

CONTRACT GENERAL PRINCIPLES

Fifth Edition

by

LF VAN HUYSSTEEN

BA LLB (Stell) Drs Jur (Leiden) LLD (UCT)
Attorney, Notary and Conveyancer of the High Court of South Africa
Formerly Professor of Private Law, University of the Western Cape;
Senior Research Fellow University of the Western Cape

GF LUBBE

BA LLB (Stell) LLM (Yale)
Advocate of the High Court of South Africa
Emeritus Professor of Private Law and Research Fellow, Stellenbosch
University

MFB REINECKE

BA LLB (Pret)
Advocate of the High Court of South Africa
Emeritus Professor of Private Law, University of Johannesburg



Foreword

I welcome the fifth edition of this seminal work which I have watched grow and develop over the years. It has maintained an in-depth analysis and understanding of the roots of the legal principles of our law of contract while confronting contemporary concerns and embracing constitutional values. It has kept abreast of case law and peers into future developments. This book has been significantly redesigned and the authors have taken particular care to be reader-friendly and to facilitate cross-referencing and to prepare ultimately for electronic publication. The authors attempt to give concrete content to issues such as good faith. Consumer protection, especially the impact of legislation, has been given greater prominence. Technological developments are not ignored and aspects such as electronic signing have been updated. It is gratifying to see the principles of the law of contract being addressed taking social justice into account. A balance is sought between the fundamental principle of the binding nature of agreements and the values of dignity, equality, reasonableness, fairness and good faith. The collective extensive breadth of expertise of the authors, who are recognised academic authorities, has been brought to bear on this excellent new edition. I have no doubt that it will be a boon to students and practitioners alike and that it will add to our rich jurisprudential landscape. It is indeed a work of substance that I am certain will be warmly and appreciatively received.

MS NAVSA
Judge of the Supreme Court of Appeal

Preface to the fifth edition

This edition has been updated for case law and important local and overseas literature generally to the end of 2015 and selected case law to the end of February 2016. In general, note has again been taken of the influence of the Constitution, which has been expanded on in various specific situations.

Some sections of the work have been substantially rewritten or adapted, including the chapter on the basis of contractual liability, so as to expound this difficult area in a more easily understandable and modern way, as well as the chapter on improperly obtained consensus, in which that concept has been further developed and applied to its jurisprudential and logical conclusion – moving away from the delictual construction where it is no longer apposite. The division of the forms of breach of contract have been simplified, but the division into four main categories has been retained in preference to a unitary construction of breach.

So also have the sections on the pre-contractual phase, in respect of the breaking-off of negotiations, the agreement to conclude a written contract later, ‘agreements to agree’ and the enforcement of undertakings to negotiate in good faith, been expanded on. In general in many chapters, including breach of contract, the role of good faith has been further developed with reference also to the latest judgments in an attempt to give it concrete content, and to elevate it to an enforceable principle rather than an amorphous, free-floating concept. The aspect of contractual powers or discretions has been expanded and developed, as well as the question of supervening impossibility of performance, also with reference to the doctrines of frustration, falling away of the contractual basis, and hardship, in comparative perspective.

The enforcement of contractual obligations has also been more substantively discussed with reference to the concepts of fairness, good faith and the values of the Constitution, as well as aspects of breach of contract and remedies for breach, in particular the principle of reciprocity.

Aspects of the signature of electronic contracts, cession, the legal nature of performance of money debts and methods of payment have been modernised and updated, as examples of smaller-scale updating.

The impact of the Consumer Protection Act 68 of 2008 on the general principles of contract has in many instances been given more prominence in separate paragraphs.

The format has been redesigned so that each chapter is divided into numbered paragraphs, which makes for easy cross-referencing and has resulted in shorter sentences and improved readability. This will also enable electronic cross-references in the publication by Juta of an E-book.

Also, we have alternated gender usage from chapter to chapter.

All told and in broad terms, we have continued to attempt to establish the law of contract as an instrument of social justice within the borders set by its rules and principles, as informed and developed in terms of the values of dignity, equality, reasonableness, fairness, good faith and the binding power of agreement.

We would like to record our sincere thanks to our families for their support and encouragement throughout. Also to all at Juta, and especially Marlinee Chetty, our publisher, for their help and unending patience with our many requests for extensions of deadlines.

We again want to express our sense of loss at the absence of our co-author and friend Schalk who died in 2011. His contribution to this book is substantial and lasting and is acknowledged with gratitude.

THE AUTHORS
August 2016