions in which it is supposed to operate' in Kok, A 'Is law able to transform society?' (2010) 127 1 *SALJ* 59, 67.

¹⁵³ Hawthorne (note 133 above) 241.

¹⁵⁴ *Barkhuizen* (note 48 above) para 167.

¹⁵⁵ *Barkhuizen* (note 48 above) para 167 in quoting Nassar 'Sanctity of Contracts Revisited: a Study in the Theory and Practice of Long-term International Commercial Transactions'.

¹⁵⁶ *Barkhuizen* (note 48 above) para 167 in quoting Nassar 'Sanctity of Contracts Revisited'.

standard contracts.¹⁵⁷ As such, an application of the classical ideology to the exclusion of other factors, such as these, would undermine the constitutional mandate of creating a substantively fair and just society.¹⁵⁸ In this regard, Sachs J expressly acknowledged that the classical model's reliance on formal equality and freedom is flawed as it excludes substantive fairness in the contractual realm, which has resulted in an imbalanced and skewed contractual framework.¹⁵⁹

In the result, Sachs J balanced the competing values in both the classical liberal and collectivist paradigms in his interpretation of public policy. Sachs J held that the intention of public policy, as an open norm, is to resolve parties' disputes in a way which encompasses both the substantive and formal; the public interest as well as the formal tenets of contract law.¹⁶⁰ In my view, Sachs J's new learning approach is logical and sound – it balances both ideological worldviews and therefore offers a viable solution for the cohesion and solidarity¹⁶¹ of these two competing paradigms.¹⁶²

The net effect of the *Indwe* judgment is its implicit adoption of relational contract theory – by enforcing the agreement to agree but also holding PetroSA accountable to the standards of good faith (as the standard against which societal conduct is to be tested). In this way the court views certainty and fairness as equal policy considerations

¹⁵⁷ *Barkhuizen* (note 48 above) para 168; for a contrasting view see further Lewis (note 104 above) 83; see further Hawthorne (note 44 above) 438 and 441. For a discussion of the Consumer Protection Act 68 of 2008, see Sharrock, RD 'Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act' (2010) 22 3 *SA Merc LJ* 295; Hawthorne (note 42 above) 63; Hawthorne (note 49 above) 81--85. The development of *legislative* corrections has serious implications and is somewhat problematic for contract law as it replaces the classical model of contract law with a new reality (Hawthorne (note 44 above) 441) but does so only a piecemeal and *ad hoc* basis, without holistically addressing the flaws in the common law framework. I do not seek to go into an in-depth discussion on this; save to say that there has been a legislative reaction to the common law's inaction.

¹⁵⁸ See further the minority judgment of *Bank of Lisbon* (note 47 above) 410 where Jansen JA held that the individualist model is not an absolute and impenetrable ideology and recognised the need for a revision of the law when it came to unconscionable agreements. The justification for a more collectivist approach was summed up by Judge Jansen at 417 as follows: 'Freedom of contract, the principles of *pacta servanda sunt* and certainty are not however absolute values...'

¹⁵⁹ Hawthorne (note 41 above) 90.

¹⁶⁰ *Barkhuizen* (note 48 above) para 174; see further the decision in *York Timbers* (note 99 above) para 33--34 where the court, while not finding that there was a duty to act in good faith, held that there was a duty to not frustrate the other party's exercise of its contractual rights and accordingly, held that there was a duty to co-operate. It is noteworthy that this interpretation was informed and required by 'the underlying principles of good faith'; see generally Hawthorne's discussion of *York Timbers* (note 99 above) as falling within the relational contract theory paradigm in Hawthorne (note 133 above) 234.

¹⁶¹ See further *Jean Monnet's* guiding principle of solidarity in Hawthorne (note 44 above) 438.

¹⁶² See Davis & Klare (note 56 above) 497--499.

and is therefore able to engage with and incorporate both. The result is, in my view, both balanced and sensible.

e) Analysis of *Indwe* in light of *Everfresh*

What has emerged in the recent chronology in this on-going debate between formal and substantive justice is a Constitutional Court judgment which rather opportunely questions the limited role afforded to good faith in the context of agreements to agree. The court's *obiter* remarks in the minority judgment of *Everfresh*,¹⁶³ which the majority appears to have accepted, have opened the door to the possibility that the common law may be developed so as to validate a more collectivist approach to good faith within the context of bilateral discretions. The court's critical comments are as follows:

Were a court to entertain *Everfresh*'s argument [which, if pleaded properly, would have centred on an obligation to negotiate in good faith] the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.¹⁶⁴

Everfresh dealt with the negotiation of a renewal of a lease, which would be on the same terms as the original contract save for the rental provision, which provided for future mutual agreement. Where agreement could not be reached, the original contract provided that the 'right of renewal shall be null and void'.¹⁶⁵ As such it constituted an agreement to agree, or the exercise of a bilateral discretion. There was no express undertaking that the renewal of the rental would be negotiated in good faith, nor was there a dispute resolution mechanism agreed upon. The facts in *Everfresh* are therefore analogous to those in *Indwe* – a preliminary agreement which falls squarely within the realm of an unenforceable arrangement, as set out in *Firechem* and approved in *Southernport*.

¹⁶³ *Everfresh* (note 2 above).

¹⁶⁴ *Everfresh* (note 2 above) para 72.

¹⁶⁵ *Everfresh* (note 2 above) para 3.

The court in *Everfresh*, however, held that the patent uncertainty present within such an arrangement could be overcome through the development of the common law, and in particular the development of the equitable mechanism of good faith. In this regard, the court did not negate the Supreme Court of Appeal's decision in *Southernport* but rather *obiter* questioned the limited role afforded to good faith within the context of agreements to agree and further whether a development of the common law is necessary to give this doctrine more substantive effect.¹⁶⁶

In this way, *Everfresh* relied on the concept of ubuntu¹⁶⁷ as a transmitter for constitutional values,¹⁶⁸ in combination with good faith *and* the classical maxim *pacta sunt servanda* to suggest that such a preliminary agreement may be enforceable. In so doing, *Everfresh* undertook a balancing act of the competing values in the classical and collectivist paradigms. This kind of analysis, as I have shown in d) above, offers a viable solution to the current imbalance present in our common law.

From the classical perspective, there has been a stark reaction to the *obiter* suggestions made in *Everfresh*. As Lewis comments, *Everfresh* introduces the notion that substantive fairness is an autonomous ground for the non-enforcement of agreements; that good faith underpins all contractual undertakings and in so doing obliterates any hope there once was of certainty in the contractual arena.¹⁶⁹ In the result, Lewis argues that there is a drastic overhaul of the hard and well-established rules of contract into discretionary and subjective normative reasoning,¹⁷⁰ which fundamentally undermines the rule of law and the freedom of contract.¹⁷¹

¹⁶⁶ *Everfresh* (note 2 above) para 37; see further *Barkhuizen* (note 48 above) para 82 where the court left the question open as to whether good faith's limited role was constitutional.

¹⁶⁷ See further Kroeze, IJ 'Doing things with values II: The case of ubuntu' (2002) 13 *Stell LR* 252, 253--256; see Sachs J's description in *Dikoko* (note 70 above) 33C--E; see generally Cornell, D & Van Marle, K 'Exploring ubuntu: Tentative reflections' (2005) 5 2 *AHRLJ* 195.

¹⁶⁸ *Everfresh* (note 2 above) para 71 and the authorities cited therein.

¹⁶⁹ Lewis (note 104 above) 81.

¹⁷⁰ See further Rycroft, A 'Settlement and the law' (2013) 130 1 *SALJ* 187, 195--196 where Rycroft argues that there would be 'definitional problems as to what good faith bargaining means'. Rycroft is referring to a labour law context; however I submit that this applies equally to the context of agreements to agree.

¹⁷¹ Lewis (note 104 above) 94 in quoting *Bredenkamp* (note 101 above) para 39; Hutchison (note 100 above) 290.

Lewis argues further that an application of the formal rules of contract would not come up short in the factual matrix of *Everfresh* as there is existing liability which attaches to a breach in this regard. Lewis submits that this would be based on the breaking off of contractual negotiations.¹⁷² Hutchinson argues that redress in these circumstances lies in bad faith, which has been recognised as undermining public policy.¹⁷³ Bad faith would be present where there is a ‘deliberate intention to string the other party along without intending to agree’.¹⁷⁴ In this way, where there is persistent bad faith conduct, a court would be able to enforce negotiations in good faith, with the possibility of even appointing an arbitrator where there is an open term.¹⁷⁵ Alternatively, redress may lie in damages where there is a complete refusal to contract.¹⁷⁶

It is my view that a solution may lie in bad faith, but that such a resolution fails to understand the macro failure in our law to incorporate substantive fairness into agreements and consequently only *symptomatically* solves the problem. In other words, recourse to bad faith could resolve the quandary in *Everfresh* as well as in *Indwe*, but would fail to address the root cause of the problem – that substantive fairness has been relegated to an inferior contractual consideration. Therefore, such recourse would constitute a temporary and superficial solution in our law; no more than the metaphorical plaster for the wound. Such an approach, as I have argued in this paper, would fail to address the inherent disease causing the so-called wound. For this reason, I would argue that a development of the common law, as suggested in *Everfresh*, is warranted as such would holistically address the core issue - the current dearth of substantive fairness in our law of contract.

f) The implications of *Indwe*

Indwe is an interesting judgment for two reasons. Firstly, at a micro level, it changes the position as to when agreements to agree will be enforceable and secondly, at a macro

¹⁷² Lewis (note 104 above) 89; Hutchinson (note 100 above) 290 and 292; see generally Hutchinson, A ‘Liability for breaking off contractual negotiations?’ (2012) 129 *1 SALJ* 104.

¹⁷³ Hutchinson (note 100 above) 290.

¹⁷⁴ Hutchinson (note 100 above) 291.

¹⁷⁵ Hutchinson (note 100 above) 296; Rycroft (note 170 above) 195--196.

¹⁷⁶ See Hutchinson’s discussion of damages in delict in Hutchinson (note 100 above) 292 and Lewis (note 104 above) 89; see generally Hutchinson (note 172 above) 104; Lewis further suggests that liability may be attached under the banner of unjustified enrichment, which would be based on the expectation of a finalised agreement at Lewis (note 104 above) 89.

level, it does so by adopting a collectivist stance and purposive reasoning, where such an approach has historically and persistently been rejected in our courts.

In the first instance, the factual matrix in *Indwe* indicates that it would fall within an unenforceable arrangement as referred to in *Southernport*, as there was neither a deadlock-breaking mechanism nor an express undertaking to negotiate in good faith.¹⁷⁷ *Indwe* therefore directly conflicts with *Southernport* in holding that such an arrangement is *prima facie* enforceable through an implied reliance on good faith (as a free standing equitable mechanism), which standard may be applied by a court, as an equivalent deadlock-breaking third party. *Indwe* unfortunately does not provide any explanation for this shift in thinking. There is no reference to the unexplained discrepancy between unilateral and bilateral contractual discretions nor is there clarification as to why *NBS Boland's* application of the standards of reasonableness and good faith within the context of unilateral discretions should be extended into the realm of agreements to agree.

In terms of the macro contractual implications of *Indwe*, the court adopted substantive fairness in the form of good faith and the *arbitrium boni viri* standard as a free-standing equitable limitation on the exercise of contractual power.¹⁷⁸ The court's reliance on *NBS Boland* as authority in this regard is further noteworthy, as the Supreme Court of Appeal suggested that such a standard could be consonant with the notion of substantive fairness as embraced in *Saayman*.¹⁷⁹ As discussed, *Saayman's* purposive and holistic employment of good faith provides a possible solution to the deficiency of substantive fairness in the private contractual arena. The implication of the *Indwe* judgment is that the role and function of good faith, purposively interpreted in accordance with *Saayman*, is elevated beyond that of an indirect doctrine, which scope is restricted to informing or influencing existing formal mechanisms. Again, without providing any meaningful reasons for the deviation, these substantive developments directly clash with the historically entrenched individualist ideology, most starkly and recently upheld in *Bredenkamp*.¹⁸⁰ What is further curious about the *Indwe* judgment is that it did not refer

¹⁷⁷ Hutchison (note 100 above) 274.

¹⁷⁸ Hutchison (note 100 above) 279.

¹⁷⁹ *Saayman* (note 65 above).

¹⁸⁰ *Bredenkamp* (note 101 above) para 53.

to the Constitutional Court's *obiter* remarks in the minority judgment of *Everfresh* on this point.

It appears as if the *Indwe* decision, as an urgent interim interdict application, was short in its reasoning. As already alluded to, there is very little explanation provided in respect of the developments it proposes at a micro and macro contractual level. I agree with the conclusions reached in *Indwe* for the reasons I have set out in this paper. However the lack of cogent reasons so as to substantiate these findings, namely that the distinction between unilateral and bilateral discretions is superficial and at a higher level, there is a constitutional mandated requirement that substantive fairness play an elevated role in our contractual jurisprudence, unfortunately undercuts the validity and strength of *Indwe's* conclusions. As leave to appeal has been granted to the Supreme Court of Appeal, this court will be required to confront *Indwe's* conclusions. Whether or not this will result in a confrontation of the shortcomings of our formalistic legal structure however is uncertain. *Indwe's* largely unsubstantiated findings leave much to be desired in this regard. In the event that the matter reaches the Constitutional Court, it is my view that the conclusions reached in *Indwe* may awaken and renew the doctrine of good faith, but possibly only if our courts supplement and build on *Indwe's* findings in light of the recent suggestions in *Everfresh*.

IV CONCLUSION

What is clear is that a change has been constitutionally mandated in our law of contract, and that this has been met either with a 'remarkable slowness'¹⁸¹ or has not been met at all. The case of *Indwe* and the *obiter* remarks in *Everfresh* do just the opposite – they fundamentally stir the pot. In my view, the burning issue of the imbalance in our law between certainty and substantive fairness was bound to arise in the context of agreements to agree, as it is in this context that the formal and substantive overlap and a purely formal approach is rendered unworkable. While *Indwe* is short on reasoning, I agree with the crisp conclusion reached – that the courts must engage in purposive normative reasoning through the application of open norms, where the facts of the matter require it. In *Indwe*, the factual matrix demanded such an enquiry. In conclusion,

¹⁸¹ Moseneke (note 46 above) 10.

I have argued that the adoption of relational contract theory is a viable solution to the lack of substantive justice in our law of contract as it urges courts to engage with certainty and fairness as equals and accordingly balance these competing policy considerations in a fair and logical manner based on the facts of each case.

It will be most interesting to see what happens to *Indwe* on appeal in light of the suggestion of a development of the common law in *Everfresh*,¹⁸² and irrespective of what side of the fence one sits on, for the macro and micro contractual issues raised in *Indwe* to be fully ventilated. To paraphrase Judge Davis, many will be eager to see, having been taken to the constitutional door, whether the court will enter the new venue.¹⁸³

¹⁸² *Everfresh* (note 2 above) para 38: '[t]here is a reasonable prospect that the question whether the common law should be developed will be answered in the affirmative.'

¹⁸³ Davis (note 45 above) 327.

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