

Government Dealings and the Intention to Create Legal Relations

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1 Introduction

It is a well-known principle of the law governing contracts that not all arrangements or agreements between parties will necessarily amount to legally enforceable contracts.¹ Thus, it has been explained that

‘an agreement will be a contract only if the parties intend to create an obligation or obligations, and if, in addition, the agreement complies with all other requirements which the law sets for the creation of obligations by agreement (such as the contractual capacity of the parties, possibility of performance, legality of the agreement, and prescribed formalities). Accordingly, should any of the latter requirements not be met, there may be an agreement, but it will not be a contract.’²

Examples of arrangements not amounting to contracts include promises (binding in honour only), social engagements (also called ‘gentlemen’s agreements’), and declarations made in jest.³ They are not legally enforceable because the parties who entered into them lacked the necessary *animus contrahendi*, that is, the intention to create a legally enforceable contract.⁴ A distinction should therefore be drawn between arrangements that are contractually enforceable and arrangements that have no legal consequences.

Like private individuals, governments have the power to enter into contracts.⁵ Prior to 1994, in the absence of any particular enabling

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¹ See generally Schalk van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract: General Principles* 2 ed (2003) in ch 1; SM Waddams *The Law of Contracts* 3 ed (1993) in ch 2; GH Treitel *The Law of Contract* 11 ed (2003) in ch 1.

² Van der Merwe et al op cit note 1 at 8.

³ See *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 189; *Bourbon-Lefitley v WPK (Landbou) Bpk* 1999 (1) SA 902 (C) at 922; E Kahn, C Lewis & C Visser *Contract and Mercantile Law: A Source Book* Vol I (1988) at 77-8.

⁴ See Van der Merwe et al op cit note 1 at 20-1; Treitel op cit note 1 at 149; Waddams op cit note 1 in pars 144 and 146; *Electronic Building Elements v Huang* 1992 (2) SA 384 (W) (if parties exclude legal enforceability of arrangement between them, arrangement amounts to moral obligation or obligation of honour and is therefore unenforceable in court of law); *Minister of Home Affairs v American Ninja IV Partnership* 1993 (1) SA 257 (A) at 269. See also generally HK Lucke ‘Intention to Create Legal Relations’ (1970) 3 *Adelaide LR* 419 at 425-6.

⁵ For literature on the subject of government contracts in South Africa, see Yvonne Burns ‘Government Contracts and the Public/Private Divide’ (1998) 13 *SA Public Law* 234; Alfred Cockrell ‘Can you Paradigm? – Another Perspective on the Public Law / Private Law Divide’ (1993) *Acta Juridica* 227 at 236-8; Lawrence Baxter *Administrative Law* (1984) at 419-24; Ian Currie (ed), Cora Hoexter with Rosemary Lyster *The New Constitutional and Administrative Law* Vol II (2002) at 166-8; Marinus Wiechers *Administrative Law* (1985) at 116-21; Jacques Labuschagne *Staatskontrakte ter Verkryging van Goedere, Dienste en Werke* (unpublished LLD thesis, University of South Africa (1985)); Thomas B Floyd *Die Owerheidsooreenkoms – ’n Administratiefregtelike Ondersoek* (unpublished LLD thesis, University of South Africa (1994)); TB Floyd ‘Die Gebruik van die Owerheidsooreenkoms ter Aanvulling, Bepaling of Vervanging van die Administratiewe Beskikking’ (1996) 11 *SA Public Law* 69. For the UK, see Peter W Hogg

statutory provision, the source of the Government's power to contract was the common-law prerogative.⁶ Today, since the prerogatives have been abolished by the coming into effect of the Constitution, the source of the Government's power to contract, in the absence of any particular enabling statutory provision, is rooted in its common-law non-prerogative powers.⁷ Unlike the French system that draws a sharp distinction between ordinary civil law and administrative law (*droit administratif*),⁸ South Africa, the United Kingdom, Australia, New Zealand and Canada do not have a distinct body of public-law rules governing 'administrative contracts'.⁹ Government contracts are *primarily* governed by the ordinary (private) law of contract.¹⁰

However, the fact that one or both of the contracting parties is a public authority may involve a departure from the ordinary laws of contract, or the application of special rules.¹¹ It has been argued that one such rule is the special application of the *animus contrahendi* principle.¹² The argument seems to be that if one of the parties to an arrangement is a public authority, that will affect the way in which courts determine the intentions of the parties in deciding whether a contract had come into being and in construing its terms. This article is an attempt to determine

& Patrick J Monahan *Liability of the Crown* 3 ed (2000) ch 9; Sue Arrowsmith *Civil Liability and Public Authorities* (1992); JDB Mitchell *The Contracts of Public Authorities* (1954); Colin Turpin *Government Contracts* (1972); Colin Turpin *Government Procurement and Contracts* (1989). For Australia, see Nicholas Seddon *Government Contracts: Federal, State and Local* (1995); Mark Aronson & Harry Whitmore *Public Torts and Contracts* (1982) ch 5-9; Dennis Rose 'The Government and Contract' in: PD Finn (ed) *Essays on Contract* (1987) in ch 9; KK Puri *Australian Government Contracts: Law and Practice* (1978). For Canada, see Waddams op cit note 1 in ch 17; René Dussault & Louis Borgeat *Administrative Law* 2 ed (1985) Vol I, Part 2, ch 3; Sue Arrowsmith *Government Procurement and Judicial Review* (1988). The US boasts a flood of publications and even has a specialist journal called the *Public Contract LJ*.

⁶ Baxter op cit note 5 at 389; *Minister of Home Affairs v American Ninja IV Partnership* supra note 4 at 268.

⁷ See s 1 of the State Liability Act 20 of 1957; Andrew Breitenbach 'The Sources of Administrative Power: The Impact of the 1993 Constitution on the Issues Raised by *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel & Nywerheid*' (1994) 3 *Stellenbosch LR* 276; JR deVillie *Judicial Review of Administrative Action in South Africa* (2003) at 116.

⁸ For literature on the French system, see Labuschagne op cit note 5 at 24-8; Mitchell op cit note 5 ch 4; Aronson & Whitmore op cit note 5 at 178-81; L Neville Brown & John S Bell *French Administrative Law* 5 ed (1998) in ch 8; H Street *Governmental Liability: A Comparative Study* (1975) in ch 3; Alan W Mewett 'The Theory of Government Contracts' (1959) 5 *McGill LJ* 222.

⁹ An 'administrative contract' has been defined by Puri op cit note 5 at 223 as a contract that contains 'terms or clauses wholly inappropriate to a civil contract' and by Aronson & Whitmore op cit note 5 at 179 as a contract that is entered into to meet a 'public need'. See also Wiechers op cit note 5 at 117 who notes that an 'administrative agreement' is to be distinguished from a private law agreement, which is based on equality and volition.

¹⁰ See Wiechers op cit note 5 at 117; Burns op cit note 5 at 236-7, 240; Floyd (thesis) op cit note 5 at 251 and 362; See also Hogg & Monahan op cit note 5 at 210; Arrowsmith (*Civil Liability*) op cit note 5 at 43; Turpin (*Government Contracts*) op cit note 5 at 99; Turpin (*Government Procurement*) op cit note 5 at 102; Peter Cane *An Introduction to Administrative Law* 3 ed (1996) at 13; Seddon op cit note 5 at 3; HWR Wade & CF Forsyth *Administrative Law* 8 ed (2000) at 775.

¹¹ For examples of such rules, see Seddon op cit note 5 at 67; Arrowsmith (*Civil Liability*) op cit note 5 at 43-4; David Foulkes *Administrative Law* 6 ed (1986) at 356.

¹² Seddon op cit note 5 at 68-78; Arrowsmith (*Civil Liability*) op cit note 5 at 49-53; Aronson & Whitmore op cit note 5 at 204-5; RD Lumb 'Contractual Relations between Government and Citizen' (1961) 35 *Australian LJ* 45 at 45; Rose op cit note 5 at 238-42; Cockrell op cit note 5 at 236-7.

whether such a special application of the animus contrahendi principle exists and if so, whether the reasons for its existence are justified.

There are very few South African cases that deal with the subject and those that do exist, seem to follow the approach of English law.¹³ As a result this paper will to a large extent focus on the position in England and also in Australia and New Zealand since these countries, like South Africa, apply the ordinary laws of contract to government arrangements.

The article will commence with a brief overview of government arrangements that are commercial in nature. Then the effect of the no-fettering-by-contract principle on commercial arrangements will be investigated. It will be shown that the commercial nature of a government arrangement does not automatically result in a legally enforceable contract. To give effect to the no-fettering-by-contract principle, courts may find a lack or absence of animus contrahendi. Suggestions will be made regarding remedies to ameliorate possible hardships that may result. Next, other, purely governmental arrangements will be investigated. The enquiry will be confined to arrangements in the form of grants, subsidies and rebates since it is particularly in this area, so various authors argue, that courts resort to a special application of the animus contrahendi principle. This argument will be scrutinised to determine its validity.

2 Arrangements with a Commercial Component

Where an arrangement entered into by a public authority is of a 'purely' commercial nature, the courts seem to generally regard it as contractual and the usual contractual remedies follow.¹⁴ Where one of the parties to such an arrangement argues that the arrangement is not contractual, such argument will also be difficult to sustain.¹⁵ It would depend on whether the arrangement diverged from an ordinary commercial arrangement. Most government arrangements are not 'purely' commercial because they contain aspects that are uniquely governmental in nature. In other words, they contain aspects or activities which ordinary commercial entities do not undertake.¹⁶ Such arrangements have been held to be contractual, for example the purchase of

¹³ For possible explanations on the limited number of court cases, see Cane op cit note 10 at 265-6; Turpin (*Government Procurement*) op cit note 5 at 221-6; Labuschagne op cit note 5 at 51-2; Aronson & Whitmore op cit note 5 at 177.

¹⁴ The State Liability Act 20 of 1957 also provides that the State is liable for any claims arising from lawful contracts entered into by it. See Burns op cit note 5 at 236; Seddon op cit note 5 at 68; Lucke op cit note 4 at 425; *Cheshire & Fifoot's Law of Contract* 6 Aus ed (1992) by JG Stark, NC Seddon & MP Ellinghaus in par 307.

¹⁵ See *President of the Methodist Conference v Parfitt* [1984] ICR 176 (QBD) at 183: 'In the case of an ordinary commercial transaction, it will be for the person who contends that there was no contract to establish that the intention to create a binding contract has been negated.' See also *Edwards v Skyways Ltd* [1964] 1 WLR 349 (QBD) at 355: 'In the present case, the subject-matter of the agreement is business relations, . . . in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one.'

¹⁶ Seddon op cit note 5 at 71.

supplies for governmental purposes and large infrastructure agreements, such as the building of a bridge or refinery.¹⁷ All contracts entered into by public authorities are however subject to the no-fettering-by-contract principle. This requires further examination.

2.1 The Effects of the No-fettering-by-contract Principle¹⁸

The fact that a government arrangement has a commercial component to it does not *necessarily* mean that it will be contractually enforceable. It is a well-known principle that a public body cannot fetter its discretion.¹⁹ This principle also applies to contracts entered into by public bodies. A public body cannot commit itself in advance to exercise discretionary powers in a certain way. Discretionary powers should always be exercised for the public good and should not be unduly limited or fettered.²⁰ The reasoning behind the principle is that if public bodies 'commit themselves in advance to acting in a certain way, this may prevent them from acting in the public interest in future'.²¹ Contracts, whether commercial or not, that fetter the future exercise of statutory powers may therefore be held to be unenforceable on the basis of public policy.

The New Zealand case of *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*²² is a classic illustration of the application of the no-fettering principle to a government arrangement that is commercial in nature. The Government entered into an agreement with the cigarette company in terms of which the Government agreed that it would not legislate for regulation of cigarette advertising and labelling of packs if the company agreed to abide by certain requirements and undertakings. The agreement was for a three-year term and the parties agreed that they would renegotiate their agreement at the end of the three years. Prior to the expiry of the three years, the Government decided to introduce legislation to control the tobacco industry and the company gave notice that it wished to renegotiate the agreement. However, the Government argued that the agreement was merely a statement of government policy and was

¹⁷ See *BP Refinery (Westernport) Pty Ltd v President, Councillors & Ratepayers of the Shire of Hastings* [1977] 16 ALR 363 (PC) (the intention to create legal relations was not in issue because large infra-structure agreements are generally regarded as contractually enforceable); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth of Australia* (1977) 139 CLR 54 (HC) (two-airline agreement contractual because specifically approved/authorised by statute). See also *Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (1994) 119 ALR 577 (HC) (agreement between Commissioner of Taxation and Mutual Pools in terms of which former agreed to repay invalidly collected taxes plus interest contractually enforceable).

¹⁸ Also referred to as the 'doctrine of executive necessity'.

¹⁹ Ways in which a public body can unlawfully fetter its exercise of discretion include rigid adherence to policy guidelines or precedent and through promises and assurances; see Baxter op cit note 5 at 415-9, 424-6; Hoexter op cit note 5 at 165-8; Burns op cit note 5 at 248-9.

²⁰ See generally Baxter op cit note 5 at 419-26; Wiechers op cit note 5 at 116-7; Hoexter op cit note 5 at 166-8; Cockrell op cit note 5 at 236-8; Burns op cit note 5 at 248-9; Labuschagne op cit note 5 at 40-54; Floyd (thesis) op cit note 5 at 280-90, 381-8; Floyd (article) op cit note 5 at 90-109; PP Craig *Administrative Law* 5 ed (2003) at 540-9; Wade & Forsyth op cit note 10 at 333-8; Carol Harlow & Richard Rawlings *Law and Administration* 2 ed (1997) at 227-32.

²¹ Hoexter op cit note 5 at 166.

²² [1991] 2 NZLR 323 (HC).

not intended to create binding legal relations. Robertson J²³ rejected this argument and said the following:

‘I am unable to accept that when the Government merely wishes to make a policy statement it would do it in a form which had all the hallmarks of a contractual agreement. The document is headed “Agreement”. It precisely defines the parties. In a preamble it sets out the history of the matter between the parties and their respective position or postures, and then uses the time honoured phrase “it is agreed as follows”. . . . In my judgment the [document] flies in the face of every clear sign and signal to suggest that this was merely a vehicle for espousing a political position or policy.’

The arrangement, which was no doubt a commercial transaction, was however held to be unenforceable based on the no-fettering-by-contract principle. According to Robertson J²⁴ it was ‘elementary that the executive may not restrict the legislative competence of Parliament by contract’.²⁵

The Court therefore made use of a special application of the animus contrahendi principle in order to give effect to the no-fettering-by-contract principle.²⁶ The special application of the intention principle was therefore more a device for applying a rule of policy rather than a genuine attempt to ascertain the intentions of the parties.²⁷ Had the parties involved been private contracting parties, the Court would in all probability have found an intention to contract.²⁸ Due to the nature and functions of public authorities, however, they are required, unlike private contracting parties, always to act in the public interest when concluding contracts.²⁹ They cannot commit themselves in advance to exercise discretionary powers because discretionary powers should always be

²³ *Idem* at 325-6.

²⁴ *Idem* at 328.

²⁵ See also *Holmes v Rolleston* [1873] 2 NZCA 287 (CA) at 294: ‘[I]n a legal sense, there can be no such thing as contracting for the future exercise of a legislative power.’ But see Hogg & Monahan op cit note 5 at 215-6 who regard as implausible Robertson J’s conclusion that the agreement failed due to an absence of consideration. They argue that contracts regularly provide undertakings that depend upon the conduct of third parties and see no reason in principle why the executive should not be permitted to promise that it will be liable in damages if Parliament subsequently repeals or amends legislation. They argue that to hold such contracts unenforceable does not assist the Government but denies the executive the legal capacity to enter into contracts that a private party would be perfectly competent to make.

²⁶ See also the cases of *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 (KBD) at 503; *Waterfalls Town Management Board v Minister of Housing* 1957 (1) SA 336 (SR); *Murray v McLean* NO 1970 (1) SA 133 (SR); *Sachs v Donges* 1950 (2) SA 265 (A); *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) at 536; and *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) in pars 198-9 which were arguably decided on the basis of a lack of animus contrahendi in order to give effect to the no-fettering principle.

²⁷ See also Arrowsmith (*Civil Liability*) op cit note 5 at 43.

²⁸ In the Rhodesian case of *Waterfalls Town Management Board* supra note 26 at 342E-F, Murray CJ went so far as saying that ‘[t]his promise, had it been given by an individual, might well have been binding and enforceable. Given by the Minister it was no more than an undertaking to discharge his administrative duties in regard to building in a way, which would remove their grievances. I cannot regard the Minister’s “agreement” as anything more than a promise to meet their objection by exercising his discretionary administrative powers in a particular way. This promise cannot fetter his right, if circumstances connected with his administration require it, to exercise his discretion in some other way.’

²⁹ See also Burns op cit note 5 at 250; Seddon op cit note 5 at 16-9; and Floyd (article) op cit note 5 at 107-9 where he refers to factors which the courts should consider in determining whether or not administrative agreements are in the public interest.

exercised for the public good and should not be unduly limited or fettered. To allow otherwise would be against public policy. This, in turn, means that arrangements entered into by public authorities cannot always be assessed as if they were made between private contracting parties.³⁰ Often it is necessary for the courts to depart from the ordinary laws of contract or to apply slightly different rules to arrangements entered into by public authorities. However, this does not make it appropriate to say that by doing so, the requirement of *animus contrahendi* is 'exploited'.³¹ Very often, the subject matter of arrangements entered into will simply not be appropriate for public authorities to contract on and the courts then interpret this as a lack or absence of *animus contrahendi*.

The special application of the intention principle in such instances is justified but it inevitably has the potential to lead to hardship on the private contracting party. The absence of *animus contrahendi* means that the usual remedies for breach of contract are not available because the court finds that there is no contract. In the United Kingdom most government contracts contain 'break clauses',³² allowing the Government to terminate them at any time subject to the payment of compensation.³³ Such clauses are not provided for in the South African State Tender Board's *General Conditions and Procedures* in regard to tenders, contracts and orders.³⁴ The conditions and procedures laid down instead acknowledge the overriding rights of the State as a contractor because protective mechanisms exist only for the State.³⁵ No provision is made for the possibility that a contract may have to be terminated (declared unenforceable) in the public interest.³⁶ Various arguments have evolved to protect the victims of the no-fettering principle, but the authors are not unanimous on the type of remedy to be afforded.³⁷

³⁰ See *The Administration of the Territory of Papua & New Guinea v Leahy* (1961) 105 CLR 6 (HC) at 19 where Kitto J pointed out that it was inappropriate for the Court below to ask whether the arrangement would, as between private contracting parties, have amounted to a contract as opposed to an arrangement between a government and a private contracting party. According to Kitto J the only question that needed to be asked was whether, taking into account all the circumstances, it was right to conclude that the *particular parties* (the Administration and Leahy) were dealing with one another on a contractual basis, or were arranging gratuitous assistance.

³¹ See Cockrell op cit note 5 at 236-7.

³² Also referred to as 'termination for convenience clauses'.

³³ Seddon op cit note 5 at 168 suggests that such clauses be limited to instances where the Government must for policy reasons terminate the contract and not when it is 'convenient' to do so. See also Turpin (*Government Procurement*) op cit note 5 at 243-6 and *Torncello v United States* 681 F 2d 756 (1982) where the Court of Claims held that the clause could be used only when there had been changed circumstances.

³⁴ ST 36: 2003.

³⁵ See par 45 on failure to comply with conditions and delayed execution; par 48 on remedies available to the State in case of death, sequestration, liquidation or judicial management; and par 49 on the contractor's liability towards the State in the event of cancellation of the contract.

³⁶ See Floyd (thesis) op cit note 5 at 399 who notes that "n beding kom in staatsboukontrakte voor wat voorsiening maak vir die wysiging van die kontrak deur die ingenieur". See also Labuschagne op cit note 5 at 216-7.

³⁷ For a critical discussion of the different types of remedy to be afforded to victims of the no-fettering principle, see P Bolton 'Government Contracts and the Fettering of Discretion: A Question of Validity' (to appear in *SA Public Law*); Floyd (thesis) op cit note 5 at 305-7.

2.2 A Specialised Remedy to Combat the Effects of the No-fettering Principle

It is suggested that the French system³⁸ be used as a guideline in South Africa and that the private contracting party be entitled to compensation.³⁹ The French recognise that in certain circumstances a public body may in its public role be required to take action which is detrimental to the other contracting party. Specialised remedies however exist to combat any possible hardship suffered. Of particular relevance is the remedy of 'fait du prince' that provides for unforeseeable loss to be shared between the parties. The remedy usually takes effect where something is done by the public body that renders the bargain less profitable for the contractor, but will not apply where the loss is caused by legislation affecting all citizens equally.⁴⁰ The remedy constitutes either an indemnity for the private party or serves as an authorisation to increase the charge. The remedy is very similar to 'act of state' in the English law of tort; as one party to the *contrat administratif* is an administrative agency, it may carry out some governmental act (unconnected with its rights under the contract) which may affect the other party to the contract.

In South Africa, unless a public contract makes express provision for changing circumstances, a remedy of compensation akin to the doctrine of *fait du prince* in French law can be used as a guideline to protect victims of the no-fettering principle. Where performance under a public contract becomes impossible due to the passing of new legislation conferring new powers, the contract should be terminated (as a result of supervening impossibility of performance) but a remedy akin to the doctrine of *fait du prince* should be afforded to the private contracting party. The same applies where a contract is terminated in the public interest due to changing circumstances after the conclusion of the contract. Where the contract is declared void *ab initio* the possibility of hardship *also* exists particularly in respect of (a) restitution of money or property, which already passed under the contract;⁴¹ (b) entitlement to compensation for expenses already incurred; (c) loss suffered in the form of expected profits.⁴² Here, too, a remedy akin to the doctrine of *fait du*

³⁸ See *supra* note 8.

³⁹ See also Baxter *op cit* note 5 at 424; Hoexter *op cit* note 5 at 167-8; Craig *op cit* note 20 at 547-8; Mitchell *op cit* note 5 at 76-80; Street *op cit* note 8; Aronson & Whitmore *op cit* note 5 at 179; Mewett *op cit* note 8; JDB Mitchell 'A General Theory of Public Contracts' (1951) 63 *Juridical Review* 60 at 81-8; Cane *op cit* note 10 at 268. Paul Rogerson 'On the Fettering of Public Powers' (1971) 45 *Australian LJ* 288 at 300 notes that compensation should not be automatic because this would unfairly favour those who contract with public authorities while others, who are just as much affected by the consequences of the exercise of discretionary powers, would have to bear their own losses.

⁴⁰ The concerns of Rogerson *op cit* note 39 would be addressed with this remedy.

⁴¹ See Rose *op cit* note 5 at 252-5 who argues that in certain instances, where subsequent legislation has the effect of destroying a contractual right, compensation should be paid for the taking of 'property'.

⁴² See Cane *op cit* note 10 at 271 who argues that expecting the victim of the no-fettering doctrine to bear *actual* losses for the sake of the public interest, could be regarded as unfair, but that allowing him to make a *profit* at the expense of the public interest is even more so.

prince could be of assistance. As noted by Craig,⁴³ the normal contractual remedies for breach are not appropriate where a public body performs a 'public' role as well as a 'private' one. Awarding damages is not an option because a precondition for an award of damages is that there must in fact have been a breach, that is, one party must have failed to do something which she promised to do. It is exactly this freedom that public bodies do not enjoy; they cannot promise to exercise or not exercise their powers in a certain way. They must always exercise their powers for the public good. An award of specific performance is also not an option; the court's discretion to refuse or allow specific performance 'must be exercised in accordance with public policy and in such a manner that it does not bring about an unjust result'.⁴⁴ An award of specific performance against the public body would amount to the fettering of powers which is against public policy.⁴⁵

3 Other Arrangements

Various authors⁴⁶ argue that where the arrangements of public authorities are of a purely governmental (non-commercial) nature, it affects the way in which the courts determine the intentions of the parties in deciding whether a contract had come into being and in construing its terms. This argument seems to surface particularly in the area of grants, subsidies and rebates. In what follows, an attempt will be made to determine its validity.

3.1 Grants, Subsidies and Rebates

The courts frequently⁴⁷ find that there is no contract where a grant, subsidy or rebate is promised by the Government to individuals who comply with certain conditions.⁴⁸ Various authors⁴⁹ therefore argue that the courts use a special application of the *animus contrahendi* principle

⁴³ Op cit note 20 at 547.

⁴⁴ Van der Merwe et al op cit note 1 at 355.

⁴⁵ See Hoexter op cit note 5 at 167-8 who notes that a remedy for compensation could possibly be read into the Promotion of Administrative Justice Act 3 of 2000 because s 8(1) allows the courts to grant 'any order that is just and equitable' and s 8(1)(a) directs an administrator 'to act in the manner that the court or tribunal requires'. Whether s 8 finds application will of course depend upon whether the conclusion of the contract or its termination (whichever is in issue) qualifies as 'administrative action' in terms of s 1 of the Act. See also Baxter op cit note 5 at 424 who is of the view that the courts should insist on compensation where public policy requires the termination of a contract unless legislation expressly excludes the payment of compensation.

⁴⁶ Cockrell op cit note 5 at 236-7; Seddon op cit note 5 at 68; Arrowsmith (*Civil Liability*) op cit note 5 at 43; Aronson & Whitmore op cit note 5 at 204-5; Lumb op cit note 12 at 45-6.

⁴⁷ There are exceptions. See *Minister of Home Affairs v American Ninja IV Partnership* supra note 4 and *Grant v Province of New Brunswick* (1973) 35 DLR (3d) 141 (NB SC App Div), discussed below.

⁴⁸ See Thomas Sharp 'Unfair Competition by Public Support of Private Enterprises' (1979) 95 *Law Quarterly Review* 203 at 214 who submits that a grant from the State should be seen as given upon 'conditions analogous to a trust and that acceptance places the grantee under an equitable obligation independent of any agreement on his part to abide by the conditions'.

⁴⁹ Seddon op cit note 5 at 69; Lumb op cit note 12 at 45; Aronson & Whitmore op cit note 5 at 204-5.

when it comes to such arrangements. One author⁵⁰ even argues that the State occupies a 'privileged position' vis-à-vis private citizens in respect of the law of contracts while others⁵¹ claim that governments are often permitted to 'welsh' on promises. Another⁵² argues that the requirement of animus contrahendi is often 'exploited' when it comes to government arrangements. What follows is an analysis of the cases usually cited in support of these arguments.

The Australian case usually referred to in support of the special application of the intention principle is *Australian Woollen Mills Pty Ltd v The Commonwealth*.⁵³ The Commonwealth announced the implementation of a wool subsidy scheme in terms of which it undertook to pay subsidies to wool manufacturers who bought Australian wool for local manufacturing. The details were notified in letters sent to all manufacturers. The scheme was subsequently terminated and the plaintiff claimed entitlement to certain outstanding payments on the ground that the scheme was contractual in nature. According to the plaintiff, the letters constituted 'offers' and the subsequent purchases 'acceptances'.

The High Court examined the arrangement between the Commonwealth and the plaintiff on the basis of the requirements of 'offer' and 'acceptance' under the ordinary laws of contract and found that there was no offer by the Commonwealth and, therefore, that nothing done by the plaintiff in response could amount to an acceptance. According to the Court the letters alleged to constitute a contractual offer came 'not from a party having a commercial interest in the subject matter, but from instrumentalities of a government, which has been dealing for years, and is still dealing with a problem created by a great war'.⁵⁴ The position was not 'that of a person proposing to expend monies on his own'. It was public moneys that were involved.⁵⁵ The scheme was to be administered by a Commission which was itself to determine the amount of the subsidy. If the intention had been to provide for a series of contracts, there would have been a form containing the provisions which, in the event of a dispute, could be construed and applied by a court. For these reasons the Court found that the announcements (in the form of letters) made by the Commonwealth were only statements of policy intentions.⁵⁶

⁵⁰ Lumb op cit note 12 at 45.

⁵¹ Aronson & Whitmore op cit note 5 at 205.

⁵² Cockrell op cit note 5 at 236-7.

⁵³ (1954) 92 CLR 424 (HC); (1955) 93 CLR 546 (PC).

⁵⁴ Idem at 460.

⁵⁵ Idem at 461.

⁵⁶ See also *Milne v Attorney General for the State of Tasmania* (1956) 95 CLR 460 (HC) at 472: 'On their face, [the circulars] are not offers capable, if accepted, of giving rise to a contract. They are not put forward as offers at all, and they do not invite acceptance or rejection. They are no more, and purport to be no more, than statements of present Government intention and present Government policy.'

The Privy Council simply held that the scheme in question did not result in a contract because there was no intention to create legal relations. The arrangement was held to be a 'non-contractual scheme'.⁵⁷

Two factors appear to have played an important role in determining the contractual nature of the arrangement: (1) the arrangement was unlike a private bargain in that the governmental promise was not given as the price for something to be done in return; (2) the Government retained far more discretion as to the execution of its promise than would be found in a private bargain.⁵⁸ Due to an absence of consideration and uncertainty as to the terms of the arrangement, the Court therefore held that there was no intention to enter into a contractual relationship. No special application of the intention principle appears to have been resorted to. I disagree with those⁵⁹ who use the case as an illustration of how 'governments have been permitted to waltz on promises'.

In *The Administration of the Territory of Papua and New Guinea v Leahy*,⁶⁰ the High Court of Australia also held that the arrangement in question did not amount to a contractual obligation. The Department of Agriculture of the Administration of the Territory of Papua and New Guinea undertook to carry out a campaign to eradicate ticks from the respondent's herd of cattle. The Department set about performing the task but failed to carry it out skilfully and efficiently. The respondent alleged that the arrangement amounted to a contract and that the Department was therefore in breach. However, the High Court held that the Department was simply giving effect to a general policy of dispensing aid to individual cattle owners to combat a recognised menace in the Territory and that the respondent's attitude throughout was that of a private person appealing for governmental aid.⁶¹ No contract therefore arose.

Lumb⁶² is of the view that the *Leahy* case illustrates 'the privileged position which the Crown holds *vis-à-vis* the citizen in the law of contracts'. He argues that it 'indicates the magnitude of the task faced by the citizen if he desires to sue a government agency or department in contract for the negligent performance of a service which is carried out either at the request of the citizen or by decision of the department'.⁶³ As

⁵⁷ Supra note 53 at 550.

⁵⁸ See also *Placer Development Ltd v Commonwealth of Australia* (1969) 121 CLR 353 (HC) (promise to pay export subsidy at rate 'determined by the Commonwealth from time to time' not enforceable – but see Aronson & Whitmore op cit note 5 at 205 who argue that the government was permitted to 'waltz' on its promise); *Administrative & Clerical Officers Association, Commonwealth Public Service & Australian Public Service Association v Commonwealth & Minister of Industrial Relations* [1979] 26 ALR 497 (HC) (promise to deduct union dues without detail of arrangements or their duration not enforceable – but see Aronson & Whitmore op cit note 5 at 204 who argue that 'political factors' influenced the court's decision). See also Treitel op cit note 1 at 153-4.

⁵⁹ Such as Aronson & Whitmore op cit note 5 at 205.

⁶⁰ Supra note 30.

⁶¹ Idem at 20-1.

⁶² Op cit note 12 at 45.

⁶³ Idem at 46.

pointed out by Rose,⁶⁴ the decision in *Leahy* is not surprising when all the circumstances of the discussions between the Administration and Leahy about the treatment of Leahy's cattle are considered. The arrangements did not in any way make provision for Leahy to pay for the treatment of the cattle. Leahy was to provide labourers that would be paid six shillings per day but the payments were in fact to be made by the Administration. The only other requirement made of Leahy was that he should arrange for the cattle to be mustered. In the words of Kitto J,⁶⁵ 'the whole atmosphere of the correspondence and discussions that took place was different from that which exists between contracting parties'.⁶⁶ No privileged position on the part of the Crown appears to have been displayed in *Leahy*. The case is also not an example of an instance where a government was permitted to 'welsh' on its promise as argued by Aronson and Whitmore.⁶⁷

In the South African case of *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel & Nywerheid*⁶⁸ the Court had to decide upon the contractual nature of an export incentive scheme promulgated in terms of a government notice. Botha JA⁶⁹ found that the form and content as well as the whole appearance and scope of the government notice was not of such a nature that is usual in, and would be expected of, an offer which was intended to give rise to contractual liability.⁷⁰ According to Botha JA, the making available of financial assistance from the Treasury to subjects by means of a purely beneficial disposition was so peculiar to a relationship in the field of administrative law that there was no room for a finding of contractual liability on the part of the State. He found that, objectively considered, when the Minister promulgated the scheme, and when the appellant registered itself in terms of the scheme and submitted a claim, there was no intention on the part of the one or the other of bringing a contractual relationship into being. The scheme created no obligations for subjects and did not encroach upon any rights; it conferred only benefits and was a purely beneficial disposition. The scheme was a classic example of an act of the executive authority which came into being in terms of the state prerogative. As a result, the requirement of *animus contrahendi* was held to be lacking. I therefore disagree with Cockrell⁷¹ who uses the case as an example of how the requirement of *animus contrahendi* has been 'exploited'.⁷²

⁶⁴ Op cit note 5 at 239.

⁶⁵ Supra note 30 at 21.

⁶⁶ See also *Hull v Canterbury Municipal Council* [1974] 1 NSWLR 300 (CL) at 312.

⁶⁷ Op cit note 5 at 205.

⁶⁸ 1992 (4) SA 1 (A).

⁶⁹ With whom Smalberger JA, Milne JA and Nicholas AJA concurred.

⁷⁰ Supra note 68 at 22-7.

⁷¹ Op cit note 5 at 236-7.

⁷² See also the cases of *Pietermaritzburg Congregation of Jehovah's Witnesses v Pietermaritzburg City Council and Another* 1973 (4) SA 306 (N) and *Gerhard v State President & Others* 1989 (2) SA 499 (T) which, according to Cockrell op cit note 5 at 236-7, are examples of the 'exploitation' of the requirement of *animus contrahendi*. On a close analysis of these cases,

In the English decision in *R v Secretary of State for Transport, Ex parte Sheriff and Sons Ltd*,⁷³ the Court also had to decide on the contractual nature of a government scheme. The Department of Transport promised a grain company the payment of a grant towards the cost of certain works under the Railways Act 1974. After the company had borrowed money from its bank (on condition that the grant would go to reduce the bank loan), the Department went back on its promise and refused to pay the grant. The grant was subsequently paid but only three and a half years later. During this time the company incurred additional interest charges and wished to claim such interest from the Department on the basis of contract. It was in this area therefore that the question of a contractual relationship arose. The company argued that even though the power to pay the grant derived from statute, once the Department decided in its discretion to offer it, a contractual relationship arose. Taylor J rejected this argument and said the following:⁷⁴

‘There was no intention to create contractual relations. The [Department] was simply exercising a statutory power to grant money out of public funds upon conditions over which [it] had discretionary control. Section 8(1) of the Railways Act left it to [the Department] to decide whether the facilities would be in the interest of the locality. Subsection (2) left it to [the Department] to decide what amounted to capital expenditure and subsection (4) empowered [the Department] very widely to impose such terms or conditions as [it] thought fit. In those circumstances, the indicia of a contract simply do not apply.’⁷⁵

Thus, as in the case of *Australian Woollen Mills*,⁷⁶ the Court found that the arrangement was not contractual because the Department retained far more discretion as to the execution of its promise than would be found in a private bargain.⁷⁷ The Department’s exercise of its discretion could be reviewed as a matter of public law but no action lay for breach of contract.

Based on these decisions, it would appear that, as a general rule, South African, Australian and English courts are reluctant to find a contract where a grant, subsidy or rebate is promised.⁷⁸

The South African case of *Minister of Home Affairs v American Ninja IV Partnership*⁷⁹ is one of the few cases where the Court was convinced

however, it is clear that the absence of *animus contrahendi* is justified. In *Jehova’s Witnesses* the arrangement in question was subject to ‘prior’ approval to confer contractual status (see at 310-11), and in *Gerhard*, statements made by the State President in Parliament could not amount to enforceable contracts because the powers of the President were subject to the then provisions contained in certain sections of the Constitution, Act 110 of 1983 (see at 504-5).

⁷³ 12 Jan 1988 *The Independent* (available on Lexis); also noted by AW Bradley ‘Delayed Payment of a Discretionary Grant’ 1989 *Public Law* 197.

⁷⁴ *Idem* at 12F of the transcript.

⁷⁵ See also *Cato v Minister of Agriculture, Fisheries and Food* [1989] 3 CMLR 513 (CA) (grant for decommissioning of fishing vessel to reduce fishing fleet not contractual).

⁷⁶ *Supra* note 53. See also the *Placer Development* case and the *Administrative & Clerical Officers Association* case *supra* note 58.

⁷⁷ See also Floyd (thesis) *op cit* note 5 at 249 n243.

⁷⁸ See also *Joy Oil Co v The King* (1951) 3 DLR 582 (SC); *Lethbridge Collieries Ltd v The King* (1950) 4 DLR 785 (SC).

⁷⁹ *Supra* note 4; Floyd (thesis) *op cit* note 5 at 358-9.

that the scheme in question *was* contractual.⁸⁰ In this case, the Government, in order to encourage the production of locally made feature films, decided to grant state financial assistance to the film industry. The Ministry of Home Affairs issued a circular, which incorporated the particulars of the financial assistance as well as the requirements that had to be complied with in order to qualify for them. The respondents alleged that they had produced a film that qualified for assistance and were therefore entitled to payment of the prescribed subsidies. They contended that the circular contained an undertaking by the State to pay the subsidies in question and was contractually bound to do so. The appellants, however, argued that they had incurred no liability in terms of the circular or otherwise. They argued that the circular was merely a departmental regulation informing potential producers of films under what conditions the applications would be considered for a subsidy, but that there was no undertaking to pay the subsidy to an applicant who complied with the terms of the circular and that this was so even though the film was registered. The registration was nothing more than an acknowledgement of receipt of the application. The appellants argued that whilst the relationship between them and the respondents contained elements of consensus, its true juristic character was a unilateral or authoritative act on the part of the State in the nature of a concession or privilegium. In other words, they argued that the consent of the respondents (applicants) played no contractual role; it was only a step in the administrative process leading to the possible grant of a subsidy; the State at all times retained the discretion whether or not to pay the subsidy; unless and until it decided to pay, no liability to do so arose.⁸¹

Nestadt JA disagreed and found that the nature of the relationship between the appellants and the respondents was essentially a consensual one involving a commercial transaction. The relationship arose and could only arise from agreement, the terms of which were contained in the circular.⁸² Nestadt JA found that in the context used, the word ‘subsidy’

⁸⁰ See also *Grant v Province of New Brunswick* supra note 47 where a government scheme for the purchase of surplus potatoes at subsidised prices was found to be contractual. According to Hughes CJNB (at 146-7), ‘the test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. . . . Had the Province intended to reserve the right to select from whom it chose to purchase potatoes which it was prepared to purchase, it could have indicated there was a limit to the quantity or the value of the potatoes which it was prepared to purchase or it could have stated that the decision of the committee appointed to administer the programme was final or made it clear that the committee’s approval was a condition to the right to payment. . . [A] reasonable person in the position of the plaintiff would be entitled to assume that if he complied with the conditions set out in the general information and disposed of his potatoes to the satisfaction of the inspector appointed by the Province, he was entitled to sell his potatoes to the Province and that the Province was legally bound to purchase and pay for them.’

⁸¹ Supra note 4 at 267.

⁸² See also the decisions in *Mustapha & Another v Receiver of Revenue, Lichtenburg, & Others* 1958 (3) SA (A); *S & T Import & Export (Pty) Ltd v Controller of Customs & Excise* 1981 (4) SA 196 (Z); and *Ondombo Beleggings (Edms) Bpk v Minister of Mineral & Energy Affairs* 1991 (4) SA 718 (A) where the arrangements in question could have arisen only by way of agreement.

denoted not a unilateral grant but a quid pro quo for the obligations undertaken by the producer, such as the duty to produce and market the film and to comply with the criteria specified in the circular. As far as the determination of *animus contrahendi* was concerned, his Lordship found that based on the terms of the circular there was an existing promise by the State (albeit in relation to a performance in the future) that a tax-free subsidy 'will be paid'.⁸³ There was also a series of firm obligations on the producer, which arose upon registration of the film. The case was therefore found to be one of mutual obligations by both parties to the agreement or, in other words, a bilateral contract.⁸⁴ Nestadt JA rejected the appellants' contention that on a proper interpretation of the circular, the State's obligation to pay subsidies arose only if and when a producer's duly documented claim was accepted and that if, in its discretion, the State decided not to accept the claim, no liability on its part arose. He rejected this contention because it failed to take account of the commercial realities of the transaction. No sensible businessman would have entered into the agreement evidenced by the circular unless the State were bound by its undertaking to pay the subsidies in question.⁸⁵

A number of factors therefore determined the contractual nature of the arrangement: the subject matter and content of the circular; the mutual obligations placed upon the parties; and the commercial nature of the arrangement. Most government schemes are however *not* contractual because their subject matter is often too far removed from ordinary commercial arrangements to regard them as contractual.⁸⁶ They are unlike private bargains in that the promise made by the public authority is not given as the price for something to be done in return.⁸⁷ The Government also retains far more discretion as to the execution of its promise than would be found in a private bargain.⁸⁸ No special application of the intention principle therefore appears to be relied on by the courts and public authorities are not afforded a 'privileged position' in these instances.

4 Conclusion

Where an arrangement entered into by a public authority has a commercial component to it, the courts seem generally to regard it as contractual and the usual contractual consequences follow. The commercial nature of a government arrangement does not, however, *guarantee* contractual enforceability to the private contracting party. The contract may still be declared invalid due to the operation of the no-

⁸³ *Supra* note 4 at 269.

⁸⁴ *Ibid.*

⁸⁵ *Idem* at 270-1.

⁸⁶ See also Seddon *op cit* note 5 at 69.

⁸⁷ See the *Australian Woollen Mills* case *supra* note 53 and the *Leahy* case *supra* note 30.

⁸⁸ See the *Placer Development* case and the *Administrative & Clerical Officers Association* cases *supra* note 58; the *Ex parte Sheriff* case *supra* note 73 at 12F of the transcript.

fettering-by-contract principle. Whereas under normal circumstances the court would find an intention to contract, it may find an absence of such intention. A special application of the animus contrahendi principle is therefore resorted to by the courts to give effect to the no-fettering principle. In doing so, the court is applying a rule of policy rather than making a genuine attempt to ascertain the intentions of the parties. For the reasons already stated, the special application of the intention principle is then justified.

The hardship suffered by the private contracting party should not be ignored though. A remedy of compensation akin to the doctrine of *fait du prince* in French law should be awarded. It seems only fair that if the private contracting party is required to suffer in the public interest, public funds should compensate for any loss suffered.⁸⁹ When it comes to government arrangements in the form of grants, subsidies and rebates, various authors argue that the courts use a special application of the animus contrahendi principle. As contended, this argument is ill-founded. Arrangements in the form of grants, subsidies and rebates are generally not regarded as contractual because they are often too far removed from ordinary commercial arrangements to regard them as contractual.

⁸⁹ In the words of Lord Moulton in *Att Gen v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) at 553, 'it [is] equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals'. In Roman-Dutch law there appears to have been a strong moral duty to pay compensation in the event of interference with contractual rights by the sovereign: see Baxter *op cit* note 5 at 424.