

**THE UNILATERAL DETERMINATION OF PRICE IN CONTRACTS OF SALE
GOVERNED BY THE CONSUMER PROTECTION ACT 68 OF 2008**

By

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DECLARATION

I declare that the dissertation, which I hereby submit for the degree LLM (Mercantile Law) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Hanri Magdalena du Plessis

24 April 2012

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SUMMARY

The purpose of this dissertation is to investigate the application of the common law rule prohibiting unilateral price determination in contracts of sale governed by the Consumer Protection Act. The unilateral determination of price has been a controversial issue for an extended period of time. This controversy is traced back to Roman law where different translations and interpretations are given to the texts dealing with the unilateral determination of price in a contract of sale. The majority of the Roman-Dutch writers preferred the view that regarded a contract granting a discretion to one of the parties to determine the price as void. Subsequently, this view was incorporated into South African law. During the 1990s the Supreme Court of Appeal questioned whether the rule should still form part of South African law. An overview of the case law indicates that the courts have been prepared to allow contractual price discretions provided such discretions refer to an objective external standard or reasonableness. There are also indications that the courts would imply that the discretion should be exercised reasonably, except in the case of clearly unfettered discretions. Recently, the Consumer Protection Act 68 of 2008 ("the CPA") has made substantial amendments to the law of sale in respect of contracts governed by the CPA. The dissertation investigates the influence of the CPA on the rule governing unilateral price determinations in such sales. It also investigates the consumer's fundamental rights to disclosure of information and fair, just and reasonable terms and conditions. Legal uncertainties and issues arising from the provisions of the CPA are identified. Finally, a comparative study with English law is undertaken which provides a comparative basis from which possible solutions are extracted and proposals made to address the uncertainties and issues emanating from the CPA.

Key terms: certainty of price, consumer protection, consumer sales, contracts of sale, contractual autonomy, contractual discretions, display of price, fundamental consumer rights, public policy, unequal bargaining relationship, unfair price, unfair terms, unilateral price determination.

TABLE OF CONTENTS

CHAPTER 1	INTRODUCTION.....	7
1 1	Background.....	7
1 1 1	Introductory remarks.....	7
1 1 2	Developments in South African contract law	8
1 1 3	Developments in South African consumer law.....	10
1 2	Purpose, problem statement and motivation	12
1 3	Hypothesis	13
1 4	Choice of legal systems.....	13
1 4 1	English law of contract and sale	14
1 4 2	English consumer law.....	15
1 5	Structure and overview of the dissertation	15
1 6	Research approach and methodology.....	16
1 6 1	Research Methodology.....	16
1 6 2	Explanatory note on source referencing and the bibliography	17
1 7	Conclusion	19
CHAPTER 2	UNILATERAL PRICE DETERMINATION IN ROMAN AND ROMAN-DUTCH LAW.....	20
2 1	Introduction.....	20
2 2	Roman law of purchase and sale	21
2 2 1	Introduction.....	21
2 2 2	Certainty of price.....	21
2 2 3	Unilateral determination of the price in the <i>Institutes</i> of Gaius.....	22
2 2 4	Unilateral determination of the price under the <i>Corpus Iuris Civilis</i>	23
2 2 4 1	<i>Introduction.....</i>	<i>23</i>
2 2 4 2	<i>Is the contract of sale void or is its conclusion valid but not yet effective?</i>	<i>24</i>
2 2 4 3	<i>Interpretations and arguments that consider the contract to be void ...</i>	<i>24</i>
2 2 4 4	<i>Interpretations and arguments that consider the contract to be valid but imperfect.....</i>	<i>30</i>

2 2 4 5	<i>Discretion granted to the buyer only or to both parties?</i>	38
2 2 5	Conclusion.....	38
2 3	Roman-Dutch law of purchase and sale.....	39
2 3 1	Introduction.....	39
2 3 2	Certainty of price.....	39
2 3 3	Unilateral determination of the price	40
2 3 3 1	<i>Introduction.....</i>	40
2 3 3 2	<i>Is the contract of sale void or validly concluded (but not yet effective)? ..</i>	40
2 3 3 3	<i>Interpretations and arguments rendering the contract void.....</i>	41
2 3 3 4	<i>Interpretations and arguments rendering the contract valid but imperfect</i>	44
2 3 3 5	<i>Discretion granted to the buyer only or to both parties?</i>	47
2 5	Conclusion	48

CHAPTER 3 UNILATERAL PRICE DETERMINATION IN SOUTH AFRICAN LAW PRIOR TO THE CONSUMER PROTECTION ACT..... 50

3 1	Introduction.....	50
3 2	General principles of the law of purchase and sale	50
3 3	Unilateral determination of price.....	52
3 3 1	The requirement of certainty in contracts.....	52
3 3 2	The requirement of certainty of price	52
3 3 3	The rule questioned by the Supreme Court of Appeal.....	54
3 3 4	The rule as a manifestation of the requirement of certainty of price	55
3 3 4 1	<i>Introduction.....</i>	55
3 3 4 2	<i>Arguments that the unilateral determination of price does not comply with the requirement of certainty of price</i>	56
3 3 4 3	<i>Arguments that the unilateral determination of price does comply with the requirement of certainty of price or does not need to.....</i>	65
3 3 4 4	<i>Conclusion.....</i>	79
3 3 5	The rule and public policy	79
3 3 5 1	<i>Introduction.....</i>	79

3 3 5 2	<i>The concept of public policy</i>	79
3 3 5 3	<i>Policy considerations relevant to the unilateral determination of price.</i> 81	
3 3 5 4	<i>Final remarks on the rule and public policy</i>	89
3 4	Conclusion	90

CHAPTER 4 UNILATERAL PRICE DETERMINATION IN CONTRACTS OF SALES GOVERNED BY THE CONSUMER PROTECTION ACT..... 91

4 1	Introduction	91
4 2	Brief historical background to the CPA	91
4 3	Overview of the CPA	92
4 3 1	Introduction.....	92
4 3 2	Purpose of the CPA.....	93
4 3 3	Interpretation of the CPA	94
4 3 4	Application of the CPA.....	95
4 3 4 1	<i>Introduction</i>	95
4 3 4 2	<i>Conclusion</i>	98
4 3 5	Focus on promotion and protection of specific consumer rights	98
4 4	Consumer’s right to disclosure and information	99
4 4 1	Right to disclosure of price	99
4 4 1 1	<i>Introduction</i>	99
4 4 1 2	<i>Definition of retailer</i>	99
4 4 1 3	<i>Display of goods for sale</i>	100
4 4 1 4	<i>Display of price</i>	103
4 4 1 5	<i>Consequences of a displayed price</i>	104
4 4 1 6	<i>Conclusion</i>	104
4 4 2	Right to a sales record for every transaction with a supplier.....	106
4 4 3	Right to information in plain and understandable language	106
4 5	Consumer’s right to fair, just and reasonable terms	108
4 5 1	Right to an itemised breakdown of the consumer’s financial obligations in written consumer contracts	109
4 5 2	Right to fair, reasonable and just contract terms.....	109

4 5 2 1	<i>Introduction</i>	109
4 5 2 2	<i>The CPA and the common-law position</i>	110
4 5 2 3	<i>Difference of approach between pure consumer sales and business-to-business consumer sales</i>	110
4 5 2 4	<i>The test for unfairness</i>	116
4 5 2 5	<i>Factors listed in section 52(2) to consider when assessing unfairness</i>	117
4 5 2 6	<i>Other relevant factors not listed in section 52(2)</i>	124
4 5 2 7	<i>Consequences of unfair terms</i>	125
4 5 2 8	<i>Conclusion</i>	125
4 5 3	Right to a fair, reasonable and just price	126
4 5 3 1	<i>Introduction</i>	126
4 5 3 2	<i>The test for unfairness of price</i>	126
4 5 3 3	<i>Conclusion</i>	128
4 5 4	Prohibited terms.....	129
4 6	Conclusion	129

CHAPTER 5 UNILATERAL PRICE DETERMINATION IN ENGLISH LAW....
..... **131**

5 1	Introduction	131
5 2	General principles of the law of purchase and sale	131
5 3	Unilateral determination of price	134
5 3 2	The requirement of certainty of price	134
5 3 3	Unilateral determination of the price	136
5 3 4	Conclusion.....	139
5 4	English consumer sales law	139
5 4 1	Introduction	139
5 5	Consumer's right to disclosure and information	140
5 5 1	Introduction	140
5 5 2	Price Marking Order 2004.....	140
5 5 2 1	<i>Introduction</i>	140
5 5 2 2	<i>Application</i>	140

5 5 2 3	<i>Requirement to indicate selling price</i>	141
5 5 2 4	<i>Manner of indication of selling or unit price</i>	142
5 5 2 5	<i>Consequences of not indicating the selling or unit price</i>	143
5 5 3	<i>Lessons for South African law</i>	144
5 6	Consumer's right to fair, just and reasonable terms	144
5 6 1	The Unfair Terms in Consumer Contract Regulations 1999	145
5 6 1 1	<i>Introduction</i>	145
5 6 1 2	<i>Interpretation</i>	145
5 6 1 3	<i>Application</i>	145
5 6 1 4	<i>The requirement of plain intelligible language</i>	148
5 6 1 5	<i>Test for unfairness</i>	148
5 6 1 7	<i>Terms that may be unfair</i>	151
5 6 1 8	<i>Burden of proof</i>	153
5 6 1 9	<i>Consequences of unfair terms</i>	154
5 6 1 10	<i>Lessons for South African law</i>	154
5 6 2	Unfair Contract Terms Bill of 2005.....	155
5 6 2 1	<i>Introduction</i>	155
5 6 2 2	<i>Interpretation</i>	156
5 6 2 3	<i>Application</i>	156
5 6 2 4	<i>Test for unfairness</i>	160
5 6 2 5	<i>Factors to consider when assessing unfairness</i>	160
5 6 2 6	<i>Terms that may be regarded as unfair</i>	162
5 6 2 7	<i>Burden of proof</i>	164
5 6 2 8	<i>Consequences</i>	164
5 6 2 9	<i>Lessons for South African law</i>	164
5 7	Conclusion	165
CHAPTER 6	CONCLUSION	167
6 1	Introduction	167
6 2	Summary of research findings and proposals	167
6 2 1	Unilateral price determination in Roman law	167
6 2 2	Unilateral price determination in Roman-Dutch law	168

6 2 3	Unilateral price determination in South African law prior to the Consumer Protection Act.....	168
6 2 4	Unilateral price determination in contracts of sales governed by the Consumer Protection Act.....	169
6 2 4 1	<i>Introduction</i>	169
6 2 4 2	<i>Consumer's right to disclosure of information</i>	170
6 2 4 3	<i>Consumer's right to fair, just and reasonable terms</i>	171
6 2 5	Unilateral price determination in English law	173
6 2 5 1	<i>General principles governing the unilateral determination of price</i>	173
6 2 5 2	<i>Consumer legislation</i>	173
6 3	Conclusion	175
	BIBLIOGRAPHY	177
	Books.....	177
	Journal articles.....	184
	Papers and reports.....	187
	Other sources.....	187
	TABLE OF CASES (SOUTH AFRICA)	188
	TABLE OF STATUTES (SOUTH AFRICA)	192
	NOTICES, RULES AND REGULATIONS (SOUTH AFRICA)	192
	TABLE OF CASES (FOREIGN)	193
	TABLE OF STATUTES (FOREIGN)	195
	NOTICES, RULES AND REGULATIONS (FOREIGN)	195
	ABBREVIATIONS	196

CHAPTER 1 INTRODUCTION

1 1 BACKGROUND

1 1 1 Introductory remarks

It has been an established rule of South African law that “[t]here can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them”.¹ During the 1990s, however, the Supreme Court of Appeal questioned (without deciding) whether the rule should still form part of our modern law.² At that time, the majority of legal scholars agreed that the abolishment of the rule would be a step in the right direction and in line with the principles of contractual autonomy.³

More than a decade later, this question remains unanswered and the legal position of the rule is still uncertain. However, recent developments in consumer law have marked a departure from the traditional reverence reserved for contractual autonomy to a contractual order striving to protect consumers against unfair business practices (including unfair contract terms and prices).⁴ The enactment of the Consumer Protection Act 68 of 2008 (“the CPA”) has made substantial amendments to the law of sale applicable to sales governed by the Act.⁵ In addition, the CPA obliges the courts to develop the common law “to improve the realisation and enjoyment of consumer rights generally”.⁶

¹ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 574.

² *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) 185–186 and *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 4 SA 928 (SCA) para 16.

³ Cornelius 2003 *TSAR* 390; McLennan 2000 *SA Merc LJ* 486ff; Van der Merwe *et al Contract* 241. Kerr is one of the few legal scholars who argue that the rule should not be abolished or changed (see Kerr *Sale* 72).

⁴ Van Vuuren 2009 *Without Prejudice* 38.

⁵ Van Eeden *Guide to the CPA* 24.

⁶ S 4(2)(a).

In 2004, Kerr predicted that consumer legislation would influence whether or not the rule would remain a part of South African law.⁷ However, the influence of the CPA on the rule has not been considered or analysed and it is the aim of this dissertation to do both.

1 1 2 Developments in South African contract law

Generally, a contract can be defined as “an agreement made with the intention of creating an obligation or obligations”.⁸ In other words, the parties must have the intention to be bound by the terms of the contract. It will be possible to enforce such contracts only if the obligations the parties are binding themselves to are certain or can be ascertained. As such, it is an accepted legal principle that the terms of a contract must result in certainty regarding their legal consequences.⁹ This usually implies that the parties must clearly state the material aspects of the obligations and how these obligations will operate.¹⁰ If a contract is so vague that the material aspects and obligations of it cannot be determined, there can be no contract.¹¹

In accordance with the above rule, the essential terms of a contract of sale must be certain or ascertainable.¹² One of the essential terms of a contract of sale is the price, which will be subject to the above requirement of certainty.¹³ This is not a problem where the exact price is determined by the parties when the contract is concluded. However, it can be problematic where the price is not determined at the time the contract is concluded and must be determined at a later stage. This may happen where it is impossible to set out the price in the

⁷ Kerr *Sale* 70, where Kerr refers to the 1998 Final Report of the South African Law Commission Project 47 on “Unreasonable stipulations in contracts and the rectification of contracts”.

⁸ Van der Merwe *et al Contract* 9.

⁹ *Idem* 221.

¹⁰ *Ibid.*

¹¹ De Wet & Van Wyk *Kontraktereg* 93.

¹² Van der Merwe *et al Contract* 223 and the cases referred to in n 16. See further ch 3 para 3 3 2.

¹³ *Westinghouse Brake & Equipment v Bilger Engineering supra* 574.

contract as the price may be uncertain at the time the contract is concluded or because for commercial or other reasons it may not be desirable to do so.¹⁴

One way of addressing uncertainties in a contract is to provide one of the parties with discretionary powers to determine how to deal with such uncertainties. Granting a discretionary power to one of the parties to deal with incidental or ancillary issues may be an effective way to deal with such uncertainties.¹⁵ However, when contractual discretions are granted in respect of essential or material aspects of the contract, it can become problematic.¹⁶ The unilateral determination of the price of a contract of sale is no exception, and has been a controversial issue in our law for an extended period of time.¹⁷

Kerr points out that “[t]here is a wealth of authority to the effect that the parties may not agree that the price is to be fixed by one of them alone” (“the rule”).¹⁸ The rule can be traced back to Roman and Roman-Dutch law, and has formed part of the law of South Africa for many years.¹⁹ One of the most recent and often-cited formulations of the rule can be found in *Westinghouse Brake & Equipment v Bilger Engineering*, where the court defined the rule as follows:

It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. There can be no valid contract of sale if the parties have agreed that the price is to be fixed in future by one of them alone.²⁰

¹⁴ Van der Merwe *et al Contract* 223.

¹⁵ Kerr *Contract* 132.

¹⁶ Van der Merwe *et al Contract* 231.

¹⁷ See eg Kerr *Sale* 55–72.

¹⁸ Kerr *Sale* 55.

¹⁹ The historical origin and development of the rule is discussed in ch 2.

²⁰ *Westinghouse Brake & Equipment v Bilger Engineering supra* 574.

Prior to 1993 the rule was firmly established in South African law and regularly applied by South African courts.²¹ The courts accepted the application of the rule in South African law without question, but interpreted and applied the rule in different ways. This casuistic approach led to different results, legal uncertainty and sometimes even undesirable results.²² Then, in *Benlou Properties v Vector Graphics*, the court criticised the rule.²³ Subsequently, in *NBS Boland Bank v One Berg River Drive* the court questioned whether the rule should still form part of South African law.²⁴

1 1 3 Developments in South African consumer law

While the Supreme Court of Appeal questioned the application of the rule, the existing consumer protection measures in South African law were criticised by legal scholars, who recognised the need to protect consumers against unfair contract terms.²⁵

Traditionally, contract law was based on the assumption that the parties have negotiated the terms of the contract and are on an equal footing during the negotiations.²⁶ This is not the case in practice because businesses use standard contracts that benefit them and are not open to negotiation.²⁷ In addition, common-law remedies to address unfair contract terms were not sufficient.²⁸ Previous legislative control in South Africa was limited to certain terms in certain contracts and contained in different pieces of legislation.²⁹ The different pieces of legislation were not co-ordinated, were not known to

²¹ See ch 3 for a discussion of the relevant case law.

²² *Ibid.*

²³ *Benlou Properties v Vector Graphics supra* 185ff.

²⁴ *NBS Boland Bank v One Berg River Drive supra* para 16.

²⁵ Sharrock *Business law* 570; Van Eeden *Guide to the CPA* 23; Naudé 2006 *Stell LR* 361; Naudé 2009 *SALJ* 505; Sharrock 2010 *SA Merc LJ* 295; Du Preez 2009 *TSAR* 64.

²⁶ Cockrell 1997 *Acta Juridica* 31; Woker 2010 *Obiter* 227; Van Eeden *Guide to the CPA* 30.

²⁷ Sharrock 2010 *SA Merc LJ* 296; Woker 2010 *Obiter* 227; Van Eeden *Guide to the CPA* 13.

²⁸ Naudé 2006 *Stell LR* 362; Sharrock 2010 *SA Merc LJ* 296.

²⁹ Van Huyssteen *et al Contract* 39; Sharrock 2010 *SA Merc LJ* 296; Woker 2010 *Obiter* 218–219; Naudé 2006 *Stell LR* 362; Du Preez 2009 *TSAR* 58, 64.

consumers and did not provide adequate protection for consumers.³⁰ Therefore, consumer law in South Africa was incomprehensive and fragmented.³¹ The courts were also hesitant to develop the common law to address these problems on a case-by-case basis.³² Finally, after years of debate and legal developments in consumer law, the CPA was promulgated.³³

The CPA substantially changed the law of sale in respect of sales governed by the Act. The CPA applies to certain contracts of sale only and divides contracts of sale into sales governed by the CPA (“consumer sales”) and those sales not governed by it (“commercial sales”).³⁴ The aim of this dissertation is to investigate and analyse the unilateral determination of price in consumer sales within the framework of the CPA.³⁵

The CPA promotes and protects certain fundamental consumer rights. Two of these fundamental rights are investigated in order to determine whether the unilateral determination of price in a consumer sale should be allowed or not.³⁶ First, the consumer’s right to disclosure and information.³⁷ Specifically, the dissertation investigates the consumer’s emanating rights to disclosure of price,³⁸ a sales record,³⁹ and information in plain and understandable language.⁴⁰ Secondly, the consumer’s fundamental right to fair, just and reasonable terms and conditions is investigated.⁴¹ The dissertation specifically investigates the consumer’s emanating rights to fair, reasonable and just terms

³⁰ Woker 2010 *Obiter* 219.

³¹ Van Eeden *Guide to the CPA* 2; Woker 2010 *Obiter* 218–219; Gouws 2010 *SA Merc LJ* 79; Jacobs *et al* 2010 *PELJ* 303; Naudé 2006 *Stell LR* 361 n 4.

³² Van Eeden *Guide to the CPA* 2.

³³ Van Huyssteen *et al Contract* 39; Woker 2010 *Obiter* 228.

³⁴ The application of the CPA is discussed in ch 4 para 4 3 4.

³⁵ As such, the application of the rule in commercial sales is not within the scope of this dissertation. However, where necessary, the general principles governing sales and the rule are discussed in order to analyse the application of the rule within the framework of the CPA.

³⁶ These rights are investigated in ch 4.

³⁷ Part D of the CPA (ss 22–28).

³⁸ S 23.

³⁹ S 26.

⁴⁰ S 22.

⁴¹ Part G of the CPA (ss 48–52).

and price,⁴² an itemised break-down of his or her financial obligations in a written consumer contract,⁴³ and whether a discretion granted to the seller to determine the price could possibly be viewed as a prohibited term.⁴⁴

Finally, the dissertation ventures some sensible and practical proposals as to when the unilateral determination of price in a consumer sale should be prohibited and under what circumstances such a determination should be allowed.

1 2 PURPOSE, PROBLEM STATEMENT AND MOTIVATION

As indicated above, the courts have questioned the applicability of the rule against unilateral price determination. Recent consumer legislation has, however, changed the South African law of sale substantively and the effect of this legislation on the applicability of the rule should be investigated. The dissertation investigates the origins, development and purpose of the rule in order to evaluate whether it should still form part of our law in the light of recent developments in consumer law and, if so, which principles should apply to the rule in respect of consumer sales.

The dissertation is a valuable contribution to the field of the law of sale and consumer law in that it provides a comprehensive overview of the rule applicable to consumer sales as well as a comparison with the principles found in English law. The dissertation proposes sensible and practical developments that will allow for the necessary flexibility in modern consumer sales while preventing the unjust and unfair exercise of a discretionary power by the seller in determining the price.

⁴² Ss 48 and 52.

⁴³ S 50.

⁴⁴ S 51.

1 3 HYPOTHESIS

The importance of certain clear legal principles determining the validity of contracts of sale in society cannot be underestimated. In modern times, the economic factors determining the purchase price payable are uncertain and constantly fluctuating. Many contracts of sale incorporate provisions on how the purchase price for a specific article or property can be determined in the future. Many of these provisions incorporate a certain measure of discretionary power in order to provide for uncertain future events. However, the extent to which these discretionary powers are granted can result in parties being bound to contract terms they never intended at the conclusion of the contract and creates an opportunity for the abuse of such discretionary powers.

There are indications that the South African courts have developed the contract law to incorporate more discretionary powers (in order to provide for the necessary flexibility required in the current economic and commercial environment), provided such discretions refer to an objective external standard or reasonableness (to protect the parties against the unreasonable exercise of these discretionary powers). However, no clear set of principles exists and there is uncertainty as to whether such discretionary powers are valid and enforceable in consumer sales.

A large number of consumer sales are concluded daily. The purchase price is an essential term of these contracts. Therefore, it is of vital importance that the legal principles governing these essential terms should not be subject to any legal uncertainty and must be developed to take cognisance of the commercial reality of the society as well as the relevant consumer-law developments.

1 4 CHOICE OF LEGAL SYSTEMS

A comparative study with English law has been chosen due to the influence of that legal system on South African law and its relevance to the research topic.

1 4 1 English law of contract and sale

In *NBS Boland Bank v One Berg River Drive* the court specifically felt the need to refer to English law.⁴⁵ The court particularly mentioned the English case of *May and Butcher Ltd v R*, in which it was said that “it is a perfectly good contract to say that the price is to be settled by the buyer”.⁴⁶ The court in *NBS Boland Bank v One Berg River Drive* also referred to *Lombard Tricity Finance v Paton*.⁴⁷ In this case, the court had to decide whether the discretion to vary the interest rate of a loan was an absolute (ie unfettered) discretion and whether it was lawful.⁴⁸ The court concluded that the agreement granted an absolute discretion and that there was no reason to imply any restrictions in respect of the discretion.⁴⁹ Thereafter, the court referred to *May and Butcher v R* and held that the discretion was lawful and enforceable.⁵⁰

Recent trends in English case law, however, indicate that the courts are far more prepared to imply terms into the contract to limit the discretion, and that such limitations would include a reference to reasonableness.⁵¹ As English law authorities have been used extensively in arguments that the rule should be abolished, a critical analysis of the applicable English-law principles is necessary in order to understand what exactly the English-law principles are and whether they should be followed in South African law.

⁴⁵ *NBS Boland Bank v One Berg River Drive supra* paras 10–11.

⁴⁶ *May and Butcher Ltd v R* [1934] 2 KB 17 21.

⁴⁷ *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918.

⁴⁸ *Idem* 923. The only qualification in the contract was that the lender had to give notice of any change in the interest rate (at 920).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ See eg *Paragon Finance Plc v Nash and another; Paragon Finance Plc v Staunton* [2002] 1 WLR 685 para 38; *Esso Petroleum Company Ltd v David, Christine Addison* [2003] EWHC 1730 (Comm) para 135; *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] Bus LR 1304 para 66. These cases are discussed in ch 5 para 5 3 3.

1 4 2 English consumer law

The United Kingdom has a long history of enacting legislation prohibiting the use of unfair terms in consumer contracts.⁵² Furthermore, the English-law approach to preventing unfair contract terms has been lauded by the European Commission.⁵³ English law is therefore far more advanced than South African law in controlling unfair terms in general. In addition, English consumer legislation has influenced some of the provisions contained in the CPA.⁵⁴ There are, however, substantial differences between the English law and South African law and it is with reference to these differences that a comparative study of the English law will be of value.⁵⁵ Finally, section 2(2) of the CPA provides that when interpreting the CPA consideration may be given to applicable foreign law.

For the reasons set out above, a comparative study of English law is of great value.

1 5 STRUCTURE AND OVERVIEW OF THE DISSERTATION

The dissertation provides a comprehensive study of the legal principles governing the unilateral determination of the purchase price in a consumer sale. The dissertation consists of six chapters, of which this chapter is the first.

In chapter 2, an overview of the historical origin, purpose and development of the rule is provided. The rule against unilateral price determination originated in Roman and Roman-Dutch law, and it is necessary to consider these principles in order to understand the purpose of the rule and the development of the rule into its current formulation.

⁵² See eg the Unfair Contract Terms Act 1977 dealing with indemnity.

⁵³ Naudé 2010 *SALJ* 518; Naudé 2007 *SALJ* 132.

⁵⁴ Van Eeden *Guide to the CPA* 24.

⁵⁵ These aspects are covered in ch 5.

The purpose of chapter 3 is to establish the position of the rule in the South African common law prior to the enactment of the CPA. The common-law principles as interpreted and developed by the South African courts are discussed and analysed in order to provide an understanding of the current common-law principles governing the unilateral determination of price. This is necessary before the influence of the CPA on the rule in consumer sales can be determined.

Chapter 4 investigates the rule within the framework of the CPA and determines the application of the rule in consumer sales. Various uncertainties and problems are identified and possible interpretations and solutions are discussed.

A comparative study of English law is undertaken in chapter 5. The chapter is divided into two parts: first, the chapter investigates the general principles of the law of sale and the rules governing the unilateral determination of price; secondly, the relevant consumer legislation governing the unilateral determination of price in consumer sales is investigated. Comparisons are drawn with South African law in order to propose possible solutions to the uncertainties and problems identified in chapter 4.

The dissertation concludes with chapter 6. This chapter provides a summary of the main findings and recommendations resulting from the research undertaken.

1 6 RESEARCH APPROACH AND METHODOLOGY

1 6 1 Research Methodology

The following research methodologies are employed: a literature study of statutes and case law as primary sources of the law is followed. Textbooks and the writings of authors are used as secondary sources. Other sources include

the internet and electronic databases. In addition, the historical research forming part of this dissertation includes references to relevant historical texts.

1 6 2 Explanatory note on source referencing and the bibliography

In general, the house style of the *Journal for Contemporary Roman-Dutch Law* (*THRHR – Tydskrif vir Hedendaagse Romeins-Hollandse Reg*) is used. With reference to sources, the citations are given as follows:

- Textbooks in the text are cited in a short form containing the surname of the author, editor and/or translator, an abbreviated title and the relevant page number. For example: Nagel (ed) *Commercial law* 232. The full references of textbooks are given in the bibliography, followed by the mode of citation used in the text. For example: Nagel CJ (ed) *Commercial law* 4 ed (2011) LexisNexis: Durban (mode of citation: Nagel (ed) *Commercial law*).
- Old authorities are cited in the text according to the accepted convention, for example: *D* 18 1 35 1. The full reference can be found by referring to the table of abbreviations, where the short form of the relevant publication is contained. For example: Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*. The full reference of the publication can be found in the bibliography. For example: Mommsen T & Krueger P (eds), Watson A (ed/tr) *The Digest of Justinian* (1985) University of Pennsylvania Press: Philadelphia (mode of citation: Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*).
- Journal articles in the text are cited in a short form containing the surname of the author, the year of the publication, the abbreviated title of the journal name and the relevant page number. For example: Hawthorne 1992 *THRHR* 639. The full references of the journal articles are given in the bibliography, except for the journal name, which is also given in the abbreviated form. For example: Hawthorne L “The contractual requirement of certainty of price”

1992 55 *THRHR* 4: 538–648. The full names of the journals can be found by referring to the table of abbreviations.

- Academic theses and dissertations in the text are cited in a short form containing the surname of the author, whether it is an LLD thesis or an LLM dissertation, and the relevant page number. For example: Laing LLM dissertation 45. The full reference of the thesis or dissertation is given in the bibliography, followed by the mode of citation. For example: Laing MR “Price adaptation and the requirement of certainty with specific reference to the contract of sale” (unpublished LLM dissertation, University of Stellenbosch, 1999) (mode of citation: Laing LLM dissertation)
- Contributions in an edited book in the text are cited in a short form containing the author and title of the contribution followed by the short form used for the relevant textbook. For example: Daube “Certainty of price” in Daube (ed) *Roman law of sale* 21.
- Court cases in the text are cited in full where used for the first time in a particular chapter, but references to “NO”, “and another” and “and others” are omitted. For example: *Erasmus v Senwes Ltd* 2006 3 SA 529 (T). The citation thereafter uses a shortened case name. For example: *Erasmus v Senwes supra*. The full reference of the case is given in the bibliography. For example: *Erasmus and others v Senwes Ltd and others* 2006 3 SA 529 (T).
- Statutes in the text are cited in full where used for the first time in a particular chapter. For example: Consumer Protection Act 68 of 2008. Citation thereafter refers to the name of the statute or an abbreviated form indicated in the text itself.
- Websites in the text are cited in full where used for the first time in the specific chapter and are identical to the reference in the bibliography, except that the initials of the author are not given in the text. For example:

Kirby “Goods and services like you’ve never seen them before: Consumer rights in South African law” 2007 available at http://www.werksmans.co.za/upload/02%20Neil_Kirby_Consumer_Rights_Feb2007.pdf (accessed 10 March 2011).

Thereafter, a shortened version is used. For example: Kirby http://www.werksmans.co.za/upload/02%20Neil_Kirby_Consumer_Rights_Feb2007.pdf

17 CONCLUSION

There is uncertainty in our law as to whether it is still good practice to apply the rule stating that a sale is invalid if one of the parties is given the power to determine the purchase price. This uncertainty has been amplified by the enactment of the CPA as the effect of this new legislation on a discretionary power to determine the price in a consumer sale has not been considered or investigated.

The dissertation addresses some of the concerns regarding this legal uncertainty in consumer sales in order to provide possible recommendations that will result in a balance between the principles that economic and commercial factors in society require a certain flexibility in contract terms, on the one hand, and that a contractual party should be protected against the unfair and unreasonable exercise of a contractual discretion by another party, on the other.

CHAPTER 2 UNILATERAL PRICE DETERMINATION IN ROMAN AND ROMAN-DUTCH LAW⁵⁶

2 1 INTRODUCTION

The law of purchase and sale in South Africa derives from Roman and Roman-Dutch law and, despite the extensive period of time that has elapsed, the Roman-law principles governing purchase and sale have not been modified to any great extent.⁵⁷ Nor, it seems, has the rule that prohibits the unilateral determination of the price by one of the parties to a contract of sale.⁵⁸ However, in *NBS Boland Bank v One Berg River Drive*, the South African Supreme Court of Appeal questioned (but did not decide) whether the rule should still form part of South African law.⁵⁹ Specifically, the Court stated that the views of the Roman-Dutch writers are “not only illogical but also sadly out of step with modern legal systems”.⁶⁰ A full investigation is therefore needed into what these “views” are and how the Roman-Dutch writers interpreted the Roman-law sources. It is the aim of this chapter to critically analyse the rule as found in Roman law. Specifically, it will be shown that the interpretation and application of the rule are, in fact, controversial and that the rule is susceptible to a variety of interpretations, some of which are more “logical” than others.

⁵⁶ This chapter is based on two articles. The first article “The unilateral determination of price in Roman law” will be published in 2012 (18-1) *Fundamina* 15. The second article “The unilateral determination of price in Roman-Dutch law” will be published in 2012 (18-2) *Fundamina*.

⁵⁷ Lotz “Purchase and sale” in Zimmerman & Visser *Southern Cross* 361.

⁵⁸ Kerr *Sale* 55 n 221, in which Kerr provides a summary of the sources of the rule as found in Roman, Roman-Dutch and South African law.

⁵⁹ *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 4 SA 928 (SCA) para 16.

⁶⁰ *Ibid.*

2 2 ROMAN LAW OF PURCHASE AND SALE

2 2 1 Introduction

The contract of sale was the first and most important consensual contract found in Roman law and the one most commonly used.⁶¹ The parties had to agree on the price and the thing to be sold, but no further formalities were required.⁶² Furthermore, the parties were bound by the principles of good faith.⁶³ This meant that the parties were bound not merely to do what was agreed, but also to act in good faith.⁶⁴ A judge could interfere with the parties' contractual rights and duties by "employing expansive and corrective functions of good faith",⁶⁵ and limit a party's rights where these were in conflict with the concepts of fairness and equity.⁶⁶

2 2 2 Certainty of price

One of the essential elements of a contract of sale was agreement on the price, which had to be certain.⁶⁷ Gaius states in his *Institutes* that agreement on price is a requirement for a contract of sale and that the price must be certain.⁶⁸ Similarly, the requirement of certainty in price was enshrined in the *Corpus Iuris Civilis*. In the *Codex* it is stated that a sale without a price is unenforceable.⁶⁹ In

⁶¹ Van Warmelo *Roman civil law* 169; Thomas *Roman law* 279; Van Zyl *Romeinse privaatrecht* 285; Zimmermann *Obligations* 230; Du Plessis *Barkowski's Roman law* 260; Buckland *Manual of Roman law* 278; Van den Bergh 2012 *TSAR* 55.

⁶² Gaius *Inst* 3 135–140; *D* 18 1 2 1; *D* 18 1 8; *I* 3 22 1; Moyle *Sale* 39–40; Roby *Roman private law* 139; Joubert *Contract* 26; Van Warmelo *Roman civil law* 169; Thomas *Roman law* 280; Van Zyl *Romeinse privaatrecht* 285; Zimmermann *Obligations* 230; Du Plessis *Barkowski's Roman law* 260–261; Buckland *Manual of Roman law* 278; Van den Bergh 2012 *TSAR* 55.

⁶³ Gaius *Inst* 3 137: "Item in his contractibus alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet". Du Plessis *Barkowski's Roman law* 260; Buckland *Manual of Roman law* 278; Roby *Roman private law* 90.

⁶⁴ Ledlie (tr) *Sohm's Institutes* 416–417.

⁶⁵ Du Plessis 2002 *THRHR* 399–400.

⁶⁶ *Ibid.*

⁶⁷ Moyle *Sale* 68; Thomas *Roman law* 280; Lötze 1991 *De Jure* 221, 229; Du Plessis *Barkowski's Roman law* 264, 266; Van den Bergh 2012 *TSAR* 60; Hawthorne 1992 *THRHR* 639. Hawthorne argues that there are two reasons for this requirement. First, the requirement of a fixed price was a remnant of earlier cash sales where the conclusion of a contract and its execution happened simultaneously and, secondly, to "prevent a breakdown of the transaction" because the price could not be ascertained.

⁶⁸ Gaius *Inst* 3 139–140.

⁶⁹ *C* 4 38 9.

the *Digest*, Ulpian is quoted as stating that “[t]here is no sale without price”.⁷⁰ In the *Institutes*, it is reiterated that the parties must agree on a price and that the price must be certain.⁷¹

2 2 3 Unilateral determination of the price in the *Institutes* of Gaius

In his *Institutes*, Gaius does not deal with the unilateral determination of the price by one of the parties but refers to the debate on whether a third party may be nominated to determine the price.⁷² This controversy was solved in Justinian’s time, when the nomination of a third party to determine the price was allowed under certain circumstances.⁷³ According to some legal scholars, this indicates that the unilateral determination of the price by one of the parties was not permitted in Roman law.⁷⁴ It would seem that this argument is based on the presumption that the buyer would have too much power to determine the price if this were allowed.⁷⁵ Daube contends that it is from this viewpoint *only* that such

⁷⁰ D 18 1 2 1 as translated by Watson (Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*).

⁷¹ I 3 23 1.

⁷² Gaius *Inst* 3 140, where it is stated that Labeo and Cassius argued that such a contract was void, while Ofilius and Proculus viewed the contract as valid.

⁷³ I 3 23 1; C 4 38 15. I 3 23 1 provides that the third party eventually had to fix the price for the contract of sale to have legal effect. If the third party did not fix the price or refused to fix the price, no contract of sale arose. See also Thomas *Roman law* 282–283; Van Zyl *Romeinse privaatrecht* 289 n 154; Zimmermann *Obligations* 254; Du Plessis *Barkowski’s Roman law* 266; Moyle *Sale* 70; Hawthorne 1992 *THRHR* 639; Buckland *Manual of Roman law* 281.

⁷⁴ See eg Kerr *Sale* 58; Kerr & Glover 2000 *SALJ* 203; Lötze 1991 *De Jure* 230 n 98 referring to C 4 38 15 as authority that the unilateral determination of the price by the buyer was not allowed under Roman law. This would seem to be the general view: see De Zulueta *Roman sale* 18 n 9; Daube “Certainty of price” in Daube (ed) *Roman law of sale* 21. Kerr *Sale* 55 n 221 is further of the view that all the old authorities who state that the price could be determined by a third party but do not mention that determination by the buyer or the seller was permitted “must have been of the opinion that it cannot be left to either of the parties to fix the price”.

⁷⁵ Lötze 1991 *De Jure* 230 n 98. Legal scholars agree that the Roman authorities did not mention the reasons for the rule (Kerr & Glover 2000 *SALJ* 205; Kerr *Sale* 65). However, two reasons have been suggested by Zimmermann *Obligations* 254. First, contracts formed by agreement require that parties agree on the essential provisions of the contract, which ensures that they conclude a firm contract and that the transaction will not subsequently break down because the price has not been determined. Secondly, in the absence of the rule one party would be more likely to impose unfair and unreasonable obligations on the other. This reasoning was referred to with approval by Kerr & Glover 2000 *SALJ* 20 and Kerr *Sale* 66.

an argument makes sense.⁷⁶ Criticising this view, he argues that this question is not relevant to Gaius's text, since he is discussing third-party price determination regarding the topic of certainty of price, not the situation where the buyer had too much power.⁷⁷ Furthermore, Daube argues that the price determined by a third party would be just as uncertain as a price determined by a buyer.⁷⁸ In fact, he believes that a price to be determined by the buyer is probably more certain, since the buyer is less likely to refrain from determining a price.⁷⁹ This view is supported by the fact that the failure of a third party to determine the price was discussed in detail in the *Corpus Iuris Civilis*.⁸⁰

2 2 4 Unilateral determination of the price under the *Corpus Iuris Civilis*

2 2 4 1 Introduction

Gaius is quoted in the *Digest* as stating that:

Illud constat imperfectum esse negotium, cum emere volenti sic venditor dicit, 'quanti velis, quanti aequum putaveris, quanti aestimaveris, habebis emptum'.⁸¹

The translation and interpretation of the above text has given rise to much controversy. The following aspects warrant further discussion, namely: (a) Is a contract that grants such a discretion void or is its conclusion valid but not yet

⁷⁶ Daube "Certainty of price" in Daube (ed) *Roman law of sale* 23. It should be noted that Daube refers to a discretion granted to the buyer (not the seller). This is because *D* 18 1 35 1, which deals with unilateral price determination, refers to a discretion granted only to the buyer. See further para 2 2 4 5 *infra*.

⁷⁷ Daube "Certainty of price" in Daube (ed) *Roman law of sale* 23. Referred to with approval by Lubbe 1989 *TSAR* 171. See also Pugsley 1972 *SALJ* 412 in which he states that the "Institutes were merely concerned to emphasize that in a contract of sale there must be certainty as to the terms". This view supports the first reason proposed by Zimmermann (see n 75 *supra*).

⁷⁸ Daube "Certainty of price" in Daube (ed) *Roman law of sale* 23. Further referred to with approval by Lubbe 1989 *TSAR* 171.

⁷⁹ Daube "Certainty of price" in Daube (ed) *Roman law of sale* 23. Zimmermann *Obligations* 254 agrees that this was not the real issue.

⁸⁰ Daube "Certainty of price" in Daube (ed) *Roman law of sale* 23.

⁸¹ *D* 18 1 35 1, *Gaius libro decimo ad edictum provinciale* (Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*).

effective? and (b) Does the rule refer to a discretion granted to the buyer only or to both parties?

2 2 4 2 Is the contract of sale void or is its conclusion valid but not yet effective?

Watson translates *D 18 1 35 1* as follows:

It is settled that *no contract is concluded* when the vendor says to the purchaser: “You shall buy for what you choose to give, or what you think fair or at your own estimate of its value”.⁸²

However, Scott translates the phrase “[i]llud constat imperfectum esse negotium” as “[i]t is settled that a transaction is imperfect”.⁸³ Therefore, it seems that there are two possible translations and interpretations of the above text, one that considers the contract to be void and one that considers it to be valid but not yet effective, or conditional upon the determination of the price.⁸⁴

2 2 4 3 Interpretations and arguments that consider the contract to be void

Many legal scholars argue that *D 18 1 35 1* must be interpreted to mean that the contract is void.⁸⁵ Three main arguments may be identified and are investigated below, namely that a discretion to determine the price:

- (a) excludes agreement on one of the essential elements of a contract of sale;
- (b) would allow for an unreasonable contractual imbalance between the parties, and
- (c) amounts to a pure potestative condition.

⁸² As translated by Watson (Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*); my emphasis.

⁸³ Scott *Civil law*.

⁸⁴ Leesen *Gaius meets Cicero* 207.

⁸⁵ Leesen *Gaius meets Cicero* 207 n 10 referring to Arangio-Ruiz *La compravendita* 141 n 3; Thomas 1967 *Tijdschrift voor Rechtsgeschiedenis* 89; Zimmermann *Obligations* 254; Grosso *Obbligazioni* 117–118. See also Muirhead *Roman law* 150; Joubert *Contract* 180 referring to *D 45 3 10*; Kerr & Glover 2000 *SALJ* 202–203; Kerr *Sale* 58–59; Lötz 1991 *De Jure* 230 n 98; Hawthorne 1992 *THRHR* 639; Van den Bergh 2012 *TSAR* 61; Roberts (ed) *Wessels' law of contract Vol 1* 141 para 432 (and also the authorities listed at 140 para 430).

- (a) A discretion to determine the price excludes agreement on one of the essential elements of a contract of sale

One of the reasons advanced for the rule is that where contracts are formed by agreement it is required that parties agree on the essential provisions of the contract. This ensures that they conclude a firm contract and that the transaction will not break down subsequently because the price had not been determined.⁸⁶ Following this line of argument, Arangio-Ruiz believes that because one of the essential elements of the sale (the price) is missing where a party is given the discretion to determine the price, there can be no agreement.⁸⁷ This view is supported by Thomas, who argues that the term “imperfectum” has two possible interpretations in the context of sale.⁸⁸ First, there is agreement on the subject and the price and therefore there is a contract, but the agreement is subject to a condition which has not yet been satisfied or fulfilled.⁸⁹ Secondly, there is no contract because the price or subject of the sale has not been agreed and the contract is incomplete.⁹⁰ Therefore, since the price is uncertain when left to the discretion of one of the parties, the contract is imperfect in the sense that it is incomplete and is therefore void.⁹¹

This view may be criticised. Although the contract is imperfect, once the price is determined, the contract becomes valid and binding. As pointed out above, the Romans did allow a third party to determine the price subsequently, and a price that a third party has to determine is just as uncertain as a price a buyer has to determine.⁹²

⁸⁶ See n 75 *supra*.

⁸⁷ Arangio-Ruiz *La compravendita* 141 n 3. The author would like to thank Ms Claudia Fratini for her translation of this source.

⁸⁸ Thomas 1967 *Tijdschrift voor Rechtsgeschiedenis* 83.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Idem* 88–89. Thomas argues that the question relates to “*Abschluß* [completion] and not *Vollziehbarkeit* [enforceability] of the contract” because without agreement on the price there is no contract.

⁹² See para 2 2 3 *supra*.

- (b) A discretion to determine the price would allow for an unreasonable contractual imbalance between the parties

Zimmermann argues that granting such a discretionary power to one of the parties would create an “unreasonable contractual imbalance” and that the purchaser could not be prevented from abusing such a power.⁹³ He suggests that this is one of the main reasons for the rule.⁹⁴ As mentioned above, this question is irrelevant in Gaius’s *Institutes* because Gaius is discussing price determination by a third party regarding the topic of certainty of price and does not refer to the situation where the buyer has too much power.⁹⁵ The same approach can be followed where this issue is discussed in Justinian’s *Institutes*.⁹⁶ Furthermore, as is shown below,⁹⁷ the *Corpus Iuris Civilis* (specifically, the *Digest*) contains provisions precluding the abuse of such power; and there are interpretations that render the contract valid but which would include an “institutional check against the danger of gross and unreasonable contractual imbalance”⁹⁸ created by granting the discretion to the purchaser to determine the price.

- (c) A discretion to determine the price amounts to a pure potestative condition
Legal scholars tend to compare and equate a discretion to determine the price with a pure potestative condition to support their assertion that the contract must be void.⁹⁹ Although Kerr and Glover rely on the text as translated by Watson to support their view that a contract granting a discretion to the buyer to determine the price is void,¹⁰⁰ they also rely on C 4 38 13.¹⁰¹ This text provides that

⁹³ Zimmermann *Obligations* 254.

⁹⁴ See also n 75 *supra* regarding the reasons for the rule as proposed by Zimmermann.

⁹⁵ See para 2 2 3 *supra*.

⁹⁶ Pugsley 1972 *SALJ* 412.

⁹⁷ See further para 2 2 4 4(b) *infra*.

⁹⁸ Zimmermann *Obligations* 254.

⁹⁹ A pure potestative condition may be described as a condition “which depends entirely upon the will of the promisor” (Roberts (ed) *Wessels’ law of contract Vol 1* 406 para 1313).

¹⁰⁰ Kerr & Glover 2000 *SALJ* 203. See para 2 2 4 2 *supra* for the different translations by Watson and Scott. Kerr & Glover refer to Scott’s translation of C 4 38 13 in the same paragraph in which they discuss D 18 1 35 1, but do not refer to Scott’s alternative translation. However, Kerr *Sale* 55 n 222 does refer to the different interpretations of

[w]hen a sale is made dependent on the will of the seller or purchaser, no obligation is created, because the contracting parties are not bound to do anything. Hence, an owner or anyone else is not compelled to sell his property unwillingly by reason of such contract.¹⁰²

This text deals with a pure potestative condition, a so-called condition *si voluero* (“if I wish to”) and refers to the situation where the existence of the contract is made dependent on the will of one of the parties. No legally enforceable obligation is created in this situation because it is not the parties’ intention to conclude a legally binding contract.¹⁰³ One of the parties may decide *whether or not* he will perform at all.¹⁰⁴ Therefore, there is a lack of *consensus*.

In contrast, *D 18 1 35 1* refers to the situation where the buyer has the discretion to determine the *price*. Here, the parties do have the intention to create a legally binding contract.¹⁰⁵ As Daube has pointed out, the text explicitly refers to a willing buyer.¹⁰⁶ However, *what price* will be paid (ie the final amount) is uncertain at the time the contract is concluded. As soon as the discretion is exercised, the amount will be certain, and seeing that the discretion favours the buyer, it is unlikely that the buyer will refuse to exercise it.¹⁰⁷ Even if the buyer refuses to determine the price, Daube argues that the discretion can be interpreted as a promissory condition, so that the buyer can be compelled to fix

“imperfectum”, but comes to the conclusion that they should not be followed because the Roman-Dutch writers adopted the view that the contract was void which is also regarded as the “usual interpretation”.

¹⁰¹ Kerr & Glover 2000 *SALJ* 203.

¹⁰² Kearly (ed) *Blume’s Justinian code*. The original Latin reads as follows: “In vendentis vel ementis voluntatem collata condicione comparandi, quia non adstringit necessitate contrahentes, obligatio nulla est. Idcirco dominus invitus ex huiusmodi conventionem rem propriam vel quilibet alius distrahere non compellitur” (see Krueger (ed) *Codex Iustinianus*).

¹⁰³ Daube “Certainty of price” in Daube (ed) *Roman law of sale 22*; Lubbe 1989 *TSAR* 166–167.

¹⁰⁴ Daube “Certainty of price” in Daube (ed) *Roman law of sale 22*.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* The Latin text refers to “emere volenti”. A literal translation will read as follows: “to the person who wishes to buy”.

¹⁰⁷ *Ibid.*

a price.¹⁰⁸ A discretion to determine the price can therefore not be equated with a discretion to decide whether or not to be bound to the contract.¹⁰⁹

The same may be said of scholars who cite *D 44 7 8*¹¹⁰ and *D 45 1 46 3*¹¹¹ in support of their view that the contract is void. *D 44 7 8* embodies the rule that a contract subject to “if I wish” is no contract at all.¹¹² A similar rule is found in *D 45 1 46 3*.¹¹³ These two texts also refer to a pure potestative condition and can be distinguished from a discretion granted to a buyer to determine the purchase price.

Another text referred to in support of the argument that the contract is void is *D 45 1 108 1*.¹¹⁴ *D 45 1 108 1*, *lavolenus libro decimo epistularum* provides that “[n]ulla promissio potest consistere, quae ex volentate promittentis statum capit”.¹¹⁵ Wessels provides two different translations of this text in *The law of contract in South Africa*.¹¹⁶ First, in his discussion of vague and indeterminate objects of a contract, he proposes the following translation: “No promise can subsist which has its character determined by wish of the promisor.”¹¹⁷ He argues that if the promisor can determine the object of the contract, the contract

¹⁰⁸ *Ibid.* See further De Zulueta *Roman sale* 28–29.

¹⁰⁹ Daube “Certainty of price” in Daube (ed) *Roman law of sale* 22. See also Lubbe 1989 *TSAR* 169–170. Windscheid further distinguishes between these two texts and argues that *C 4 38 13* does not refer to a reasonable discretion and that therefore no contract comes into being once the determination is made (Kipp (ed) *Windscheid’s pandektenrechts* 632 para 386 n 6). (The author would like to thank Prof Melodie Slabbert for her assistance in the translation of this source.)

¹¹⁰ Daube “Certainty of price” in Daube (ed) *Roman law of sale* 21; MacKintosh *Roman sale* 71.

¹¹¹ LötZ 1991 *De Jure* 230 n 98.

¹¹² *Pomponius libro sexto decimo ad Sabinum*: “Sub hac condicione ‘si volam’ nulla fit obligatio” translated by Watson as “[n]o obligation is created if it is subject to a condition ‘if I wish’”. (See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.)

¹¹³ *Paulus libro duodecimo ad Sabinum*: “Illam autem stipulationem ‘si volueris, dari?’ inutilem esse constat” translated by Watson as “[h]owever, the stipulation ‘do you promise to give, if you wish’ is clearly invalid”. (See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.) See further Rodger 2002 *TSAR* 15 where he points out that this text deals with a stipulation (a *stricti iuris* contract) which can be distinguished from a contract of sale (a *bona fide* contract).

¹¹⁴ Roberts (ed) *Wessels’ law of contract Vol 1* 141 para 432. Wessels clearly follows the approach adopted by Voet. See further para 2 3 3 3 *infra*.

¹¹⁵ Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.

¹¹⁶ *Ibid.*

¹¹⁷ *Idem* 138 n 21.

will be too vague and indefinite to enforce.¹¹⁸ This translation would seem to deny the power granted to the buyer to determine the price. This is because such a power permits the promisor (the buyer) to determine the character (the amount) of the promise (to pay a price). However, when discussing potestative conditions, he translates this text as “[n]o valid promise can exist which is dependent upon the wish of the promisor”.¹¹⁹ This second translation relates to a condition *si voluero*, which can be distinguished from the situation in *D 18 1 35 1*. This would also seem to be the preferred interpretation of *D 45 1 108 1*.¹²⁰

Legal scholars similarly refer to *D 18 1 7pr* in support of their view that the contract is void.¹²¹ *D 18 1 7pr*, *Ulpianus libro vicensimo octavo ad Sabinum* provides that “venditio nulla est, quemadmodum si quis ita vendiderit, si voluerit, vel stipulanti sic spondeat ‘si voluero, decem dabo’ neque enim debet in arbitrium rei conferri, an sit obstrictus”.¹²² Once again, this argument may be questioned since the passage refers to a pure potestative condition (“si voluero”) that can be distinguished from the situation described in *D 18 1 35 1*.¹²³

Reference may also be made to *D 45 1 17*, where Ulpian is quoted as stating that “[a] stipulation is not valid when a condition is entrusted to the judgment of

¹¹⁸ *Idem* 138 para 423(1). This view is criticised by Kerr *Sale* 58 and Kerr & Glover 2000 *SALJ* 208.

¹¹⁹ Roberts (ed) *Wessels’ law of contract Vol 1* 406 n 35. The translation by Watson is very similar: “No promise can be valid if it lies wholly within the choice of the promisor.” See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.

¹²⁰ Roberts (ed) *Wessels’ law of contract Vol 1* 141 para 432; Lubbe 1989 *TSAR* 165–166.

¹²¹ Roberts (ed) *Wessels’ law of contract Vol 1* 140 para 430; Daube “Certainty of price” in Daube (ed) *Roman law of sale* 22; Hawthorne 1992 *THRHR* 639.

¹²² Watson translated it as follows: “[T]he sale is null as would be also the case where a man would sell if he chose to do so, or if he promised in a stipulation, ‘I will give ten if I want to’, it cannot be left to the decision of a contracting party whether he is under an obligation.” (See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.)

¹²³ However, the whole text as found in *D 18 1 7pr* read together with other relevant texts is used by legal scholars to support the view that the situation described in *D 18 1 35 1* provides for a valid (but not yet effective) contract. See further para 2 2 4 4(b) *infra*.

the party making the promise”.¹²⁴ Generally, this text is regarded as referring to a pure potestative condition.¹²⁵ This view is supported by the fact that this text originally followed directly after the phrase “the sale is null as would be also the case where a man would sell if he chose to do so, or if he promised in a stipulation, ‘I will give ten if I want to’” (as found in *D 18 1 7*) in Ulpianus’ discussion on sale in his commentaries on the works of Sabinus.¹²⁶

It is therefore clear that a discretion to determine the price cannot be equated to a pure potestative condition. Consequently, none of these texts should be relied on to support the view that a discretion to determine the price renders the contract void.

2 2 4 4 Interpretations and arguments that consider the contract to be valid but imperfect

There are legal scholars who support the view that such a contract was valid but imperfect and thus subject to the determination of the price by the buyer.¹²⁷ The moment the buyer determined the price and the condition was fulfilled, the contract became binding. Two main arguments may be identified here and are investigated, namely:

- (a) the use of the word “imperfectum” in *D 18 1 35 1*, and
- (b) the question whether the standard of *arbitrio boni viri* should apply to such discretions.¹²⁸

¹²⁴ As translated by Watson (see Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*). The Latin reads as follows: “Stipulatio non valet in rei promittendi arbitrium collata condicione”.

¹²⁵ Roberts (ed) *Wessels’ law of contract Vol 1* 406 para 1312; Lubbe 1989 *TSAR* 166; MacKintosh *Roman sale* 71.

¹²⁶ Lenel *Palingenesia Vol 2* 1119 para 2712.

¹²⁷ Leesen *Gaius meets Cicero* 207 n 11 referring to Daube “Certainty of price” in Daube (ed) *Roman law of sale* and Nelson & Manthe *Gai Institutiones* 261–263. See also Kipp (ed) *Windscheid’s pandektenrechts* 632 para 386; Moyle *Sale* 69 n 2; Meijers 1916 *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 237–240, 253–256, 261–263; and the authorities cited by Roberts (ed) *Wessels’ law of contract Vol 1* 140 para 431.

¹²⁸ There are other arguments but they are discussed. For example, there are arguments based on the case where someone gives clothes to a tailor to mend on the understanding that the reward will be agreed on afterwards, as discussed in *D 19 5 22* (Daube “Certainty of price” in Daube (ed) *Roman law of sale* 24–26; Grosso *Obbligazioni* 118–119 (the

(a) The use of the word “imperfectum” in *D 18 1 35 1*

Some legal scholars argue that the use of the word “imperfectum” (imperfect) in *D 18 1 35 1* in contrast with “nullum” (void), indicates that such a contract was not void but imperfect (valid, but not yet effective).¹²⁹ However, the wording used in *D 18 1 35 1* requires further investigation. Daube argues that Gaius uses the word “constare” to indicate a unanimous view replacing previous differing views.¹³⁰ He suggests that “illud constat” indicates that there was a difference of opinion on the three different cases mentioned in *D 18 1 35 1*.¹³¹ According to Daube, some classicists would have argued that “for what you consider fair” and “for what you think it worth” would constitute a binding contract since it indicated some external reference.¹³² He argues that such contracts would be valid but imperfect until the price was fixed.¹³³ On the other hand, contracts containing the term “for what you wish” would probably not have found any takers because the buyer would have been able to fix any price or no price.¹³⁴ The problem is that all three cases discussed in *D 18 1 35 1* render the sale imperfect.¹³⁵ The inclusion of the latter case would indicate that the contract would be void.¹³⁶ In contrast, it could be argued that because third-party price determination was allowed, a price for what the buyer wished would be permissible, since it could still be distinguished from a sale subject to a condition *si voluero*.¹³⁷ Daube suggests that it would probably be a requirement that even in such cases the determination had to result in “a price which is not a

author would like to thank Ms Claudia Fratini for her translation of this latter source)). Both Daube and Grosso point out that this situation is a *sui generis* one that it should not be used in arguments on the unilateral determination of the price in a contract of sale.

¹²⁹ Daube “Certainty of price” in Daube (ed) *Roman law of sale* 21; Nelson & Manthe *Gai Institutiones* 262; Kipp (ed) *Windscheid’s pandektenrechts* 632 para 386 n 6. Moyle *Sale* 69 n 2 concedes that the word “imperfectum” is used rather than “nullum”.

¹³⁰ Daube “Certainty of price” in Daube (ed) *Roman law of sale* 21.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.* See also Moyle *Sale* 69. He is of the view that a contract is void if the determination of the price is left to the *absolute* discretion of one of the parties.

¹³⁵ Daube “Certainty of price” in Daube (ed) *Roman law of sale* 24.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

non-price” while other legal scholars argue that such a discretion would have to be exercised *arbitrio boni viri*.¹³⁸

The relationship between *D 18 1 35 1* and other texts must also be considered. First, the text must be compared with that of Gaius in his *Institutes*, dealing with third-party determination.¹³⁹ It has been mentioned above that in that work, Gaius refers to the different opinions on third-party price determination without expressing an opinion of his own on the matter.¹⁴⁰ Nelson and Manthe argue that Gaius’ use of the term “imperfect” in *D 18 1 35 1* indicates that he supported the Proculian view that the price may be determined by a third party and believed that even one of the parties could determine the price.¹⁴¹

Legal scholars also refer to the relationship between *D 18 1 35 1* and *D 18 1 35 5*.¹⁴² *D 18 1 35 5* deals with the situation where fungible goods that are the object of the sale have not yet been counted, weighted or measured and the contract of sale is considered to be imperfect. The fact that these two texts formed part of the same chapter and discussion in Gaius’ *Ad Edictum Provinciale*¹⁴³ indicates that the words in the text should be given the same meaning.¹⁴⁴ In addition, Nelson and Manthe also refer to the text in *D 18 6 8 pr* in which the so-called “risk rule” appears and argues that since the text also refers to the term “perfecta”, the use of “imperfect” in *D 18 1 35 1* should be given the same meaning.¹⁴⁵ Thus there seem to be various reasons why “imperfect” in *D 18 1 35 1* should be interpreted as providing for a valid but imperfect contract.

¹³⁸ *Ibid.* Referred to with approval by Rodger 2002 *TSAR* 15 n 63. See further para 2 2 4 4(b) *infra* in respect of the arguments that such discretions had to be exercised *arbitrio boni viri*.

¹³⁹ Gaius *Inst* 3 140.

¹⁴⁰ See para 2 2 3 *supra*.

¹⁴¹ Nelson & Manthe *Gai Institutiones* 263.

¹⁴² *Idem* 262; Daube “Certainty of price” in Daube (ed) *Roman law of sale* 22–23.

¹⁴³ Lenel *Palingenesia Vol 1* 216 para 238.

¹⁴⁴ Nelson & Manthe *Gai Institutiones* 262.

¹⁴⁵ *Ibid.*

(b) The standard of *arbitrio boni viri* should apply to such discretions. Although there are arguments that it was possible for the buyer to have an absolute discretion to determine the price,¹⁴⁶ the view generally taken is that the discretion must be exercised *arbitrio boni viri*.¹⁴⁷ Support for this view can be found in *D 18 1 7pr* and *D 50 17 22 1*. Originally, these two texts formed part of Ulpian's discussion on sale in his commentaries on the works of Sabinus.¹⁴⁸ *D 18 1 7pr* provides:

The sale of a slave "if he shall have settled his account to his master's satisfaction" is conditional; now conditional sales become perfect only when the condition is satisfied. Does the condition mentioned refer to the master's personal satisfaction or to the satisfaction of an honorable man? If we accept the former interpretation, the sale is null as would be also the case where a man would sell, if he chose to do so, or if he promised in a stipulation, 'I will give ten if I want to', it cannot be left to the decision of a contracting party whether he is under an obligation. Accordingly, it was settled by the earlier jurists that one looks to the judgment of an honorable man and not that of the master himself. Hence, if the accounts were acceptable but he refused them or if he, in fact, accepted them but pretended not to, the condition of purchase would be realized and the vendor could be sued by the action on purchase.¹⁴⁹

As pointed out above, the last part of *D 18 1 7pr* is referred to in support of the argument that a discretion granted to the buyer to determine the price renders

¹⁴⁶ See eg Kipp (ed) *Windscheid's pandektenrechts* 632 para 386 as referred to by Lubbe 1989 *TSAR* 171.

¹⁴⁷ Roberts (ed) *Wessels' law of contract Vol 1* 140 para 431; Lubbe 1989 *TSAR* 171.

¹⁴⁸ Lenel *Palingenesia Vol 2* 1119 para 2712; Rodger 2002 *TSAR* 14.

¹⁴⁹ As translated by Watson (Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*). The Latin text reads: "Haec venditio servi 'si rationes domini computasset arbitrio' condicionalis est: condicionales autem venditiones tunc perficiuntur, cum impleta fuerit condicio. sed utrum haec est venditionis condicio, si ipse dominus putasset suo arbitrio, an vero si arbitrio viri boni? nam si arbitrium domini accipiamus, venditio nulla est, quemadmodum si quis ita vendiderit, si voluerit, vel stipulanti sic spondeat 'si voluero, decem dabo': neque enim debet in arbitrium rei conferri, an sit obstrictus. placiut itaque veteribus magis in viri boni arbitrium id collatum videri quam in domini. Si igitur rationes potuit accipere nec accepit, vel accepit, fingit autem se non accepisse, impleta condicio emptionis est et ex empto venditor conueniri potest."

the contract void.¹⁵⁰ This is based on the incorrect view that such a contract equals a condition “si voluero”.¹⁵¹ The comparison between a condition “si voluero” (“where a man would sell if he chose to do so”) and contractual discretion (“refer to the master’s personal satisfaction”) would appear to be the reason for this incorrect interpretation. However, legal scholars also refer to this text in support of the view that a *reasonable* discretion would have been allowed.¹⁵² This would seem to be the better interpretation of this text.¹⁵³

Originally, *D 50 17 22 1* follows on *D 18 1 7pr* and provides that “[o]ne must generally agree with the principle that, wherever in actions of good faith a condition is to be determined by reference to the judgment of the owner or his manager, this is to be interpreted as the judgment of an upright man”.¹⁵⁴ When one reads this text in the context of *D 18 1 7pr* it is clear that it deals with the sale of slaves and a condition imposed by the seller that the sale of the slave is conditional, subject to his satisfaction with the accounts managed by the slave on his behalf.¹⁵⁵ To ensure that a seller did not stall the sale for frivolous or fallacious reasons, the seller was required to make his judgement in accordance with the standard of a *bonus vir*.¹⁵⁶ Rodger argues that this principle would have applied to all *bona fide* contracts.¹⁵⁷ Where, therefore, someone was granted the power to decide about a condition in a *bona fide* contract, such

¹⁵⁰ See para 2 2 4 3(c) *supra*.

¹⁵¹ *Ibid.*

¹⁵² Kipp (ed) *Windscheid's pandektenrechts* 632 para 386 n 6; MacKintosh *Roman sale* 21–22; Nelson & Manthe *Gai Institutiones* 262; Meijers 1916 *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 240.

¹⁵³ However, Rodger 2002 *TSAR* 15 n 63 indicates that this text could be distinguished from *D 18 1 35 1* in that this text deals with a discretion granted to the seller, while *D 18 1 35 1* deals with a discretion granted to the buyer.

¹⁵⁴ As translated by Rodger 2002 *TSAR* 15. The Latin text reads as follows: “Generaliter probandum est, ubicumque in bonae fidei iudiciis confertur in arbitrium domini vel procuratoris eius condicio, pro boni viri arbitrio hoc habendum esse” (Mommesen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*). This text is translated by Watson as “[o]ne must in general approve of the principle that wherever in actions of good faith the condition of someone is placed in the power of his master or of his procurator, then this power is to be regarded as equivalent to the power of the decision of a good man”. This translation is criticised by Rodger at 13–14 as not making sense because of the translator’s failure to consider the context of Ulpian’s original text.

¹⁵⁵ Rodger 2002 *TSAR* 15.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

a power had to be exercised *arbitrio boni viri*. Since a contract of sale is subject to the principles of good faith,¹⁵⁸ a discretion granted to the buyer to determine the price had to be exercised *arbitrio boni viri*.¹⁵⁹

Reference may also be made to *D 17 2 6* which deals with partnership agreements. The partnership agreement was also a *bona fide* contract and subject to the principles of good faith. *D 17 2 6* provides for one of the parties to determine the division of shares in the partnership, provided such a determination is made in accordance with the standard of a *bonus vir*.¹⁶⁰ In the same way, it is argued, the price in a contract of sale (also a *bona fide* contract) could be determined by one of the parties provided that the determination was made *arbitrio boni viri*.¹⁶¹ Furthermore, *D 17 2 76–79* deals with the situation where a partnership is formed subject to the condition that a third party will determine each party's share. Proculus held that since a partnership agreement is a *bona fide* contract, the third party must make the determination *arbitrio boni viri*.¹⁶² In the same way, the price in a contract of sale could be determined by one of the parties provided that the determination was made *arbitrio boni viri*.¹⁶³

¹⁵⁸ See para 2 2 1 *supra*.

¹⁵⁹ MacKintosh *Roman sale* 22–23. As pointed out by MacKintosh, the “*bonus vir* is a sort of standard embodiment of honesty and aptitude for the equitable settlement of disputes” and therefore refers to a reasonable discretion.

¹⁶⁰ *Pomponius libro nono ad Sabinum*: “Si societatem mecum coieris ea condicione, ut partes societatis constitueres, ad boni viri arbitrium ea res redigenda est.” Translated by Watson as: “If you enter a partnership with me on the terms that you are to determine our respective shares in the partnership, then the matter must be referred to a good man for decision.” See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*. Interestingly enough, this text originally formed part of Pomponius’ discussion of contracts of sale (Lenel *Palingenesia Vol 2* 108 para 532).

¹⁶¹ Kipp (ed) *Windscheid’s pandektenrechts* 632 para 386 n 6; and the authorities listed by Roberts (ed) *Wessels’ law of contract Vol 1* 140 para 431.

¹⁶² *D 17 2 78, Proculus libro quinto epistularum*: “[I]n proposita autem quaestione arbitrium viri boni existimo sequendum esse, eo magis quod iudicium pro socio bonae fidei est”). Translated by Watson as “[b]ut in the case before us, my judgment is that the decision of a good man ought to be followed, the more so because the partnership action is an action of good faith.” (See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.)

¹⁶³ Kipp (ed) *Windscheid’s pandektenrechts* 632 para 386 n 6; Kaser & Knütel *Romisches privatrecht* 182 refer to both *D 17 2 6* and *D 17 2 76–79* as authority that any object of performance can be determined in the reasonable discretion of the debtor or the creditor. (The author would like to thank Prof Melodie Slabbert for her assistance in the translation of this source.)

Further reference may be made to *D 19 2 24pr*, which provides that where the approval of the work is left to the employer in a *locatio operis* contract it must be exercised *arbitrio boni viri*.¹⁶⁴ This text is quoted in support of the proposition that the price in a contract of sale could be determined by one of the parties provided that the determination was made *arbitrio boni viri*.¹⁶⁵ Wessels criticises this view on the basis that this text addresses the question whether the work was done satisfactorily as against the situation where one of the parties is given the power to determine the object of the contract, for example, having a discretion to determine the price.¹⁶⁶

Legal scholars have also referred to the rules governing dowries.¹⁶⁷ *C 5 11 3* deals with the situation where the party promising to pay a dowry on the bride's behalf is given a discretion to determine its amount and provides that it must be exercised *arbitrio boni viri*.¹⁶⁸ *D 23 3 69 4* deals with the situation where the

¹⁶⁴ *Paulus libro trigesimo quarto ad edictum*: "Si in lege locationis comprehensum sit, ut arbitrato domini opus adprobetur, perinde habetur, ac si viri boni arbitrium comprehensum fuisset, idemque servatur, si alterius cuiuslibet arbitrium comprehensum sit: nam fides bona exigit, ut arbitrium tale praestetur, quale viro bono conuenit." Translated by Watson as: "If it is provided in a lease clause [of a job] that the owner is to judge the work acceptable, this is construed to mean that what they had called for was the judgment of an upright man, and the same rule holds had they provided for judgment by some third party. Good faith requires that a judgment be offered such as is compatible with an upright man." The phrase "of a job" was inserted by the translator. (See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.)

¹⁶⁵ Kipp (ed) *Windscheid's pandektenrechts* 632 para 386 n 6; Meijers 1916 *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 240; and Glück as referred to by Roberts (ed) *Wessels' law of contract Vol 1* 140 para 432.

¹⁶⁶ Roberts (ed) *Wessels' law of contract Vol 1* 140 para 432.

¹⁶⁷ See eg Kipp (ed) *Windscheid's pandektenrechts* 632 para 386 n 6; Meijers 1916 *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 240 in respect of *C 5 11 3*. See eg Roberts (ed) *Wessels' law of contract Vol 1* 140 para 431 in respect of *D 23 3 69 4*.

¹⁶⁸ "Si, cum ea quae tibi matrimonio copulate est nuberet, is cuius meministi dotem tibi non addita quantitate, sed quodcumque arbitrates fuisset pro ea daturum se rite promisit et interpositae stipulationis fidem non exhibit, competentibus actionibus usus ad repromissi emolumentum iure iudiciorum perveniens: videtur enim boni viri arbitrium stipulation incertum esse" (Krueger (ed) *Codex Iustinianus*). Translated as: "If, when you married your wife, the party whom you mention solemnly promised to give you a dowry in her behalf, the amount not fixed, to be according to his best judgment, but he has failed to perform the stipulation attached to his promise, you may compel him to do so, by suing him in the proper action, for the stipulation seems to contemplate that the amount to be paid is an amount according to the judgment of a just man" (Kearly (ed) *Blume's Justinian code*).

dowry is to be decided by the bride's father.¹⁶⁹ Such a contract was considered valid and the amount of the dowry could be determined with reference to the father's resources and the bridegroom's rank. Dowry was not included in any of the classes of *bona fide* contracts and was governed by its own rules that formed part of a number of wider rules governing marriages.¹⁷⁰ For this reason this text should not be considered applicable to contracts of sale.

There are also texts on the rules governing the services of freedmen, specifically *D 38 1 30pr.*¹⁷¹ This text provides that where a freedman has undertaken to provide as many services as would meet his patron's satisfaction, the patron's judgement must be fair.¹⁷² Once again, this text concerns the services of freedmen, governed by separate rules, which therefore cannot be applied to contracts of sale.¹⁷³

Finally, we may refer to arguments based on the principles governing *fideicommissum*¹⁷⁴ that rely on *D 32 11*. This allows a *fideicommissum* to be based on such terms as "if you judge it good", "if you think it suitable" and "if you hold it", provided that the discretion is exercised *arbitrio boni viri*. Daube rejects

¹⁶⁹ *Papiniani libro quarto responsorum*: "Gener a socero dotem arbitrato soceri certo die dari non demonstrata re vel quantitate stipulates fuerat: arbitrio quoque detracto stipulationem valere placuit, nec videri simile, quod fundo non demonstrato nullum esse legatum vel stipulationem funi constaret, cum inter modum constituendae dotis et corpus ignotum differentia magna sit: dotis etenim quantitas pro modo facultatum partris et dignitate mariti constitui potest." Translated by Watson as: "A son-in-law stipulated with his father-in-law for the payment of a dowry at a fixed date, without specifying its nature or quantity, but leaving this for the father-in-law to decide. This stipulation is held to be valid, without considering the father-in-law's decision, unlike cases involving land which is not specified. A legacy or a stipulation of land is held to be void here, because there is great difference between constituting a dowry and providing an unspecified piece of property; the amount of the dowry can be fixed on the basis of (the) father's resources and the husband's rank." (See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.)

¹⁷⁰ These rules are contained in Book 23 of the Digest. See further Grubbs *Women and the law* 91–98; Frier & McGinn *Roman family law* 72–86.

¹⁷¹ See eg Meijers 1916 *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 240.

¹⁷² *Celsus libro duodecimo digestorum*: "Si libertus ita iurauerit dare se, quot operas patronus arbitrates sit, non aliter ratum for arbitrium patroni, quam si aequum arbitratus sit", translated by Watson as "[i]f a freedman has sworn to render as many services as his patron has judged fit, the judgment of the patron will be ratified only where it is a fair one". (See Mommsen & Krueger (eds), Watson (ed/tr) *Digest of Justinian*.)

¹⁷³ The rules governing services of freedmen are to be found in Book 38 of the *Digest*.

¹⁷⁴ Daube "Certainty of price" in Daube (ed) *Roman law of sale* 23–24.

these arguments because it would be “rash to transfer a rule from *fideicommissum* to sale”.¹⁷⁵

2 2 4 5 Discretion granted to the buyer only or to both parties?

D 18 1 35 1 refers to the discretion granted to the purchaser to determine his own performance (namely the price he has to pay).¹⁷⁶ However, it has been argued that the same rule applied where one party was given the power to determine the other party’s performance¹⁷⁷ Support for this view is usually sought in *C* 4 38 13.¹⁷⁸ However, as shown previously, this text deals with a different situation, namely, a condition *si voluero* (“if I wish to”)¹⁷⁹ so that it seems that *D* 18 1 35 1 dealt only with a discretion granted to the buyer to determine the price.¹⁸⁰ However, some of the texts relied on to support the argument that such a contract is valid though not yet effective if the discretion has to be exercised reasonably, also include a discretion granted to the seller.¹⁸¹

2 2 5 Conclusion

There are various arguments for and against the possibility of the unilateral determination of the price in a contract of sale in Roman law, so that its interpretation and application are controversial and the texts susceptible to a variety of interpretations. As was shown, the majority of the arguments seeking

¹⁷⁵ *Idem* 24.

¹⁷⁶ “[C]um emere volenti sic venditor dicit” tr by Scott *Civil law* as “when the vendor says to a party who wishes to buy”.

¹⁷⁷ See eg Moyle *Sale* 69 n 2; Kerr & Glover 2000 *SALJ* 203; Kerr *Sale* 58. However, Kerr *Sale* 55 n 221 does point out that *D* 18 1 35 1 only mentions determination by the buyer, but relies on *C* 4 38 13 and many Roman-Dutch writers for authority that the rule relates to a discretion granted to both parties.

¹⁷⁸ Moyle *Sale* 69 n 2; Kerr & Glover 2000 *SALJ* 203; Kerr *Sale* 58; MacKintosh *Roman sale* 71; Daube “Certainty of price” in Daube (ed) *Roman law of sale* 21; Lötzt 1991 *De Jure* 230 n 98.

¹⁷⁹ See para 2 2 4 3(c) *supra*.

¹⁸⁰ Daube “Certainty of price” in Daube (ed) *Roman law of sale* 21 where Daube deals with these issues under the heading “Valuation by the Buyer”. See also Leesen *Gaius meets Cicero* 207; Zimmermann *Obligations* 254.

¹⁸¹ Specifically, *D* 18 1 7 and *D* 50 17 22 1 dealing with the seller’s discretion to decide whether the slave to be sold has handled the seller’s accounts in a manner satisfactory to the seller. See para 2 2 4 4(b) *supra*. See also Rodger 2002 *TSAR* 15 n 63.

to illustrate that such a contract was void are open to criticism. Although there are many arguments favouring the view that the contract would be valid but imperfect, not all of these stand up to scrutiny. The most widely held view gives the impression that a discretion to determine the price did not invalidate the contract provided that the discretion was exercised *arbitrio boni viri*. This would seem to comply with the general principle that contracts of sale were subject to the principles of good faith.¹⁸² If this view is followed, it would appear that such a discretion could be granted to either the buyer or the seller.

2 3 ROMAN-DUTCH LAW OF PURCHASE AND SALE

2 3 1 Introduction

As in Roman law, the contract of sale was also regarded as one of the most important and commonly used contracts in Roman-Dutch law.¹⁸³ The Roman-Dutch law of purchase and sale was in essence the Roman law of purchase and sale – as amended by Dutch custom.¹⁸⁴ The requirements for a contract of sale in Roman-Dutch law were similar to that of Roman law, namely, *consensus, a thing to be sold and a price*.¹⁸⁵ No formalities were required for the valid conclusion of a contract of sale.¹⁸⁶ Although good faith and equity still played an important role in Roman-Dutch law, it could not be used to countermand established rules.¹⁸⁷ As such, a judge could consider good faith in a case but only to the extent that it did not conflict with the rules as found in Roman-Dutch law.¹⁸⁸

2 3 2 Certainty of price

Grotius states that the price must be certain and that a sale is concluded only once there is agreement on the price or the price is determined by a nominated

¹⁸² See para 2 2 1 *supra*.

¹⁸³ De Groot *Inl* 3 14 23.

¹⁸⁴ Lee *Roman-Dutch law* 300; Van den Bergh 2012 *TSAR* 62.

¹⁸⁵ Van Leeuwen *CF* 1 4 19 1.

¹⁸⁶ *Idem* 1 4 19 3.

¹⁸⁷ Du Plessis 2002 *THRHR* 405.

¹⁸⁸ *Ibid.*

third party.¹⁸⁹ Van Leeuwen reiterates these requirements and states that the price must be certain or ascertainable by reference to a third party or “some definite thing”.¹⁹⁰ Voet also requires that the price must be definite (either in itself, by reference to something else or determined by a third party).¹⁹¹ Van der Linden mentions that the price must be “*defined*, either directly or by reference to something else”.¹⁹² Huber states that there is no sale without a price and the price must be certain or referred to a third party for determination.¹⁹³ These rules are similar to the rules found in Roman law.¹⁹⁴

2 3 3 Unilateral determination of the price

2 3 3 1 Introduction

The same questions investigated in Roman law are also investigated in Roman-Dutch law, namely: (a) Is a contract that grants such a discretion void or validly concluded (but not yet effective) and (b) Does the rule refer to a discretion granted to the buyer only or both parties?

2 3 3 2 Is the contract of sale void or validly concluded (but not yet effective)?

Once again, the answer to this question turns upon the interpretation of *D 18 1 35 1* and other relevant Roman-law texts. In Roman-Dutch law there is also a difference of opinion as to whether such a contract was void or validly concluded but imperfect.

¹⁸⁹ De Groot *Inl* 3 14 23.

¹⁹⁰ Van Leeuwen *CF* 1 4 19 2. See also Van Leeuwen *RHR* 3 17 1.

¹⁹¹ Voet *Comm ad Pand* 18 1 23.

¹⁹² Henry (tr) *Van der Linden's institutes* 1 15 8.

¹⁹³ Gane (tr) *Huber's jurisprudence* 3 4 1 and 3 4 5.

¹⁹⁴ See para 2 2 2 *supra*.

2 3 3 3 Interpretations and arguments rendering the contract void

The majority of the Roman-Dutch writers agree that the price may not be left to the discretion of either of the parties.¹⁹⁵ Grotius is of the view that no contract of sale is concluded if the price is to be determined by either of the parties.¹⁹⁶ This is supported by Van der Keessel¹⁹⁷, Van der Linden,¹⁹⁸ Voet¹⁹⁹ and Vinnius.²⁰⁰

As pointed out by Kerr and Glover, the Roman-Dutch writers do not give reasons for their views except to refer to the applicable Roman authorities.²⁰¹ Grotius and Van der Keessel do not give reasons for their views. Van der Linden merely refers to *D 18 1 35 1*.²⁰² Voet refers to *D 18 1 35 1* in conjunction with *C 4 38 13* and *D 45 1 108 1*.²⁰³ Therefore, it would seem that Voet and Van der Linden interpret "imperfectum" in *D 18 1 35 1* as meaning "void" and that Voet is further of the view that such a discretion would amount to a pure potestative condition.²⁰⁴ As discussed previously, both these views are open to criticism.²⁰⁵ Later, when discussing the approval of work done under letting and hiring, Voet distinguishes between a discretion to approve work and a discretion to determine the price.²⁰⁶ He states:

It should be borne in mind that it can indeed be entrusted to the discretion of the debtor or of the creditor to say what, of what sort and *how much has to be made good*, provided that there exists an effective obligation to make something good, so that in such a case

¹⁹⁵ Roberts (ed) *Wessels' law of contract Vol 2* 1094 para 4447; Van den Bergh 2012 *TSAR* 62.

¹⁹⁶ De Groot *Inl* 3 14 23.

¹⁹⁷ Van der Keessel *Praelectiones* on *Gr* 13 14 23.

¹⁹⁸ Henry (tr) *Van der Linden's institutes* 1 15 8.

¹⁹⁹ Voet *Comm ad Pand* 18 1 23.

²⁰⁰ Vinnius *Commentarius* 612. (The author would like to thank Ms Carina van der Westhuizen for her assistance with the translation of this source.)

²⁰¹ Kerr & Glover 2000 *SALJ* 203; Kerr *Sale* 66. See Hawthorne 1992 *THRHR* 639.

²⁰² Henry (tr) *Van der Linden's institutes* 1 15 8.

²⁰³ Voet *Comm ad Pand* 18 1 23.

²⁰⁴ Roberts (ed) *Wessels' law of contract Vol 1* 141 para 432 agrees with this view.

²⁰⁵ See paras 2 4 3 1 and 2 4 3 3 *supra*. See also Lubbe 1989 *TSAR* 169–170 for Lubbe's criticism of the view held by Voet and Wessels.

²⁰⁶ Voet *Comm ad Pand* 19 2 35.

the discretion of debtor or creditor is to be taken as the discretion of a good man.²⁰⁷

He then states that with a discretion to approve work there was “an effective obligation to make something good” while it cannot be left to the buyer to determine that “he should owe nothing by his settling”.²⁰⁸ It has already been shown that the discretion to determine the price does not amount to a pure potestative condition.²⁰⁹ Furthermore, it has been shown that there are arguments that support the proposition that a discretion to determine the price would be subject to the “discretion of a good man” which would prevent the buyer from determining that no price would be payable.²¹⁰ In fact, all of the texts referred to by Voet in support of his proposition that a discretion can be granted to either of the parties if exercised as a good man, are the texts used to support the proposition that the price can be determined in the reasonable discretion of the buyer.²¹¹ When applying Voet’s argument – as quoted above – the buyer would be permitted to determine “how much has to be made good” (ie the price) provided such determination was made *arbitrio boni viri*. Therefore, the buyer would never be in the position to determine that no price would be payable.

Vinnius states that the price cannot be determined in the discretion of the seller or the buyer and refers to *D 18 1 35 1* for this proposition.²¹² He equates such a contract with a contract where the buyer or the seller had the power to decide whether they are bound to the contract.²¹³ As shown previously, this argument is open to criticism.²¹⁴

Van Leeuwen does not deal with this question in his *Censura Forensis*. However, in his *Het Rooms-Hollands-Regt* he states that where someone

²⁰⁷ Voet *Comm ad Pand* 19 2 35 as translated in Gane (tr) *The selective Voet*; my emphasis.

²⁰⁸ *Ibid.*

²⁰⁹ See para 2 2 4 3(c) *supra*.

²¹⁰ See para 2 2 4 4(b) *supra*.

²¹¹ Voet refers to *D 17 2 6*, *C 5 11 3*, *D 38 1 30*, *D 50 17 22 1* and *D 18 1 7*.

²¹² Vinnius *Commentarius* 612.

²¹³ *Ibid.*

²¹⁴ See para 2 2 4 3(c) *supra*.

promises something “if, or as much as, he shall feel disposed” such a promise is void because that person cannot be held bound to more than what he pleases.²¹⁵ He refers to *D 44 7 8*, *D 45 1 17* and *D 45 1 108 1* in support of this proposition.²¹⁶ However, as shown previously, all these texts deal with a pure potestative condition (*si voluero*) and do not deal with the situation where a party promises “as much as, he feels disposed”.²¹⁷ Further arguments also exist that even if the party could promise to pay as much as he feels disposed, such discretion would have to comply with the standard of a *bonus vir*.²¹⁸

Huber merely states that the price may not be left to the discretion of the purchaser.²¹⁹ He does not deal with the situation where the seller is granted the discretion to determine the price.²²⁰

Finally, it may be mentioned that Pothier states that the price cannot be “left in the power of one of the parties” and that if the price was to be determined by one of the parties the sale is invalid.²²¹ It would appear that he bases his view on *D 18 1 35 1*.²²² Later, when discussing the case where the parties agree that the thing will be sold “for such a price as shall be offered him for it”, Pothier argues that such a sale should not be allowed because of the increased risk of fraud.²²³ He suggests that the buyer may bring forward someone who will offer a very low price and in the same way, the seller may bring forward someone who will offer a very high price.²²⁴ Kerr and Glover argue that the increased risk of fraud could also be one of the reasons for Pothier’s view on the unilateral determination of the price in a contract of sale.²²⁵ However, it has been shown

²¹⁵ Van Leeuwen *RHR* 4 3 5 as translated in Decker (ed) *Van Leeuwen’s Commentaries*.

²¹⁶ *Ibid.*

²¹⁷ See para 2 2 4 3(c) *supra*.

²¹⁸ See para 2 2 4 4(b) *supra*.

²¹⁹ Gane (tr) *Huber’s jurisprudence* 3 4 5.

²²⁰ Kerr & Glover (n 201) 203.

²²¹ Cushing (tr) *Pothier’s sale* 23 and 29.

²²² *Ibid.*

²²³ *Idem* 27.

²²⁴ *Ibid.*

²²⁵ Kerr & Glover 2000 *SALJ* 205; Kerr *Sale* 66.

previously that any abuse by one of the parties of such a power could probably be addressed by employing the principles of *arbitrio boni viri*.²²⁶

2 3 3 4 Interpretations and arguments rendering the contract valid but imperfect

Although it is generally accepted that the Roman-Dutch writers are of the view that a contract providing for the unilateral determination of the price is void, in fact, two Roman-Dutch writers differ in their opinion.

Donellus is of the view that if a contract provides that if a party is granted the discretion to determine the price and does not determine the price, there is no price and therefore no sale.²²⁷ However, if the party determines the price, the sale would be valid as the price would be certain.²²⁸ It would seem that he is of the view that such a discretion would have to be exercised *arbitrio boni viri* as he refers to *D 18 1 7* in support.²²⁹ He further argues that the rule that prohibits an obligation where the buyer or seller can decide whether they are bound does not stand in the way of this view.²³⁰ He states that whether someone is bound to a contract cannot be in their power, but *what* such a person owes or *how much* may be in his power.²³¹ Finally, he refers to *D 18 1 35 1* in support of his argument.²³² He argues that as this text refers to the situation where the seller says to buyer that he can determine the price in his discretion; the contract has not been concluded as the buyer still has to accept this condition.²³³ He argues that the contract is not concluded, not because the contract is void (“nullum”), but because the condition has not yet been accepted by the buyer.²³⁴ Once the

²²⁶ See para 2 2 4 4(b) *supra*.

²²⁷ Donellus *Operum index rerum* 788. (The author would like to thank Dr Paul Hasse and Ms Carina van der Westhuizen for their assistance with the translation of this source.)

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.* He refers to *D 18 1 7* again.

²³² *Ibid.*

²³³ *D 18 1 35 1* refers to “cum emere volenti sic venditor dicit” (“when the seller says to the buyer”).

²³⁴ Donellus *Operum index rerum* 789.

buyer has accepted the condition and determined the price, the condition is fulfilled and the contract is concluded.²³⁵

Noodt deals with this question in detail by considering the meaning of other relevant Roman-law texts.²³⁶ He refers to *D 18 1 35 1* where Gaius states that the contract is imperfect if the discretion to determine the price has been granted to the buyer.²³⁷ He rejects the argument that such a contract would amount to a term that the buyer could decide whether he wants to be bound or not.²³⁸ He investigates the possible tension between *D 18 1 7*²³⁹ and *D 18 1 35 1* and states that the real question to be answered is what is meant with the term “arbitrium”.²⁴⁰ He considers whether it refers to the pure will of the party or to the discretion of a good man as distinguished by Proculus in *D 17 2 76*.²⁴¹ He argues that the meaning ascribed to the word “arbitrium” will determine whether the price can be ascertained or not.²⁴² He argues that, in this context, it is more probable that the parties intended that “arbitrium” would refer to the discretion of a good man.²⁴³ Therefore, the sale is valid because the buyer cannot choose whether he wants to be bound to the contract or not.²⁴⁴ He has to exercise his discretion according to the standard of a *bonus vir*.²⁴⁵

Remarkably, Noodt noticed that the texts in *D 18 1 7* and *D 50 17 22 1* must be read together as they originally formed part of the same discussion under Ulpianus’ commentary on the works of Sabinus. As discussed previously,²⁴⁶ these two texts deal with the sale of a slave on the condition that the slave

²³⁵

Ibid.

²³⁶

Noodt *Opera omnia* 388–389. (The author would like to thank Dr Paul Hasse for his assistance with the translation of this source.)

²³⁷

Ibid.

²³⁸

Idem 389.

²³⁹

See paras 2 2 4 3(c) and 2 2 4 4(b) *supra*.

²⁴⁰

Noodt *Opera omnia* 389.

²⁴¹

Ibid. See para 2 2 4 4(b) *supra*.

²⁴²

Ibid.

²⁴³

Ibid.

²⁴⁴

Ibid.

²⁴⁵

Ibid.

²⁴⁶

Ibid.

managed the seller's accounts to the satisfaction of the seller. Ulpianus considered the question whether the discretion by the seller was subject to the mere will of the seller or had to be exercised as a good man. Noodt classifies the first instance as a condition where the outcome is uncertain and undeterminable. He classifies the last instance as a condition where the outcome is inevitable and therefore certain and determinable.²⁴⁷ Ulpianus concluded that the seller was required to exercise his judgement in accordance with the standard of a *bonus vir*.²⁴⁸ As such, if the seller could accept the accounts managed by the slave but did not, or if he received the accounts but pretended that he did not, the condition to the sale was considered fulfilled and the buyer could institute an action against the seller on the basis of a concluded sale.²⁴⁹

Noodt states that these same principles would be applicable to a discretion granted to the buyer to determine the price.²⁵⁰ If the buyer exercised the discretion in an inequitable manner, his determination could be corrected by the judgement of a *bonus vir*.²⁵¹ He further argues that if the buyer did not make a determination – when in a position to do so – it must be regarded as if the determination was made.²⁵² This line of thought allows him to conclude that a sale where the price was to be determined by the buyer *arbitrio boni viri* would be valid as the price can be ascertained, which can be distinguished from the situation where the price determination is subject to the buyer's pure will and therefore uncertain.²⁵³

Finally, it would seem that he agrees with Donellus' interpretation of *D 18 1 35 1* as he is also of the view that in this text the buyer has not yet accepted the

247

Ibid.

248

D 50 17 22 1. See para 2 2 4 4(b) *supra*.

249

D 8 1 7pr. See para 2 2 4 4(b) *supra*.

250

Noodt *Opera omnia* 389.

251

Ibid. He refers to *D 17 2 76* in support of his view.

252

Ibid.

253

Ibid.

condition offered by the seller.²⁵⁴ Therefore, he argues that if the buyer does not accept the condition immediately and in the meantime, the seller revokes the condition before the buyer accepts it, there is no sale and the buyer has no action against the seller.²⁵⁵

2 3 3 5 Discretion granted to the buyer only or to both parties?

Grotius,²⁵⁶ Voet,²⁵⁷ Van der Keessel,²⁵⁸ Van der Linden²⁵⁹ and Vinnius²⁶⁰ are of the view that the discretion to determine the price could not be granted to the buyer or the seller. However, Huber states that the price may not be left to the discretion of the buyer.²⁶¹ Therefore, it would seem that most Roman-Dutch writers agree that the discretion to determine the price may not be left to either of the parties. Furthermore, it seems that both Donellus and Noodt were of the opinion that the discretion to determine the price could be left to *either* of the parties.²⁶²

2 4 Conclusion

It is clear that the majority of the Roman-Dutch writers regarded a contract that provides for a discretion by one of the parties to determine the price as void. However, their views are based on a very conservative interpretation of *D 18 1 35 1* and a misplaced reliance on the rules dealing with pure potestative conditions.²⁶³ Therefore, their views are open to criticism.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ De Groot *Inl* 3 14 23.

²⁵⁷ Voet *Comm ad Pand* 18 1 23.

²⁵⁸ Van der Keessel *Praelectiones* on Gr 13 14 23.

²⁵⁹ Henry (tr) *Van der Linden's institutes* 1 15 8.

²⁶⁰ Vinnius *Commentarius* 612.

²⁶¹ Gane (tr) *Huber's jurisprudence* 3 4 5.

²⁶² See para 2 3 3 4 *supra*.

²⁶³ Lubbe 1989 *TSAR* 172–173.

Two Roman-Dutch writers criticised these views and were of the view that such a contract would be valid, as the discretion would have to be exercised *arbitrio boni viri*. This view is also supported by other jurists and modern researchers who have considered the meaning of the Roman-law texts.

2 5 CONCLUSION

Daube refers to certainty of price as a specialised question of certainty.²⁶⁴ The importance of this statement cannot be underestimated. The failure to recognise the importance of this fact has resulted in confusion between different rules and situations. This has further obscured the arguments and views in respect of the rule. These confusions are based on the wrong interpretation and the incorrect use of the Roman-law sources in respect of the rule.

It is unfortunate that these views were followed in South African law. In the past, South African courts have been content to cite the Roman and Roman-Dutch authorities, especially the view of Voet.²⁶⁵ Lubbe has argued that Wessels' support for Voet's view was a contributing factor to the acceptance of Voet's view in South African law.²⁶⁶ Kerr also argues that as Voet's view is considered to be the "usual interpretation", it should be followed.²⁶⁷ In *Master v African Mines Corporation Ltd*, Wessels J stated as follows:

Now this Court administers the Roman Dutch Law, and not the Roman Law of Justinian. If the Courts of Holland have placed a certain interpretation upon a *lex* in the *Digest*, and by virtue of that interpretation a certain practice was adopted, then this Court should follow the interpretation of the Dutch Courts, rather than that which modern investigators give to the text.²⁶⁸

²⁶⁴ Daube "Certainty of price" in Daube (ed) *Roman law of sale* 15.

²⁶⁵ Kerr & Glover 2000 *SALJ* 205; Kerr *Sale* 66. See further the case law discussed in ch 3.

²⁶⁶ Lubbe 1989 *TSAR* 165 n 39 commenting on Roberts (ed) *Wessels' law of contract Vol 1* 141 para 432. In addition, Lubbe criticises Wessels' preference for the views of Voet to other plausible interpretations as being based on a pure historical patriotism (at 173).

²⁶⁷ Kerr *Sale* 55 n 222.

²⁶⁸ *Master v African Mines Corporation Ltd* 1907 TS 925 928–929.

Van Warmelo refers to the above case and concedes that our law is the Roman law as seen through the eyes of the Roman-Dutch writers.²⁶⁹ However, he questions whether the courts should not give more attention to the Roman law and consider the findings of modern writers and interpreters.²⁷⁰ He argues that the courts should be allowed to consider Roman law from other viewpoints outside Roman-Dutch law in order to improve the Roman-Dutch law.²⁷¹

As shown previously and above, there are various other viewpoints that could be taken into account. In fact, it has been shown that two Roman-Dutch writers – Noodt and Donellus – did in fact hold differing views from Voet and the other Roman-Dutch writers.

Finally, the South African Supreme Court of Appeal questioned whether the rule should still be applicable in South African law as it is of the opinion that the views of the Roman-Dutch writers are illogical.²⁷² Therefore, the Supreme Court of Appeal itself acknowledges that the views of the Roman-Dutch writers are not above criticism and can be re-investigated in the light of new research and findings. This is investigated in the next chapter.

²⁶⁹ Van Warmelo 1959 *Tulane Law Review* 572.

²⁷⁰ *Idem* 575.

²⁷¹ *Ibid.*

²⁷² *NBS Boland Bank v One Berg River Drive supra* para 16.

CHAPTER 3 UNILATERAL PRICE DETERMINATION IN SOUTH AFRICAN LAW PRIOR TO THE CONSUMER PROTECTION ACT

3 1 INTRODUCTION

In the previous chapter it was shown that the rule that prohibits the unilateral determination of price was controversial in Roman and Roman-Dutch law. Specifically, the views of Voet *et al* (that a contract granting a discretion to one of the parties to determine the price is void) were criticised as being a very conservative interpretation of the Roman-law texts and based on a misplaced reliance on the rules dealing with pure potestative conditions.

The aim of this chapter is to establish the position of the rule in South African common law prior to the enactment of the Consumer Protection Act 68 of 2008 (“the CPA”).²⁷³ The common-law principles as interpreted and developed by the South African courts are discussed and analysed. In the following chapter the application of the rule is considered within the framework of the CPA.

3 2 GENERAL PRINCIPLES OF THE LAW OF PURCHASE AND SALE

The contract of sale is one of the most important and commonly used contracts in South Africa.²⁷⁴ A contract of sale can be defined as:

[a] contract in terms of which one person, the seller, undertakes to deliver something to another person, the purchaser, and the latter undertakes to pay a certain amount of money to the former in exchange therefor.²⁷⁵

As previously mentioned, the law of purchase and sale in South Africa derives from Roman and Roman-Dutch law.²⁷⁶ The essential elements for a contract of

²⁷³ The CPA came in to full force on 31 March 2011.

²⁷⁴ Zulman & Kairinos (eds) *Norman's sale* vii; Nagel (ed) *Commercial law* 193.

²⁷⁵ Fouché (ed) *Contracts* 135. See also De Wet & Van Wyk *Kontraktereg* 313; Van Huyssteen *et al Contract* 215; Sharrock *Business law* 271.

²⁷⁶ See ch 2 para 2 1.

sale are therefore similar to the requirements in Roman-Dutch law, namely, consensus (the seller must intend to sell and the purchaser to buy), a thing to be sold and a price.²⁷⁷ As a rule, no formalities are required but there are notable exceptions.²⁷⁸

The Roman-law principles of purchase and sale have not been modified to any great extent in the history of South African law.²⁷⁹ The new CPA has, however, brought about substantial changes to the law of purchase and sale. These are examined in the following chapter.

Although “all contracts are subject to the principle of good faith”,²⁸⁰ the role of good faith in the law of contract – including the law of purchase and sale – is limited in South African law.²⁸¹ As pointed out by Van Huyssteen *et al*: “[G]ood faith will probably not be directly applied as a rule or remedy in the field of contracts.”²⁸² However, this does not mean that good faith has no role to play in the law of purchase and sale. Good faith can be considered when investigating whether a term is against public policy.²⁸³ Public policy is also informed by the Bill of Rights and the values of the Constitution.²⁸⁴ These principles have played, and will in future play, an important role in the development of the common-law principles applicable to purchase and sale.²⁸⁵

²⁷⁷ Bradfield & Lehmann (eds) *Sale and lease* 11; Fouché (ed) *Contracts* 136–137; Mostert *et al Koopkontrak* 5; Lotz “Purchase and sale” in Zimmerman & Visser *Southern Cross* 362; Nagel (ed) *Commercial law* 193.

²⁷⁸ The two most notable exceptions are the sale of immovable property (s 2 of the Alienation of Land Act 68 of 1981) and the sale of goods on credit governed by the National Credit Act 34 of 2005. Contracts of sale governed by the CPA also have to meet certain formal requirements. The requirements relevant to the research are discussed in ch 5. See further Van Huyssteen *et al Contract* 217.

²⁷⁹ Lotz “Purchase and sale” in Zimmerman & Visser *Southern Cross* 361.

²⁸⁰ *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652; *Erasmus v Senwes Ltd* 2006 3 SA 529 (T) 538; *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 3 SA 544 (SCA) para 13. See also Otto 1998 TSAR 608.

²⁸¹ Sutherland 2008 *Stell LR* 411.

²⁸² Van Huyssteen *et al Contract* 62.

²⁸³ *Ibid*; Van der Merwe *et al Contract* 199.

²⁸⁴ The Constitution of the Republic of South Africa, 1996 (“the Constitution”). Van Huyssteen *et al Contract* 62.

²⁸⁵ *Ibid*.

3 3 UNILATERAL DETERMINATION OF PRICE

3 3 1 The requirement of certainty in contracts

In general terms, a contract can be defined as “an agreement made with the intention of creating an obligation or obligations”.²⁸⁶ In other words, the parties must have the intention to be bound by the terms of the agreement. The enforcement of such agreements will be possible only if the obligations that the parties are binding themselves to are certain or can be ascertained.²⁸⁷ As such, it is an accepted legal principle that the terms of a contract must result in certainty regarding their legal consequences.²⁸⁸ This usually implies that the parties must clearly state the material aspects of the obligations and how they should operate.²⁸⁹ No contract can exist if the agreement is so vague that its material aspects and obligations cannot be determined.²⁹⁰

3 3 2 The requirement of certainty of price

The price is an essential element of a contract of sale.²⁹¹ Certainty of price is therefore a requirement for a contract of sale in South African law.²⁹² In 1964 the requirement of certainty of price was formulated in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*:

²⁸⁶ Van der Merwe *et al Contract* 9.

²⁸⁷ De Wet & Van Wyk *Kontraktereg* 93; Hutchison & Pretorius (eds) *Kontraktereg* 218; Hawthorne 1992 *THRHR* 638; Lubbe 1989 *TSAR* 159; Otto 1998 *TSAR* 603; Otto 2000 *SALJ* 1.

²⁸⁸ Bradfield & Lehmann (eds) *Sale and lease* 17; Du Bois *et al* (eds) *Wille's principles of SA law* 754; Van der Merwe *et al Contract* 221; Hawthorne 1992 *THRHR* 638.

²⁸⁹ Du Bois *et al* (eds) *Wille's principles of SA law* 754.

²⁹⁰ De Wet & Van Wyk *Kontraktereg* 93.

²⁹¹ *Dawidowitz v Van Drimmelen* 1913 TPD 672 675; *Meyer v Kirner* 1974 4 SA 90 (N) 97. See also Bradfield & Lehmann (eds) *Sale and lease* 11; Fouché (ed) *Contracts* 136; Hackwill (ed) *Mackeurtan's sale* 14; Mostert *et al Koopkontrak* 6; Zulman & Kairinos (eds) *Norman's sale* 2; Schulze 2003 *Juta's Business Law* 201.

²⁹² *Coronel v Kaufman* 1920 TPD 207 at 209; *Deary v Deputy Commissioner of Inland Revenue* 1920 CPD 541 552; *Margate Estates Limited v Moore* 1943 TPD 54 59; *Hattingh v Van Rensburg* 1964 1 SA 578 (T) 582; *Meyer v Kirner supra* 97; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 2 SA 425 (A) 434; *Patel v Adam* 1977 2 SA 653 (A) 665; *Johnston v Leal* 1980 3 SA 927 (A) 938; *Reymond v Abdulnabi* 1985 3 SA 348 (W) 349. See also Bradfield & Lehmann (eds) *Sale and lease* 18; Fouché (ed) *Contracts* 137; Visser *et al* (eds) *Gibson's mercantile law* 114; Hackwill (ed) *Mackeurtan's Sale* 14; Roberts (ed) *Wessels' law of contract Vol 2* 1093; Nagel (ed) *Commercial law* 197; Van den Bergh 2012 *TSAR* 63.

It is, I think, clear that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They must fix the amount of that price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. ... Moreover, in our law, which does not conform in this regard with certain other systems, there can be no valid contract of sale if the parties have agreed that the price is to be fixed by one of them or by his nominee.²⁹³

The above formulation was approved in a number of cases – including cases before the Supreme Court of Appeal.²⁹⁴ It is clear that a price must be determined in the contract itself or be capable of determination in accordance with some external standard.²⁹⁵ An external standard would refer to an objective one.²⁹⁶ Furthermore, it must also be determined without further reference to the parties.²⁹⁷ It appears that this would mean that the parties may not agree that one of them has the power to determine the price.²⁹⁸ In a case such as this it would appear that a discretionary power granted to one of the parties to determine the price would render the sale void in South African law.²⁹⁹

²⁹³ *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W) 670.
²⁹⁴ *Westinghouse Brake & Equipment v Bilger Engineering supra* 574; *Shell SA (Pty) Ltd v Corbitt* 1986 4 SA 523 (C) 526; *Genac Properties JHB (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 1 SA 566 (A) 576–577; *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 2 SA 225 (A) 233; *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 4 SA 141 (SCA) 158; *Pareto Ltd v Mythos Leather Manufacturing (Pty) Ltd* 2000 3 SA 999 (W) para 9.

²⁹⁵ This is in accordance with the principle *certum est quod certum reddi potest* (“something is certain if it can be made certain”) found in *D 12 1 6* and *D 45 1 74* (Mostert *et al Koopkontrak* 10; Hawthorne 1992 *THRHR* 640). For examples of acceptable external standards see Du Bois *et al* (eds) *Wille’s principles of SA law* 891; Hackwill (ed) *Mackeurtan’s Sale* 15; Joubert *Contract* 179–180; Kerr *Sale* 33–34; Mostert *et al Koopkontrak* 12; Van der Merwe *et al Contract* 227; Zulman & Kairinos (eds) *Norman’s sale* 43; Nagel (ed) *Commercial law* 198; Sharrock *Business law* 272.

²⁹⁶ Van der Merwe *et al Contract* 223. As pointed out by Laing LLM dissertation 18, although an objective standard is required, the courts have given different meanings to what would be considered objective. See further para 3 3 4 3(b) *infra*.

²⁹⁷ There are differing opinions on whether these two requirements (an external standard and no further recourse to the parties) should be tested independently or not (Laing LLM dissertation 19). See further para 3 3 4 3(b) *infra*.

²⁹⁸ See further para 3 3 4 3(b) *infra*.

²⁹⁹ Hawthorne 1992 *THRHR* 638; Kerr & Glover 2000 *SALJ* 203; Otto 1998 *TSAR* 604; Schulze 2003 *Juta’s Business Law* 201.

3 3 3 The rule questioned by the Supreme Court of Appeal

Prior to 1993 the rule was firmly established in South African law and regularly applied by South African courts.³⁰⁰ The courts accepted the application of the rule, but interpreted and applied it in different ways. This casuistic approach led to different results, to legal uncertainty and, sometimes, even to undesirable results.³⁰¹

Then, in *Benlou Properties v Vector Graphics*, the Supreme Court of Appeal criticised the rule but stated that, despite these criticisms, it is still bound “by the view of our old authorities”.³⁰²

During the 1990s the steep increase in interest rates triggered a number of High Court cases attacking the standard discretionary clauses in loan agreements, which provide for the adjustment of the interest rate at the lender’s discretion.³⁰³ This question was referred to the Supreme Court of Appeal in *NBS Boland Bank v One Berg River Drive*.³⁰⁴ The question before the court was whether a clause providing a party with the discretion to fix the performance of the other party is valid and enforceable in our law. The court set three requirements for a discretionary power to fix performance to be valid and enforceable: first, the discretion is not to fix a purchase price or rental payable,³⁰⁵ secondly, the

³⁰⁰ See eg *Burroughs Machines v Chenille Corporation supra* 670; *Steyn v Lomlin (Edms) Bpk* 1980 1 SA 167 (O) 170; *Westinghouse Brake & Equipments v Bilger Engineering supra* 574; *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) 514–515.

³⁰¹ *Otto* 1998 TSAR 604; *Lubbe* 1989 TSAR 160; *Kerr Sale* 60-65; *Hawthorne* 1992 THRHR 638; *Mofokeng* 1998 *Juta’s Business Law* 55–56; *Osode* 2000 *Afr J Int’l & Comp L* 170–171; *Van den Bergh* 2012 TSAR 64.

³⁰² *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) 186. These remarks were made *obiter* in respect of the price in a contract of sale as the case dealt with a lease agreement.

³⁰³ *Cornelius* 2003 TSAR 389; *Lawack-Davids* 2001 *Obiter* 181. See *NBS Boland Bank Ltd v One Berg River Drive CC*; *Deeb v ABSA Bank Ltd*; *Friedman v Standard Bank of SA Ltd* 1999 4 SA 928 (SCA) paras 2–8 for a summary of these cases. For more background information on the reasons for the steep increase in interest rates see *Otto* 1998 TSAR 616.

³⁰⁴ *NBS Boland Bank v One Berg River Drive supra*.

³⁰⁵ *Idem* para 24.

discretion is to fix the performance of the other party³⁰⁶ and, thirdly, the discretion must be exercised *arbitrio boni viri*.³⁰⁷

Although the matter before the court was in respect of a discretion granted to a lender to adjust the interest rate, the court did refer to the rule that a sale agreement is invalid if one of the parties is given the power to determine the purchase price payable.³⁰⁸ The court raised a few questions in respect of the rule and commented that the rule as applied in South African law is “not only illogical but also sadly out of step with modern legal systems”.³⁰⁹ The court also remarked that public policy, *bona fides* and contractual equity might also be employed when considering such issues.³¹⁰ However, the court made it clear that all these comments were made *obiter*.³¹¹ Despite the criticisms of the Supreme Court of Appeal, it would seem that the rule still forms part of our law.³¹² This chapter investigates whether the rule should be retained in South African law. This will depend on two separate questions: Is the rule a manifestation of the requirement of certainty of price? If not, does public policy require that the rule be retained?

3 3 4 The rule as a manifestation of the requirement of certainty of price

3 3 4 1 Introduction

As shown above, the rule is traditionally viewed as a manifestation of the requirement of certainty of price. However, this view is not without criticism. The arguments for and against the rule dealing with the requirement of certainty of price are investigated below.

³⁰⁶ *Ibid.* Subsequently, in *Erasmus v Senwes supra* 538, the court extended the last requirement to include a discretion that relates to a party’s own performance. See further para 3 3 4 3(d) *infra*.

³⁰⁷ *NBS Boland Bank v One Berg River Drive supra* para 25.

³⁰⁸ *Idem* paras 9, 10, 16 and 32.

³⁰⁹ *Idem* para 16.

³¹⁰ *Idem* para 28. See further para 3 3 5 *infra*.

³¹¹ *NBS Boland Bank v One Berg River Drive supra* paras 16 & 32. See also Kerr *Sale* 55.

³¹² Bradfield & Lehmann (eds) *Sale and lease* 19; Cornelius *Interpretation* 148; Du Bois *et al* (eds) *Wille’s principles of SA law* 891; Zulman & Kairinos (eds) *Norman’s sale* 2; Osode 2000 *Afr J Int’l & Comp L* 175–176.

3 3 4 2 Arguments that the unilateral determination of price does not comply with the requirement of certainty of price

There are four main arguments in support of the assertion that a unilateral determination of price does not comply with the requirement of certainty of price and that this uncertainty cannot be remedied. These are:

- (a) The unilateral determination of price excludes agreement on one of the essential elements of a contract of sale.
- (b) The unilateral determination of price amounts to a pure potestative condition.
- (c) The unilateral determination of price is too vague to be enforceable.
- (d) The court should not make a contract for the parties.

- (a) A discretion to determine the price excludes agreement on one of the essential elements of a contract of sale

A tendency exists in South African law to distinguish between discretions granted in respect of essential elements of a contract and discretions granted in respect of non-essential elements of a contract.³¹³

In respect of contracts of sale, *Machanick v Simon* can be mentioned.³¹⁴ The court referred to *D 18 1 35 1* and stated that the price left to the discretion of the buyer in Roman law was imperfect.³¹⁵ The court stated that as the price is one of the essential elements of a sale, "there is no room for doubt in that case".³¹⁶ The court referred to *D 18 1 35 1* in support of this argument. The court held that this can be distinguished from non-essential discretions which are referred

³¹³ Kerr *Sale* 64; Kerr *Contract* 132; Davids 1965 *SALJ* 110.

³¹⁴ *Machanick v Simon* 1920 CPD 333.

³¹⁵ *Idem* 336.

³¹⁶ *Ibid.*

to by Ulpian in *D 18 1 7* and which must be exercised *arbitrio boni viri*.³¹⁷ This distinction was followed in subsequent case law.³¹⁸

This distinction is based on the argument that a discretion to determine the price renders the contract void because *consensus* on an essential element of the sale (ie the price) is lacking.³¹⁹ This view is open to criticism. Laing argues that the reason for the requirement of certainty of price is to “place the price beyond the reach of consensus” and to ensure that no further agreement is necessary to determine the final price.³²⁰ Where one of the parties is given the power to determine the price, no further agreement is necessary and there is *consensus* on the essential element of price.³²¹ The party must merely exercise the discretion and determine the price. This is supported by the criticism in *Benlou Properties v Vector Graphics*, where the court remarked that it could not understand why the purchase price determined by a third party is *more* certain than the purchase price determined by one of the parties to the contract.³²² Subsequently, the court in *NBS Boland Bank v One Berg River Drive* agreed with the criticism and expressed doubt as to the reasons for the distinction between a discretion to determine the price and other contractual discretions.³²³

This distinction between discretions dealing with essential and non-essential terms was also applicable to the rent in a lease agreement. However, in *Genac Properties JHB v NBC Administrators* the court was willing to enforce a discretion that entitled the landlord to determine expenses to be paid (as part of the rent), because the court was of the view that it referred to an objective

³¹⁷ *Ibid.*

³¹⁸ See eg *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 1 SA 700 (A) 706–707 & *Burroughs Machines v Chenille Corporation of SA* *supra* 670.

³¹⁹ *Kerr Sale* 64.

³²⁰ Laing LLM dissertation 20. Laing refers to the following extract in *Odensdaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 2 SA 656 (O) 665: “The contract itself must place the subject-matter of the transaction, the price and the fact of consensus out of range of the clash of the will of the parties.”

³²¹ Laing LLM dissertation 59, 153–154.

³²² *Benlou Properties v Vector Graphics* *supra* 185. The court’s comment was made in light of the fact that the determination of the purchase price or rent by a third party is acceptable in our law (*Pareto v Mythos Leather Manufacturing* *supra* para 9).

³²³ *NBS Boland Bank v One Berg River Drive* *supra* para 32. This remark was made *obiter*. See also Lubbe 1989 *TSAR* 173; Hutchison & Pretorius (eds) *Kontraktereg* 223.

standard (the expenses were limited to expenses actually and reasonably incurred).³²⁴ This reasoning was followed in *Engen Petroleum v Kommandonek*.³²⁵ The court held that a clause providing for the adjustment of the rental in the landlord's discretion is valid if it refers to an objective and reasonable discretion.³²⁶

There no longer seems to be a good reason for distinguishing between price discretions and other discretions,³²⁷ especially on the ground that price discretions exclude agreement on one of the essential elements of a contract of sale.

(b) A discretion to determine the price amounts to a pure potestative condition. As in Roman-Dutch law, there is a tendency to equate a discretion to determine the price with a pure potestative condition.³²⁸ There is also case law that refers to Voet 18 1 23 in support of the rule.³²⁹ As shown in the previous chapter, Voet argued that the discretion to determine the price would amount to a pure potestative condition.³³⁰

The first reference to this argument can be found in Wessels J's reasoning in *Dawidowitz v Van Drimmelin*. In this case the defendant pleaded that he and the plaintiff had agreed that he could pay the purchase price in monthly instalments, the amount of such instalments to be according to what the defendant could afford to pay.³³¹ As such, this case did not actually deal with a

³²⁴ *Genac Properties JHB v NBC Administrators supra* 579.

³²⁵ *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 2 SA 170 (W) 173–174.

³²⁶ *Idem* 174. These remarks were made *obiter* as the court held that the contract expressly limited the discretion to an objectively ascertainable discretion (at 173).

³²⁷ See also Cornelius 2003 TSAR 390.

³²⁸ *Dawidowitz v Van Drimmelen supra* 672; *Dharumpal Transport v Dharumpal supra* 707. See also Mostert *et al Koopkontrak* 11.

³²⁹ See eg *Deary v Deputy Commissioner of Inland Revenue supra* 548; *Burroughs Machines v Chenille Corporation of SA supra* 670; *Shell SA v Corbit supra* 525. See also Kerr & Glover 2000 SALJ 205; Hackwill (ed) *Mackeurtan's sale* 16).

³³⁰ See ch 2 para 2 3 3 3 *supra*.

³³¹ *Dawidowitz v Van Drimmelen supra* 672.

discretion to determine the price, but with how the price should be paid.³³² De Villiers JP held that the defendant had not proved the agreement.³³³ Although Wessels J concurred with De Villiers's judgment, he went further and discussed the general principles applicable to sale:

Our law requires, as one of the elements of a contract of sale, that there shall be a certain price. It may very well be that, from the circumstances of the case, the Court will imply that the purchaser was to pay a reasonable sum for the goods which he received. But if you cannot gather this from the surrounding circumstance, if there is no price, there is no contract. If I say, for instance: 'I will buy your horse for what I think it is worth', or: 'for what I choose to pay for it,' there is no sale. This principle applies to every form of contract. *If a person who claims that he has made a contract proves that it depends wholly on his own will what part of it he should perform, then according to my view there is no contract; it is void for vagueness*³³⁴ (my emphasis).

Clearly, Wessels J held that a discretion to determine the price ("I will buy your horse for what I think it is worth") amounted to a pure potestative condition ("depends wholly on his own will what part of it he should perform").³³⁵ This argument is open to criticism and must not be followed.³³⁶

Reference must also be made to *Theron v Joynt*, where the court stated as follows:

³³² Laing LLM dissertation 131 n 612. Therefore, the court's remarks regarding unilateral determinations of price were made *obiter* (Lubbe 1989 *TSAR* 163; Laing LLM dissertation 132 n 616).

³³³ *Dawidowitz v Van Drimmelen supra* 674.

³³⁴ *Idem* 675. Strangely, in *Williams and Taylor v Hitchcock* 1915 WLD 51 it would seem that Wessels J changed his mind. This seems to be true even though Wessels J specifically distinguished this case from the case in *Dawidowitz v Van Drimmelen supra* 53–54. The parties agreed that the purchaser would not be called upon to pay the purchase price "until such time as he is in a financial position to do so" (at 52). These facts are almost identical to the facts in *Dawidowitz v Van Drimmelen*. Wessels J held that the contract was not void for vagueness and did not depend entirely on the will of one of the parties (at 54). He stated that whether the money would be due would depend on the facts of the case which can be ascertained. See also Beck 1985 *SALJ* 666.

³³⁵ Laing LLM dissertation 131 n 612.

³³⁶ See ch 2 paras 2 2 4 3(c). See also Laing LLM dissertation 131 n 612; Van der Merwe *et al Contract* 236 & 243 n 146.

Waar een van twee mense, wat voorgee kontrakterende partye te wees, hom die reg voorbehou om na willekeur enige beding in die sogenaamde ooreenkoms eensydig te wysig, kom sy regposisie in alle opsigte ooreen met dié van iemand wat oënskynlik 'n verpligting aangaan op voorwaarde dat hy na willkeur daardie verpligting kan nakom of ontduik. Sulke handeling beskou ons reg as geen regshandeling nie of handeling sonder regsgevolge. (D 45 1 17; 45 1 46 3; 45 1 108 1).³³⁷

The meaning of the term “willekeur” is uncertain.³³⁸ In *Benlou Properties v Vector Graphics* the court interpreted “willekeur” as a determination of price which “depends *entirely* on the will of one of the parties”³³⁹. In *NBS Boland Bank v One Berg River Drive* the court stated that even if it refers to a discretionary power, the authorities listed by Van Heerden DCJ do not support his argument because all these texts refer to a condition *si voluero*.³⁴⁰ This was approved by *Erasmus v Senwes*, where the court held that a discretion to amend the terms of a contract does not amount to a condition *si voluero*.³⁴¹

Another case where the court dealt with contractual discretions and pure potestative conditions is the rather difficult judgment in *Machanick v Simon*.³⁴² As mentioned above, the court distinguished between discretions dealing with essential terms and non-essential terms.³⁴³ However, the court’s arguments in respect of discretions of non-essential terms are noteworthy as the court discussed the possible conflict between *D 18 1 7* and *C 4 38 13*.³⁴⁴ The court stated that there is no real conflict between the two texts.³⁴⁵ In both cases,

³³⁷ *Theron v Joynt* 1951 1 SA 498 (A) 1951 1 SA 498 (A) 506. This remark was also *obiter* (see Lubbe 1989 *TSAR* 164 n 30).

³³⁸ Kerr & Glover 2000 *SALJ* 204 argues that the word has been used in translations of Van der Keessel’s work to refer to a discretion to determine the price.

³³⁹ *Benlou Properties v Vector Graphic supra* 186.

³⁴⁰ *NBS Boland Bank v One Berg River Drive supra* paras 22–23. See also Lubbe 1989 *TSAR* 176. See ch 2 para 2 2 4 3(c).

³⁴¹ *Erasmus v Senwes supra* 537. See also Van der Merwe *et al Contract* 243 n 146.

³⁴² *Machanick v Simon supra*.

³⁴³ See para 3 3 4 2. The court stated that *D 18 1 35 1* deals with the discretion to determine the price and that *D 18 1 7* deals with the discretion to determine non-essential terms.

³⁴⁴ *Machanick v Simon supra* 336–337. As mentioned before, *C 4 38 13* deals with a pure potestative condition (cf ch 2 para 2 2 4 3(c)).

³⁴⁵ *Machanick v Simon supra* 337.

where the existence of the contract of sale is made dependent on the will of one of the parties, the contract is void.³⁴⁶ However, whether the discretion is dependent on that party's will or the will of a *bonus vir* depends on the construction of the contract.³⁴⁷ The court referred to Ulpian's discussion of a condition by the seller that the sale of the slave is conditional on his satisfaction of the accounts managed by the slave on his behalf.³⁴⁸ Ulpian concluded that the seller's discretion had to be exercised *arbitrio boni viri*.³⁴⁹ He argued that if the words were construed to refer to the personal satisfaction of the seller, the sale would be void.³⁵⁰ However, such an interpretation would not be in accordance with the intention of the parties to conclude a legally binding contract.³⁵¹ The court agreed that such a construction would also be in accordance with modern practice.³⁵²

Finally, in *Levenstein v Levenstein* the court stated that a pure potestative condition renders the contract void because it is uncertain "whether the promisor will ever acknowledge the existence of an obligation".³⁵³ Therefore, it is uncertain whether there will ever be real consensus between the parties.³⁵⁴ This is not the case with a discretion granted in respect of the price.³⁵⁵

A further argument is that such a discretion amounts to a pure potestative condition because it is uncertain whether the party will ever determine the price.³⁵⁶ Laing counters this argument as follows: first, such uncertainty has not prevented the recognition of third-party price determinations. Secondly, the

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ See ch 2 para 2 2 4 4(b).

³⁴⁹ *Ibid.*

³⁵⁰ *Machanick v Simon supra* 337.

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ *Levenstein v Levenstein* 1955 3 SA 615 (SR) 619.

³⁵⁴ Van der Merwe *et al Contract* 233.

³⁵⁵ See ch 2 para 2 2 4 3(c). See also para 3 3 4 3(b) *infra*.

³⁵⁶ Laing LLM dissertation 122.

failure to determine the price could possibly be construed as a breach of contract and be dealt with accordingly.³⁵⁷

(c) A discretion to determine the price is too vague to be enforceable

In *NBS Boland Bank v One Berg River Drive* the court stated the following:

A recurring theme in those cases in which it was held that the clause in question is invalid is that a contract which empowers one of the parties to fix a prestation is void for vagueness. With one exception that was undoubtedly the view of Roman-Dutch law writers in regard to the determination of the price in a sale and the rental in a lease.³⁵⁸

In his commentary on the above extract, Kerr remarked that there is no reference in Roman-Dutch law that a contract allowing for the determination of the price by one of the parties is void for vagueness.³⁵⁹ However, there are cases in South African law that do support such a view and almost all these cases cite *Dawidowitz v Van Drimmelen* as the authority.³⁶⁰ This is probably because the first mention of vagueness in respect of a discretion to determine the price is found in this case, where the court stated as follows:

[I]f there is no price, there is no contract. If I say, for instance: 'I will buy your horse for what I think it is worth', or: 'for what I choose to pay for it,' there is no sale. This principle applies to every form of contract. If a person who claims that he has made a contract proves that it depends wholly on his own will what part of it he should perform, then

³⁵⁷ *Ibid.* See also Van der Merwe *et al Contract* 235; Lubbe 1989 *TSAR* 171.

³⁵⁸ *NBS Boland Bank v One Berg River Drive supra* para 9.

³⁵⁹ Kerr *Sale* 59; Kerr & Glover 2000 *SALJ* 208. See also ch 2 para 2 3. There is also no reference to vagueness in the Roman law (see ch 2 para 2 2 and Kerr *Sale* at 58–59).

³⁶⁰ *Dharumpal Transport v Dharumpal supra* 70; *Westinghouse Brake & Equipment v Bilger Engineering supra* 574; *Shell SA v Corbitt supra* 525–526; *Murray & Roberts Construction v Finat Properties supra* 514; *Boland Bank Bpk v Steele* 1994 1 SA 259 (T) 274; *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK* 1998 3 SA 729 (W) 736. Other cases that do not refer to *Dawidowitz v Van Drimmelen* directly, refer to the one of the cases listed above. See for example, *H Merks v The B-M Group supra* 233 referring to *Westinghouse Brake & Equipment v Bilger Engineering*.

according to my view there is no contract; it is *void for vagueness*³⁶¹
(my emphasis).

As shown above, a discretion to determine the price is not the same a contract where the party can decide whether he wants to be bound to the contract or not.³⁶² Such a contract is also not void for vagueness. Vagueness refers to “indefinite terms”, terms “not definitely or precisely expressed” or “deficient in details or particulars”.³⁶³ In respect of words and language, it means “[n]ot precise or exact in meaning”.³⁶⁴ Therefore, vagueness refers to a contract where the intention of the parties cannot be determined because the terms are indefinite, imprecise, insufficient or unclear in their meaning and, consequently, the contract is void for vagueness.³⁶⁵

Where one of the parties is given the power to determine the price in clear language, the agreement cannot be described as vague.³⁶⁶ The only thing that is not certain is the eventual price.³⁶⁷ However, the moment the price is determined, this uncertainty disappears.³⁶⁸ Another example of such a contract is a contract of sale where the price is to be determined by a third party. Such contracts are not considered void for vagueness.³⁶⁹

A further argument that the contract is void for vagueness is that it is uncertain how the eventual price should be determined. If the party with the discretion fails to determine the price, what guidelines must the court follow to make such a determination? It is argued below that in the absence of guidelines in the contract itself the court should imply that such a discretion should be exercised

³⁶¹ *Dawidowitz v Van Drimmelen supra* 675. See the full extract of this judgment in para 3 3 4 2(b) *supra*.

³⁶² See para 3 3 4 2(b) *supra*.

³⁶³ Kerr *Sale* 57 where he refers to the dictionary meaning of “vague” and “vagueness”.

³⁶⁴ *Ibid*.

³⁶⁵ Kerr *Sale* 65; Sharrock *Business law* 89.

³⁶⁶ Kerr *Contract* 133; Laing LLM dissertation 65.

³⁶⁷ Kerr *Sale* 65; Laing LLM dissertation 65.

³⁶⁸ Van der Merwe *et al Contract* 235.

³⁶⁹ Kerr *Sale* 57–58. See para 3 3 4 2(b) *supra*.

arbitrio boni viri.³⁷⁰ It will also be shown that there are principles and guidelines that could be followed to make such a determination.³⁷¹

(d) The principle that the courts should not make a contract for the parties Kerr argues that the unilateral determination of price according to the standard *arbitrio boni viri* should not be allowed. One of the reasons for his view is that such an interpretation would result in the same problems encountered in third-party price determinations.³⁷² Where there is a dispute, the court acting in the place of a reasonable person will have to determine the price or set the contract aside.³⁷³ Kerr argues that this will breach the principle that the courts should not make a contract for the parties.³⁷⁴ In support of his argument, Kerr refers to *H Merks v The B–M Group*. However, in this case the parties agreed that the “price may be increased by mutual agreement from time to time”.³⁷⁵ This can be distinguished from the unilateral determination of price where no further agreement is required. Alternatively, this principle is usually applied where there is uncertainty as to what the parties intended.³⁷⁶ This is not the case in discretions to determine the price as the parties’ intention is usually clear. Furthermore, this principle could be tempered by the application of the maxim *ut res magis valeat quam pereat*.³⁷⁷ Where this is not possible (as in the case of a clearly unfettered discretion), the courts will not be willing to imply an *ex lege* term of reasonableness and determine the price for the parties.³⁷⁸

³⁷⁰ See para 3 3 4 3(c) *infra*.

³⁷¹ *Ibid*.

³⁷² Kerr *Sale* 71.

³⁷³ *Ibid*. However, these “concerns” have not resulted in third-party determinations not being recognised in South African law. See para 3 3 4 3(c) *infra* in respect of how this problem is dealt with in third-party price determinations.

³⁷⁴ Kerr *Sale* 71. However, Kerr concedes that his real reason for distinguishing the two instances from each other is because the unilateral determination of price was not allowed in Roman law, while third-party determinations were. As shown in ch 2 para 2 2 4 4, this is not the case and there are various interpretations in Roman law that would allow for one of the parties to determine the price, including that such a discretion would have to be exercised *arbitrio boni viri*. See also Kerr & Glover 2000 *SALJ* 208; Beck 1985 *SALJ* 662.

³⁷⁵ *H Merks v The B-M Group supra* 230.

³⁷⁶ See eg *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 3 SA 583 (C) 592.

³⁷⁷ *Bellville-inry v Continental China supra* 592. See para 3 3 4 3(e) *infra*.

³⁷⁸ Laing LLM dissertation 152 referring to *Benlou Properties v Vector Graphic supra* 187–188.

3 3 4 3 *Arguments that the unilateral determination of price does comply with the requirement of certainty of price or does not need to*

There are also arguments that the unilateral determination of price does comply with the requirement of certainty of price or does not need to. The following main arguments are investigated:

- (a) the use of the word “imperfectum” in D 18 1 35 1;
- (b) where the discretion refers to an objective or external standard;
- (c) the standard of *arbitrio boni viri* should apply to such discretions;
- (d) the discretion can be granted to either the seller or the buyer;
- (e) the contract should be interpreted in favour of its validity, and
- (f) the contract could be enforced as an innominate contract.

- (a) The use of the word “imperfectum” in D 18 1 35 1

In *Benlou Properties v Vector Graphics* the court considered the interpretation of D 18 1 35 1 by the Roman-Dutch writers and Daube’s contradictory arguments. The court stated the following:

According to *Daube* there is much to be said for a construction that the text does not condemn a sale as invalid if the price is to be fixed by the buyer, but merely provides that the sale is *imperfectum* until the price has been fixed.³⁷⁹

In *NBS Boland Bank v One Berg River Drive* the court stated that “in some cases providing for discretional determinations there may be no enforceable contract until the determination is made. But when made an unconditional contract comes into being.”³⁸⁰ The court was not specifically discussing a discretion to determine the price, but this would be a plausible interpretation that would allow for a valid contract as soon as the price was determined.

³⁷⁹ *Benlou Properties v Vector Graphics supra* 186. However, the court stated that it was “bound to the views of our old authorities”.

³⁸⁰ *NBS Boland Bank v One Berg River Drive supra* para 24.

(b) Where the discretion refers to an objective or external standard

In *Burroughs Machines v Chenille Corporation* the court stated that the parties “must fix the amount of that price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them”.³⁸¹ From the above formulation, it is clear that when the price is not fixed in the contract itself, it must be capable of determination in accordance with some external standard (which will be an objective standard).³⁸² Furthermore, it should not be necessary to consult with the parties before determining the price. According to some writers, this would mean that there should be no further need to consult the parties to ascertain their *intention*.³⁸³ Therefore, no further *agreement* should be necessary to determine the final price.³⁸⁴ This would accord with the reason for the rule, namely, to “place the price beyond the reach of consensus”.³⁸⁵ On this interpretation, where one of the parties may determine the price, the determination would not fall foul of this second requirement, as the price can be determined without any further agreement between the parties. However, such a discretion would still have to meet the first requirement, namely, it must refer to some external or objective standard.³⁸⁶ Such an interpretation has been viewed as an interpretation “stretching the limits of the meaning of the term ‘objectively ascertainable’”,³⁸⁷ but it is clear that our courts have been prepared to follow such an interpretation.

In *Murray & Roberts Construction v Finat Properties* the court was prepared to accept that an agreement between the parties that the price would have to be determined by one of the parties together with a third party would be valid because it would “on the face of things” refer to an objective and external

³⁸¹ *Burroughs Machines v Chenille Corporation supra* 670.

³⁸² See para 3 3 2 *supra*.

³⁸³ Hawthorne 1992 *THRHR* 640; Laing LLM dissertation 19. Contra Kerr who merely states that the price should be ascertainable without further reference to the parties (Kerr *Sale* 33).

³⁸⁴ Laing LLM dissertation 20; Van der Merwe *et al Contract* 227.

³⁸⁵ Laing LLM dissertation 20. See n 320 *supra*.

³⁸⁶ Van der Merwe *et al Contract* 237.

³⁸⁷ Hawthorne 1992 *THRHR* 647.

standard.³⁸⁸ This was also the case in *Stead v Conradie*.³⁸⁹ In this case, a clause in a contract provided that one of the parties could determine the “current value” of the property, which would form the basis of the price to be paid.³⁹⁰ The court held that “current value” referred to the market value, which could be objectively ascertained.³⁹¹ The court said that the discretion was not left to the absolute discretion of the party and therefore it was valid as it referred to an external standard, which could be determined without further reference to the parties.³⁹²

The courts have also been prepared to follow such an interpretation in respect of contracts of lease. In *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* the court had to decide whether a provision in a rental agreement providing for the tenant to be liable for certain costs incurred by the landlord was valid.³⁹³ The court *a quo* held that in effect the clause meant that the landlord could determine such costs in his discretion and therefore the clause was invalid.³⁹⁴ However, this decision was reversed on appeal. The court referred to the provisions in the contract that required that the costs had to be reasonable and any dispute concerning the reasonableness of the costs should be referred to the landlord’s auditors.³⁹⁵ The auditors would act as experts and their decision would be final and binding on the parties.³⁹⁶ The auditors would have to consider the fair market costs of the services supplied and call for evidence from suitably qualified persons in making their decision.³⁹⁷ The

³⁸⁸ *Murray & Roberts Construction v Finat Properties supra* 515. However, the court accepted that whether this method would refer to an objective and external standard would depend on the relationship between the contracting parties and the independence and competence of the third party who jointly with one of the parties would determine the price. However, Hawthorne 1992 *THRHR* 642 argues that the judgment has indicative (but not authoritative) value because the court dealt with the specific facts only and refused to lay down a general rule.

³⁸⁹ *Stead v Conradie* 1995 2 SA 111 (A) 123.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A) 747.

³⁹⁴ *Idem* 750.

³⁹⁵ *Idem* 747.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

Supreme Court of Appeal held that the discretion was valid as it did provide for an “objective determination of reasonableness ... by the landlord’s auditors as expert outsiders without any reference to the landlord”.³⁹⁸

In *Genac Properties JHB v NBC Administrators* the court stated that the discretion to determine expenses to be paid (as part of the rent) was objectively ascertainable because the expenses were limited to expenses actually and reasonably incurred.³⁹⁹ Therefore, the court held that the expenses were “not subject to the landlord’s will or whim”.⁴⁰⁰

In *Benlou Properties v Vector Graphics* the court stated that a discretion would be invalid if the rent could be determined in one of the party’s unfettered discretion.⁴⁰¹ As the discretion granted to the lessor to determine additional rent was subject to three qualifications, all of which referred to an objective standard, the court held that the clause was valid.⁴⁰²

In *Engen Petroleum v Kommandonek* the lessee was granted the right to adjust the rental payable in terms of the lease agreement.⁴⁰³ However, such right was subject to three requirements: first, the discretion may be exercised only on reasonable grounds; secondly, such right arises only if certain circumstances changed to make the continued performance of the lessee uneconomic; finally, the adjustment must render the lessee’s obligations economic as opposed to

³⁹⁸ *Idem* 751. Hawthorne 1992 *THRHR* 643–644 criticises the judgment as not setting an objective standard because the auditors were appointed by the landlord and therefore acting as his agent. However, Laing LLM dissertation 137 n 643 argues that as the contract referred to reasonable costs it already constituted an objective standard and the auditors were obliged to act reasonably.

³⁹⁹ *Genac Properties JHB v NBC Administrators supra* 579.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Benlou Properties v Vector Graphics supra* 182. The court was of the view that this was also the view of the old authorities. See also Brand 1993 *Codicillus* 83.

⁴⁰² *Benlou Properties v Vector Graphics supra* 184. First, it was limited to a certain percentage (74,4%) of the increased expenditure. Secondly, the expenditure actually had to be incurred and, finally, only increases in expenses applicable at date of commencement of negotiations would be taken into account. Therefore, no new expenses could be claimed from the tenant.

⁴⁰³ *Engen Petroleum v Kommandonek supra* 173.

uneconomic. The court held that all these requirements referred to an objective standard, which could be determined and, as such, the clause was valid.⁴⁰⁴

Therefore, a discretion will be valid if it is subject to an external or objective standard and this could include a reference to reasonableness.⁴⁰⁵

(c) The standard of *arbitrio boni viri* should apply to such discretions

The courts are also willing to read reasonableness into a discretion unless it is clear from the contract that the discretion is not subject to these standards.⁴⁰⁶

Therefore, once reasonableness is implied, the discretion refers to an objective standard and, as such, complies with the requirement of certainty of price.⁴⁰⁷

In *NBS Boland Bank v One Berg River Drive* the court stated that “unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio boni viri*”.⁴⁰⁸ The court referred to various previous cases supporting this proposition.⁴⁰⁹ In addition, the court referred to *D 50 17 22*.⁴¹⁰ As discussed previously, *D 50 17 22 1* should be read together with *D 18 1 7pr*.⁴¹¹ These two texts deal with the sale of slaves and a condition imposed by the seller, namely, that the sale of the slave is conditional on his satisfaction of the accounts managed by

⁴⁰⁴ *Idem* 173–174.

⁴⁰⁵ Laing LLM dissertation 138 where the author states that the court regards “reasonableness as a concept quite capable of objective ascertainment”.

⁴⁰⁶ Laing LLM dissertation 154 argues that this is a manifestation of the principle of good faith that underlies the South African law of contract.

⁴⁰⁷ See para 3 3 4 3(b) (specifically n 405) *supra*.

⁴⁰⁸ *NBS Boland Bank v One Berg River Drive supra* para 25. Referred to with approval in *Juglal v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 5 SA 248 (SCA) 261; *Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd* 2007 6 SA 404 (D) para 37. Prior to the decision in *NBS Boland Bank v One Berg River Drive*, the court in *Benlou Properties v Vector Graphics* held that reasonableness would be implied by law as the standard where one of the parties were granted a discretion.

⁴⁰⁹ *Moe Bros Appellants v White Respondent* 1925 AD 71 at 77; *Holmes v Goodall & Williams, Ltd* 1936 CPD 35 at 40; *Dharumpal Transport v Dharumpal supra* 707; *Herbert Porter & Co Ltd v Johannesburg Stock Exchange* 1974 4 SA 781 (W) 789; *Bellville-Inry v Continental China supra* 592; *Remini v Basson* 1993 3 SA 204 (N) 210. Reference can also be made to *Machanick v Simon supra* 340–341 and *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 3 SA 373 (C) 383.

⁴¹⁰ *NBS Boland Bank v One Berg River Drive supra* paras 25–26.

⁴¹¹ See ch 2 para 2 2 4 4(b).

the slave on his behalf.⁴¹² To ensure that the seller did not stall the sale due to frivolous or captious reasons, the seller was required to make his judgment *arbitrio boni viri*.⁴¹³ The Supreme Court of Appeal was prepared to deduce, from this passage, a general implied term of reasonableness applicable to all contractual discretions (save contracts of sale and lease). As the passage originally deals with a contract of sale, there does not seem to be any reason why the rule should not be extended to apply to the unilateral determination of price.⁴¹⁴ The court itself also expressed doubt as to the reasons for the distinction between a discretion to determine the price and other contractual discretions.⁴¹⁵ The court did not decide whether these principles should apply to a contract of sale or lease, but there seems to be authority in our case law for applying this principle to both types of contract.

Laing traced such authority back to 1909 in the case of *Dickinson & Fisher v Arndt & Cohn*.⁴¹⁶ In this case, the parties agreed that the price was subject to market fluctuations.⁴¹⁷ The court held that this would mean “that the price may be increased at the option of the sellers ... upon fluctuation upwards in the market price”.⁴¹⁸ Therefore, before the price could be adjusted there must be an increase in market prices.⁴¹⁹ Furthermore, the court held that the adjustment of the seller may not result in a price “for too much”.⁴²⁰ Although, this does not explicitly refer to a reasonable discretion, it clearly refers to a limited discretion. Soon thereafter the court had to consider a contract of sale of a jeweller’s business where the parties agreed that the price would be “the amount of the stock-in-trade at marked price less 15 per cent., provided always that in the event of the purchaser considering the cost price of any portion of the stock-in-

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

⁴¹⁵ *NBS Boland Bank v One Berg River Drive supra* para 32.

⁴¹⁶ *Dickinson & Fisher v Arndt & Cohn* 1909 30 NLR 172. Laing LLM dissertation 131.

⁴¹⁷ *Dickinson & Fisher v Arndt & Cohn supra* 175.

⁴¹⁸ *Idem* 183.

⁴¹⁹ *Idem* 187.

⁴²⁰ *Idem* 183.

trade as too high, he shall be entitled to decline to purchase same”.⁴²¹ As it happened, the buyer rejected the majority of the stock because he considered the marked prices as excessively high.⁴²² The seller argued that the buyer’s argument that he is entitled to reject the stock would amount to a claim to determine his own price, which is not allowed.⁴²³ The court held that the parties considered that the buyer was not likely to reject the stock *mala fide* as he would need it in the new business, which indicates that the parties intended that he would act *bona fide*.⁴²⁴ Finally, the court held that in line with the principle of freedom of contract, the parties could leave a condition of the contract to the discretion of one of them and that in the present case such a discretion had to be exercised *bona fide*.⁴²⁵

In respect of contracts of lease, this type of reasoning reflects in the more recent cases of *Benlou Properties v Vector Graphics* and *Engen Petroleum v Kommandonek* dealing with a discretion to adjust the rental in a lease agreement.⁴²⁶

If these principles should apply to a discretion to determine the price in a contract of sale, it is necessary to determine the meaning of the phrase *arbitrio boni viri*. On various occasions the courts have discussed the standard against which a discretionary power must be tested. Despite earlier indications that the standards of *arbitrio boni viri* and reasonableness can be distinguished from each other,⁴²⁷ cases that are more recent indicate that *arbitrio boni viri* would refer to a reasonable discretion.⁴²⁸ In *Juglal v Shoprite Checkers* the court held

⁴²¹ *Lichtheim v Stern* 1910 WLD 284–285.

⁴²² *Idem* 286.

⁴²³ *Idem* 284. Referring to Voet 18 1 23 and Grotius 3 14 23.

⁴²⁴ *Lichtheim v Stern supra* 288.

⁴²⁵ *Ibid.* See also Lubbe 1989 TSAR 164–165 for his discussion of this case.

⁴²⁶ *Benlou Properties v Vector Graphics supra* 186; *Engen Petroleum v Kommandonek supra* 174–175.

⁴²⁷ Cockrell 1997 *Acta Juridica* 34 and the cases mentioned in n 40.

⁴²⁸ This would accord with the views of the South African writers. Cornelius 2003 TSAR 390 proposed that the discretion should be exercised in good faith and reasonably. He argued that good faith would refer to the purpose for the exercise of the discretion and reasonability would refer “to the various socio-economic factors that influence the sustainability of a particular performance”. McLennan 2000 SA Merc LJ 487 also referred

that the person must “act reasonably and ... exercise a reasonable discretion”.⁴²⁹ This would refer to an objective standard.⁴³⁰ In *Erasmus v Senwes* the court referred to the dictionary meaning of *arbitrio boni viri*, namely, “the decision of a good man”, which is explained as “a reasonable decision”.⁴³¹ The court has also held that in the current-day context this would mean “the judgment of a fair-minded person”.⁴³²

In *Erasmus v Senwes* the court held that “the concept of reasonableness is so settled in our law that it can readily be used, and is used, as an objective standard that is justiciable by a court”.⁴³³ The fact of the matter is that the courts are comfortable and familiar with working with terms such as “fairness” and “reasonableness” and already there are various guidelines laid down that could be used in such an assessment.⁴³⁴ Generally, the courts have referred to the dictionary meaning of “reasonable”, namely, that which is equitable or fair, and not asking too much.⁴³⁵ In respect of contractual discretions, the courts have considered the following factors to determine whether the discretion was exercised reasonably:

- (a) the intention of the parties when the contract was concluded;⁴³⁶
- (b) the facts of the particular case (ie the terms and circumstances of the contract);⁴³⁷

to the differences between good faith and reasonableness and argued that “the test should expressly include objectivity: the determination must be exercised fairly and reasonably”. Otto also refers to the test of reasonableness (Otto 2000 SALJ 5).

⁴²⁹ *Juglal v Shoprite Checkers supra* para 26.

⁴³⁰ *Unilever South Africa Ice Cream (Pty) Ltd (known as Ola South Africa (Pty) Ltd) v Jepson* 2008 2 SA 456 (C) 461; *Remini v Basson supra* 210; *Joosub Investments v Maritime & General Insurance supra* 383; *F W Knowles (Pty) Ltd v Cash-Inn (Pty) Ltd* 1986 4 SA 641 (C) 650; *Herbert Porter v Johannesburg Stock Exchange supra* 789. This is why the court has been willing to regard a discretion in respect of the price or rent subject to some measure of reasonableness as a reference to an objective standard (cf para 3 3 4 3(b) *supra*).

⁴³¹ *Erasmus v Senwes supra* 538. See also Cockrell 1997 *Acta Juridica* 32.

⁴³² *Nedcor Bank v SDR Investment Holdings supra* para 8.

⁴³³ *Erasmus v Senwes supra* 538.

⁴³⁴ Otto 2000 SALJ 5. In Visser *et al* (eds) *Gibson’s mercantile law* 114 the author states the following: “Terms to be bound by what is ‘fair and reasonable’ are well known throughout the law of contract ... [a]nd the courts have to, and do assess what is reasonable in all manner of contexts.”

⁴³⁵ *Koumantarakis Group v Mystic River Investment 54 supra* para 50. See also *Bryer v Teabosa CC t/a Simon Chuter Properties* 1993 1 SA 128 (C) 137.

⁴³⁶ *Koumantarakis Group v Mystic River Investment 54 supra* para 39.

- (c) the viewpoint of both parties in order to achieve a balance between the interests of both parties,⁴³⁸
- (d) the commercial rationality of the decision measured against a reasonable man in the mercantile world,⁴³⁹ and
- (e) what is customary and usual does not necessarily equal what is fair and reasonable.⁴⁴⁰

In an article in response to *NBS Boland Bank v One Berg River Drive*, Otto reviewed all the relevant case law and compiled a list of guidelines or factors that could be used to test whether a discretion to adjust the interest rate was exercised reasonably.⁴⁴¹ These factors could be adapted for use in discretions to determine the price. Such adjusted factors would include the following: contract terms dealing with how the price must be determined;⁴⁴²

- (a) where the contract does not prescribe how the price should be determined, the prices “customarily levied ... at that particular time in respect of that class of customer”,⁴⁴³
- (b) price movements in the market for the same goods under the same circumstances,⁴⁴⁴
- (c) general economic fluctuations,⁴⁴⁵ and
- (d) prices charged by other sellers.⁴⁴⁶

⁴³⁷ *Idem* para 49; *F W Knowles v Cash-Inn supra* 649–650. A good example is where the contract already prescribes certain criteria for the exercise of the discretion. See para 3 4 3(b) *supra*.

⁴³⁸ *F W Knowles v Cash-Inn supra* 650; *Erasmus v Senwes supra* 540. Van der Merwe *et al Contract* 240 proposes that consideration must be given to the interests of the party bound by the discretion in such a way as not to “reduce what was intended as a mutually beneficial exchange of performances to a transaction serving the interests of one party only”.

⁴³⁹ *Koumantarakis Group v Mystic River Investment 54 supra* para 42.

⁴⁴⁰ *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 1 SA 704 (C) 708.

⁴⁴¹ Otto 2000 SALJ 5–7.

⁴⁴² Otto 2000 SALJ 6 referring to *NBS Bank v Badenhorst-Schnetler Bedryfsdienste supra* and *Investec Bank (Pty) Ltd v GVN Properties CC* 1999 3 SA 490 (W).

⁴⁴³ Otto 2000 SALJ 7 referring to *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd* 1988 4 SA 73 (N). Otto provides possible examples in respect of the classes of customer, namely “individual and corporate customers” and “new and longstanding customers”.

⁴⁴⁴ Otto 2000 SALJ 7 referring to *Boland Bank v Steele supra* and *ABSA Bank Ltd v Deeb* 1999 2 SA 656 (N).

⁴⁴⁵ Otto 2000 SALJ 7 referring to *Standard Bank of SA Ltd v Friedman* 1999 2 SA 456 (C).

⁴⁴⁶ Otto 2000 SALJ 7 referring to *Standard Bank of South Africa v Friedman supra*.

It is clear that a discretion to determine the price should accord with the standard of *arbitrio boni viri* and this should refer to a reasonable standard. The question that now arises is this: When can an unreasonable exercise of a discretion to determine the price be attacked and how must this be done? The court in *NBS Boland Bank v One Berg River Drive* questioned whether the determination will not comply “if it is merely unjust, or whether it must be manifestly unjust”?⁴⁴⁷ In this respect, the court was asking whether the principles governing third-party price determinations should be applicable to a price determination by one of the parties.⁴⁴⁸ The analogy between third-party price determinations and unilateral price determinations would seem appropriate.⁴⁴⁹ First, the third party is required to act reasonably in determining the price, which is the same standard that will be required in a case of unilateral price determinations.⁴⁵⁰ Secondly, the problems faced in determining whether a unilateral determination of price was unreasonable are similar to those faced in third-party price determinations.⁴⁵¹ Therefore, the principles applicable to third-party determinations will also provide useful guidelines for testing unilateral price determinations.

Generally, if the third party does not fix the price, there is no sale.⁴⁵² Where this is due to the actions of one of the parties, the situation is not clear; but there is authority that it should be dealt with as a fictional fulfilment of a condition or a breach of contract.⁴⁵³ In respect of the unilateral determination of the price, it has been suggested that this could possibly be dealt with as a breach of contract.⁴⁵⁴

⁴⁴⁷ *NBS Boland Bank v One Berg River Drive supra* para 29.

⁴⁴⁸ *Ibid.* See also Zulman & Kairinos (eds) *Norman's sale* 45.

⁴⁴⁹ Laing LLM dissertation 155.

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

⁴⁵² *Idem* 20; Hackwill (ed) *Mackeurtan's sale* 16; Kerr *Sale* 37; Sharrock *Business law* 272.

⁴⁵³ Kerr *Sale* 38.

⁴⁵⁴ See para 3 3 4 2(b) *supra*.

Where the price determined by the third party does not differ too much from the amount that might have been expected, the parties are bound to it.⁴⁵⁵ However, if the price falls outside this range, it does not have to be paid or accepted.⁴⁵⁶ Such a price is referred to as a price that is “manifestly unjust”, “manifestly unfair” or “altogether too high or too low”.⁴⁵⁷ This manifestly unjust price is not void *ipso facto* but must be set aside by the court.⁴⁵⁸ The court can then substitute the price determined by the third party with the price the court considers reasonable.⁴⁵⁹ The party attacking the third-party determination will have to put evidence before the court of what a reasonable determination would have been, which will enable the court to determine a reasonable price.⁴⁶⁰ Once the court has determined the price, the non-aggrieved party (the party not disadvantaged by the price determined by the third party) then has the choice either to accept the court’s determination or to resile from the contract.⁴⁶¹ Different reasons are proposed for this rule.⁴⁶² First, the court in *Hurwitz v Table Engineering* stated that if the court quantifies the price, it will probably be different from the method that the parties agreed on.⁴⁶³ However, in *Van Heerden v Basson* the court stated that the right to resile is rather because the parties should have a choice not to become involved in the time-consuming and expensive endeavour of obtaining the court’s determination.⁴⁶⁴ Kerr suggests that whether a party should be bound by the court’s decision would depend on

⁴⁵⁵ *Dublin v Diner* 1964 1 SA 799 (D) 802; *Van Heerden v Basson* 1998 1 SA 715 (T) 718. See also Kerr *Sale* 39; Bradfield & Lehmann (eds) *Sale and lease* 20.

⁴⁵⁶ *Gillig v Sonnenberg* 1953 4 SA 675 (T) 683; *Dublin v Diner supra* 804–805. This is based on the assumption that the parties “did not intend an arbitrary but a just estimation *tanquam boni viri*” (*Machanick v Simon supra* 339). See also Bradfield & Lehmann (eds) *Sale and lease* 20 Kerr *Sale* 39.

⁴⁵⁷ Sharrock *Business law* 272; Kerr *Sale* 39.

⁴⁵⁸ *Hurwitz v Table Bay Engineering (Pty) Ltd* 1994 3 SA 449 (C) 456.

⁴⁵⁹ Nagel (ed) *Commercial law* 198.

⁴⁶⁰ Kerr *Sale* 39 & 51; Bradfield & Lehmann (eds) *Sale and lease* 20.

⁴⁶¹ *Gillig v Sonnenberg supra* 683; *Dublin v Diner supra* 805; *Hurwitz v Table Bay Engineering supra* 459; *Van Heerden v Basson supra* 720; See also Bradfield & Lehmann (eds) *Sale and lease* 20; Nagel (ed) *Commercial law* 198; Sharrock *Business law* 272.

⁴⁶² For a more detailed discussion on this issue see Kerr *Sale* 39–55 & Laing LLM dissertation 38–47.

⁴⁶³ *Hurwitz v Table Bay Engineering supra* 459.

⁴⁶⁴ *Van Heerden v Basson supra* 720. Referred to with approval in *Breau Investments (Pty) Ltd v Maverick Trading* 236 CC 2010 1 SA 367 (GNP) paras 17–19. In this case the court confirmed that one of the parties may also exercise the right to cancel after litigation commenced.

the intention of the parties.⁴⁶⁵ Did they want the price to be determined by that specific third party alone or did they rather intend a reasonable determination?⁴⁶⁶ In the last instance, it could be argued that the parties should be bound to the price determined by the court. It is submitted that the parties' intention should also be the determining factor when deciding whether the parties must be bound to the court's determination in cases dealing with unilateral determinations of price.

(d) The discretion can be granted to either the seller or the buyer
A further consequence of the principles discussed above and the criticisms levied at viewing price discretions as pure potestative conditions, is that the discretion should be valid whether it is granted to the seller or the buyer (as long as it results in certainty of the price).

In *NBS Boland Bank v One Berg River Drive* the court referred to the Roman-law texts dealing with pure potestative conditions.⁴⁶⁷ The court stated that all these texts deal with a situation where the promisor has a right to determine his own performance, but does not deal with the situation where the promisee has the right to determine the promisor's obligation.⁴⁶⁸ Therefore, the court held that where a party can determine the other party's performance such a contract is valid (provided the discretion must be exercised *arbitrio boni viri*), but did not answer the question whether a party could determine his own performance.⁴⁶⁹

Subsequently, in *Erasmus v Senwes* the court held that a discretion granted to a party to determine his own performance would be allowed, if the discretion

⁴⁶⁵ Kerr *Sale* 49–50.

⁴⁶⁶ *Idem* 50–51.

⁴⁶⁷ *NBS Boland Bank v One Berg River Drive supra* para 22. Specifically, the court referred to *D 45 1 17*, *D 45 1 46 3* and *D 45 1 108 1* (cf ch 2 para 2 2 4 3(c)).

⁴⁶⁸ *NBS Boland Bank v One Berg River Drive supra* para 23.

⁴⁶⁹ *Idem* 24–25.

was “subject to an objective standard and thus fettered”.⁴⁷⁰ The court held that there is no reason to limit the rule that discretionary powers must be exercised *arbitrio boni viri* to discretions granted to the promisee.⁴⁷¹

Therefore, if these principles are extended to apply to sales it would mean that a discretion granted to either the buyer or the seller would be valid, provided the discretion is not an unfettered one.

(e) A contract should be interpreted in favour of its validity

It is an established principle that the courts should favour an interpretation that renders the contract valid, rather than an interpretation that renders it void.⁴⁷²

This rule of interpretation refers to the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat*.⁴⁷³

This is in accordance with the principle that the court should “rather try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all than he has intended”.⁴⁷⁴ As such, the court should not act as the destroyer of bargains, but rather give operation to agreements made with a serious intention to be binding.⁴⁷⁵ This is in accordance with the public policy that agreements entered into freely should be enforced.⁴⁷⁶ This is probably one

⁴⁷⁰ *Erasmus v Senwes supra* 537–538. The court’s reasons were that all contracts are subject to the principle of good faith and that parties should be held bound to their contracts. See also Van der Merwe *et al Contract* 239.

⁴⁷¹ *Erasmus v Senwes supra* 538.

⁴⁷² Joubert *Contract* 62 and the authorities listed in n 35; Hutchison & Pretorius (eds) *Kontraktereg* 277; Otto 1998 *TSAR* 603; Otto 2000 *SALJ* 3.

⁴⁷³ Cornelius *Interpretation* 126.

⁴⁷⁴ *Hoffman and Carvalho v Minister of Agriculture* 1947 2 SA 855 (T) 860. Referred to with approval in *Sadie v Annadale* 1992 2 SA 240 (O) 244. See also Du Bois *et al* (eds) *Wille’s principles of SA law* 755.

⁴⁷⁵ *Soteriou v Retco Poyntons sup Soteriou v Retco Poyntons (Pty) Ltd* 1985 2 SA 922 (A) 931; *Genac Properties v JHB v NBC Administrators supra* 579; *Engen Petroleum v Kommandonek supra* 175. See also Lubbe 1989 *TSAR* 164, where he criticises the decisions in *Burroughs Machines v Chenille Corporations* and *Patel v Adam*.

⁴⁷⁶ *Benlou Properties v Vector Graphics supra* 187. See further para 3 3 5 3(e) *infra*.

of the reasons why the courts are willing to imply that a discretion must be exercised reasonably rather than unfettered.⁴⁷⁷

Kerr concedes that this principle forms part of the rules of interpretation, but he argues that this principle should not be used to “validate an agreement which lacks *consensus* on an essential requirement”.⁴⁷⁸ However, as shown above, such contracts do not lack *consensus*.⁴⁷⁹ Furthermore, the courts have referred to this principle when dealing with discretions to determine the performance of one of the parties.⁴⁸⁰

(f) The contract can be enforced as an innominate contract

Some South African commentators argue that where a contract of sale fails because of uncertainty of price, the contract could possibly be enforced as an innominate contract.⁴⁸¹ In *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* the court did not decide this issue but seemed doubtful that the courts would “ever enforce a purported sale in which the price is neither fixed nor determinable by reference to some stated external standard”.⁴⁸²

In *Murray & Roberts Construction v Finat Properties* the court dealt with an innominate contract, where the parties agreed that Murray & Roberts Construction together with a third party would determine the price at which certain stands would be sold to the public. However, the court held that the price is a material term of the contract and would have to be ascertained with reference to an external standard.⁴⁸³ The court stated explicitly that it was not laying down a general rule.⁴⁸⁴ However, the judgment is indicative that even if the court was willing to view a contract granting one of the parties a discretion to

⁴⁷⁷ See para 3 3 4 3(c) *supra*.

⁴⁷⁸ Kerr *Salé* 64.

⁴⁷⁹ See paras 3 3 4 23 3 4 2(a) & 3 3 4 2(b) *supra*.

⁴⁸⁰ See eg *Genac Properties JHB v NBC Administrators supra* 579 & *Boland Bank v Steele supra* 276.

⁴⁸¹ See eg Hackwill (ed) *Mackeurtan's sale* 18–19 dealing with a contract of sale “at a reasonable price”.

⁴⁸² *Burroughs Machines v Chenille Corporation of SA supra* 675.

⁴⁸³ *Murray & Roberts Construction v Finat Properties supra* 514–515.

⁴⁸⁴ *Idem* 515.

determine the price as an innominate contract, such a discretion would also need to refer to an external standard where the price was a material term of the contract. As the standard for a certain price in a contract of sale would be identical to the standard required from a price in an innominate contract, regarding the contract as an innominate contract would take the issue no further.

3 3 4 4 Conclusion

It should be clear from the above discussion that the rule that prohibits the unilateral determination of price should not be seen as a manifestation of the requirement of certainty of price.⁴⁸⁵ There are various circumstances, where the unilateral determination of the price, results in certainty of price or can be applied in such a way as to arrive at certainty of price. Most of these arguments require that the discretion to determine the price should not be unfettered and be subject to some objective standard. This can be done expressly or tacitly in the contract or an objective standard (in the form of reasonableness) will be implied by law.⁴⁸⁶

3 3 5 The rule and public policy

3 3 5 1 Introduction

As the requirement of certainty of price should not be used as the test against which a unilateral determination of price is tested, the validity of such discretions should rather be assessed against public policy.⁴⁸⁷

3 3 5 2 The concept of public policy

It is a fundamental principle of the law of contract that agreements made with a serious intention to be legally binding should be enforced.⁴⁸⁸ However, when a contract is against public policy, it will not be enforced.⁴⁸⁹

⁴⁸⁵ Van Huyssteen *et al Contract* 235.

⁴⁸⁶ Hawthorne 1992 *THRHR* 641.

⁴⁸⁷ Van Huyssteen *et al Contract* 235.

The concept of public policy is difficult to define, but it is generally accepted that a contract will be contrary to public policy if it runs counter to the interests of the community.⁴⁹⁰ In *Barkhuizen v Napier* the court defined public policy as “the legal convictions of the community”.⁴⁹¹ As the interests and views of the community change over time, public policy is not a static concept but subject to change.⁴⁹² First, the principles and rules governing public policy are subject to change.⁴⁹³ Secondly, public policy is also context-sensitive and dependent on the circumstances of the specific case.⁴⁹⁴ As such, there is no specific formula or test, which must be followed, to determine whether a term in a contract is contrary to public policy.⁴⁹⁵ In most cases, the courts weigh up various policy considerations or interests against one another to determine whether a term in a contract would be contrary to public policy.⁴⁹⁶

The courts have set some rules that should be followed when embarking on a public policy investigation.⁴⁹⁷ First, public policy is anchored in the values enshrined in the Constitution⁴⁹⁸ and the court must consider these values together with any other policy considerations.⁴⁹⁹ Secondly, the courts will be

⁴⁸⁸ Hutchison & Pretorius (eds) *Kontraktereg* 183.
⁴⁸⁹ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7; *Jordan v Farber* [2010] JOL 24810 (NCB) para 12. See also Hutchison & Pretorius (eds) *Kontraktereg* 183;
⁴⁹⁰ *Sasfin v Beukes supra* 8. See also Van Huyssteen *et al Contract* 127.
⁴⁹¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28.
⁴⁹² *Sasfin v Beukes supra* 8. See also Van Huyssteen *et al Contract* 127 & 200; Hutchison & Pretorius (eds) *Kontraktereg* 185; Kruger 2011 *SALJ* 713.
⁴⁹³ Hutchison & Pretorius (eds) *Kontraktereg* 185; Christie & Bradfield *Contract* 360; Kruger 2011 *SALJ* 715.
⁴⁹⁴ Christie & Bradfield *Contract* 360–361; Kruger 2011 *SALJ* 733.
⁴⁹⁵ Van der Merwe *et al Contract* 199.
⁴⁹⁶ Van der Merwe *et al Contract* 199; Hutchison & Pretorius (eds) *Kontraktereg* 186.
⁴⁹⁷ Hutchison & Pretorius (eds) *Kontraktereg* 185.
⁴⁹⁸ The values are dignity, equality and freedom (*Barkhuizen v Napier supra* para 28).
⁴⁹⁹ *Barkhuizen v Napier supra* para 30 where the court stated as follows:

The proper approach to the constitutional challenge to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with constitutional values even though the parties may have consented to them.

See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22 where the court stated that “issues of public policy in turn cannot be

hesitant to declare a term contrary to public policy and will only do so in clear cases.⁵⁰⁰ Thirdly, the term itself must be contrary to public policy. Neutral terms that can be implemented in a way that would not be contrary to public policy will not result in the contract being against public policy.⁵⁰¹ Fourthly, the court will be cautious to declare a term contrary to public policy merely because it is against the court's individual feeling of justice or fairness.⁵⁰²

If a term is contrary to public policy, it will be unenforceable or void.⁵⁰³ The price is one of the essential elements of a contract of sale and without a price there can be no sale.⁵⁰⁴ Where a discretion to determine the price is contrary to public policy, there is no price and the contract will be void.

3 3 5 3 Policy considerations relevant to the unilateral determination of price

This discussion aims to identify and investigate considerations that may be relevant in determining whether a unilateral determination of price is against public policy or not. The following considerations or factors are discussed:

- (a) contractual autonomy and the sanctity of contracts;
- (b) the principle of simple justice between man and man;
- (c) the parties should (as far as possible) have equal bargaining power, and
- (d) practical considerations in favour of the unilateral determination of price.

considered without reference to section 39(2) [of the Constitution]". See also *Brisley v Drotsky* 2002 4 SA 1 (SCA) 34; *Jordan v Farber supra* para 12–13; Hutchison & Pretorius (eds) *Kontraktereg* 183 & 185; Sutherland 2008 *Stell LR* 407; Christie & Bradfield *Contract* 361.

⁵⁰⁰ *Sasfin v Beukes supra* 9; *Brisley v Drotsky supra* 35–36; *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA) para 8; *Juglal v Shoprite Checkers supra* para 12. See also Hutchison & Pretorius (eds) *Kontraktereg* 185; Christie & Bradfield *Contract* 360.

⁵⁰¹ *Juglal v Shoprite Checkers supra* para 12. See also Hutchison & Pretorius (eds) *Kontraktereg* 185.

⁵⁰² *Sasfin v Beukes supra* 9. See also Hutchison & Pretorius (eds) *Kontraktereg* 185.

⁵⁰³ Van Huyssteen *et al Contract* 200–204; Van der Merwe *et al Contract* 200–201.

⁵⁰⁴ See para 3 3 2 *supra*.

(e) Contractual autonomy and the sanctity of contracts

Generally, public policy demands that contracts entered into freely should be enforced.⁵⁰⁵ This is also the case in respect of contractual discretions. In *Benlou Properties v Vector Graphics* the court stated as follows:

Nor is there a policy reason why such an undertaking should be void merely because it relates to an exercise of discretion. Although pronounced in a different context, the following oft-quoted dictum of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 is apposite:

'... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice'.⁵⁰⁶

In *Erasmus v Senwes* the court cited contractual autonomy as one of the reasons why a discretion to determine a party's own performance should be allowed.⁵⁰⁷

When a party agrees to the unilateral determination of price by the other party, he is agreeing (and thus exercising his contractual autonomy) "to forfeit his autonomy regarding the determination of the consequences of the contract".⁵⁰⁸ Therefore, giving effect to the discretionary clause would be in accordance with the principle of contractual autonomy.⁵⁰⁹ Therefore it can be argued that public policy dictates that discretionary powers to determine the price should be valid.

The fact that a person should be allowed to determine his own matters, even to his detriment, has been held to refer to the constitutional values of dignity and

⁵⁰⁵ *Sasfin v Beukes supra* 9. Also referred to as the maxim *pacta sunt servanda*.

⁵⁰⁶ *Benlou Properties v Vector Graphics supra* 187.

⁵⁰⁷ *Erasmus v Senwes supra* 538.

⁵⁰⁸ Laing LLM dissertation 152.

⁵⁰⁹ *Idem* 153.

freedom.⁵¹⁰ Although contractual autonomy is an important policy consideration, it is not the only or the most important consideration.⁵¹¹ Other values in the Constitution (for example equity) may reduce the weight given to contractual autonomy.⁵¹²

(f) The principle of simple justice between man and man

In both the cases referred to above, the court added a proviso that the discretion may not be unfettered.⁵¹³ The court in *Benlou Properties v Vector Graphics* referred to the rules governing the certainty of price for this proviso.⁵¹⁴ However, in *Erasmus v Senwes* the court referred to the fact that “all contracts are subject to the principle of good faith” and therefore extended discretionary powers to include the determination by a party of its own performance provided it did so *arbitrio boni viri*.⁵¹⁵ As such, good faith is a factor that is taken into account when deciding whether a term is against public policy or not.⁵¹⁶

Although the role of good faith in the concept of public policy is not that clear,⁵¹⁷ good faith has been considered to inform the principle of simple justice between man and man.⁵¹⁸ This principle requires that the parties’ individual interests must be weighed against each other.⁵¹⁹ The unreasonableness of a term against one of the parties must be weighed up against the interests of the other party who is protected by the term.⁵²⁰ However, the courts will not hold a term

⁵¹⁰ *Barkhuizen v Napier supra* para 57; *Afrox Healthcare v Strydom supra* para 23. See also Hutchison & Pretorius (eds) *Kontraktereg* 187.

⁵¹¹ *Barkhuizen v Napier supra* para 15. See also Barnard & Nagel 2010 *PELJ* 456.

⁵¹² *Brisley v Drotsky supra* 34-36; *Napier v Barkhuizen supra* para 57. See also Van Huyssteen *et al Contract* 57 n 8; Barnard & Nagel 2010 *PELJ* 456.

⁵¹³ *Benlou Properties v Vector Graphics supra* 186; *Erasmus v Senwes supra* 538.

⁵¹⁴ *Benlou Properties v Vector Graphics supra* 186.

⁵¹⁵ *Erasmus v Senwes supra* 538.

⁵¹⁶ Van der Merwe *et al Contract* 199; Lawack-Davids 2001 *Obiter* 188.

⁵¹⁷ Van der Merwe *et al Contract* 199. See also the discussion of the role of good faith as a policy consideration in Lubbe 2004 *SALJ* 411–413.

⁵¹⁸ Hutchison & Pretorius (eds) *Kontraktereg* 193–194; Van Huyssteen *et al Contract* 130.

⁵¹⁹ Hutchison & Pretorius (eds) *Kontraktereg* 193. This seems to accord with Lubbe's view that good faith, in the context of public policy, should not only encompass honesty but also require that a party's pursuit of his own interest "must be tempered by a reasonable measure of concern" for the other party's interest (Lubbe 1990 *Stell LR* 20 as quoted by Naudé 2009 *SALJ* 518).

⁵²⁰ Hutchison & Pretorius (eds) *Kontraktereg* 193.

as contrary to public policy merely because it is unreasonable or unfair to one of the parties to the contract.⁵²¹ The term would have to go so far as to be contrary to the interests of the public.⁵²² Where the term goes further than what would reasonably be necessary to protect the interest of the party in whose favour it is, this could indicate that the term is contrary to public policy.⁵²³ This could be the case where the effect of the term is to place one of the parties almost entirely in the economic power of the other party.⁵²⁴

As is shown below, there are practical considerations that would necessitate a discretion to determine the price.⁵²⁵ However, none of these would require the seller to reserve an unfettered discretion to determine the price. It is therefore not surprising that there is no authority in our case law that allows for an unfettered discretion.⁵²⁶ Kerr argues that this is because allowing unfettered discretions would result in a greater possibility of fraud or abuse by a party to impose unfair and unreasonable obligations.⁵²⁷ This would explain why the courts would require that a discretion to determine the price or the rent would need be limited by an external objective standard or reasonableness.⁵²⁸ This further explains why the courts would read reasonableness into the discretion, where possible.⁵²⁹

⁵²¹ *Dickinson & Fisher v Arndt & Cohn supra* 179; *Sasfin v Beukes supra* 9. See also Van Huyssteen *et al Contract* 127.

⁵²² Hutchison & Pretorius (eds) *Kontraktereg* 194.

⁵²³ *Sasfin v Beukes supra* 10. See also Hutchison & Pretorius (eds) *Kontraktereg* 195; Van Huyssteen *et al Contract* 129.

⁵²⁴ *Sasfin v Beukes supra* 13–14. See also Van der Merwe *et al Contract* 219; Van Huyssteen *et al Contract* 129.

⁵²⁵ See para 3 3 5 3(h) *infra*.

⁵²⁶ Kerr *Sale* 66.

⁵²⁷ *Ibid.* In *NBS Boland Bank v One Berg River Drive supra* para 30 the court questioned whether such discretions would be invalid (as contrary to public policy) or valid but assailable if not exercised in good faith. As pointed out by Van der Merwe *et al Contract* 242 what is meant with an unfettered discretion is not clear and therefore it is difficult to determine whether the discretion would be regarded as valid or not. They submit that this will have to be determined with reference to the specific facts of the case with special consideration given to the possibility of abuse of power by the party exercising the discretion.

⁵²⁸ Laing LLM dissertation 154 argues that the willingness of the court to imply a term of reasonableness in contractual discretions is a manifestation of the principle of good faith. As good faith informs public policy, the willingness of the court to imply a term of reasonableness can also be found in policy considerations.

⁵²⁹ See para 3 3 4 3(c) *supra*.

A further argument by Kerr is that the party alleging that the discretion was exercised unreasonably would have the *onus* to prove this.⁵³⁰ This can be very difficult where the buyer does not know what factors were taken into account in determining the price or how the price was set. In *FW Knowles v Cash-Inn* the court remarked that the person alleging that he has exercised his discretion reasonably and has good reasons alone can know what it consists of and should be obliged to establish it.⁵³¹ However, the court did not decide this issue and accepted that the onus is on the party alleging that the discretion was exercised unreasonably.⁵³² This was confirmed in subsequent case law.⁵³³

In *ABSA Bank Ltd v Lombard* the court dealt with the discretion of a bank to adjust the interest rate in respect of the loan. The debtor placed evidence before the court that the bank increased the interest rate upon an increase in the prime lending rate, but failed to reduce the interest rate when the prime lending rate decreased.⁵³⁴ The court held that this evidence was enough to establish a *prima facie* case that the bank had exercised its discretion unreasonably.⁵³⁵ It is, of course, easier to prove this in the case of interest rates as they are all linked to some or other interest rate (for example, the prime lending rate or the Reserve Bank rate) that can be determined with ease. However, using the guidelines and factors outlined above to determine reasonableness, it would be possible to establish a *prima facie* case for unreasonableness in respect of a discretion to determine or adjust the price. Specifically, the factors adjusted from those proposed by Otto in respect of interest rate discretions could provide good examples of the kind of evidence that could be put before the court to establish a *prima facie* case that the seller

⁵³⁰ Kerr *Sale 72*; Kerr & Glover 2000 *SALJ* 207.

⁵³¹ *FW Knowles v Cash-Inn supra* 650.

⁵³² *Ibid.*

⁵³³ *Bryer v Teabosa supra* 134; *Southern Life Association Ltd v Miller* 2005 2 All SA 371 (SCA) 137; *Koumantarakis Group v Mystic River Investment 45 supra* para 38;.

⁵³⁴ *ABSA Bank Ltd v Lombard* 2005 5 SA 350 (SCA) 353–354.

⁵³⁵ *Idem* 354.

exercised his discretion unreasonably.⁵³⁶ This is investigated in the following chapter.⁵³⁷

(g) The parties should (as far as possible) have equal bargaining power. As shown above, there is authority in our case law that supports a limited discretion, either because the discretion must be exercised reasonably or because the discretion refers to an objective or external standard.⁵³⁸ These standards would appear to overcome the possible problems where one of the parties would abuse such a power.⁵³⁹

Kerr argues that there is a further danger in allowing a limited discretion.⁵⁴⁰ His concern is in respect of limited discretions where an unequal bargaining position exists.⁵⁴¹ This refers to the policy consideration that parties, as far as possible, should have equal bargaining power, which can be deduced from the underlying constitutional value of equality.⁵⁴² Where an unequal bargaining position is present, the weight given to the principle of contractual autonomy (and the values of freedom and dignity) must be decreased.⁵⁴³

It has been said, and it is true, that market competition should temper this problem to some extent.⁵⁴⁴ However, Kerr argues that if such a discretion is allowed, dominant parties would include such discretions in their standard-form contracts.⁵⁴⁵ The other party would then either have to accept the determined

⁵³⁶ See para 3 3 4 3(c) *supra*.

⁵³⁷ See ch 4 para 4 5 2 3.

⁵³⁸ If the discretion refers to a reasonable discretion, the courts regard such a discretion as referring to an objective standard. See paras 3 3 4 33 3 4 3(b), 3 3 4 3(c) *supra*.

⁵³⁹ See para 3 3 5 3(f) *supra*. See also Osode 2000 *Afr J Int' & Comp L* 174 and Laing LLM dissertation 122.

⁵⁴⁰ Kerr *Sale* 66.

⁵⁴¹ *Ibid*; Kerr & Glover 2000 *SALJ* 207.

⁵⁴² Hutchison & Pretorius (eds) *Kontraktereg* 187.

⁵⁴³ *Barkhuizen v Napier supra* para 57. See also Hutchison & Pretorius (eds) *Kontraktereg* 187.

⁵⁴⁴ Laing LLM dissertation 124; Otto 1998 *TSAR* 620; Woker 2010 *Obiter* 218. See also *Investec Bank v GVN Properties supra* 495, referring to *Standard Bank of SA v Friedman supra* 468–469.

⁵⁴⁵ Kerr *Sale* 72; Kerr & Glover 2000 *SALJ* 207; See also Woker 2010 *Obiter* 230 discussing this issue in the context of consumer contracts.

price or attack the discretion.⁵⁴⁶ Attacking the discretion would result in a time-consuming and expensive endeavour and, more often than not, the costs of attacking the discretion would exceed the determined price.⁵⁴⁷ Kerr's fear is that this would result in the dominant party setting a price above the appropriate value "secure in the knowledge that few, if any, opposing contracting parties would be in a financial position to challenge the determination".⁵⁴⁸ There would seem to be some merit to this argument. However, an unequal bargaining position *per se* will not be enough to indicate that a term is contrary to public policy. This factor must be considered together with other relevant factors.⁵⁴⁹

Finally, unequal bargaining relationships are commonly found in consumer contracts. In this regard, Kerr predicted that consumer legislation would influence whether or not the rule would remain a part of South African law.⁵⁵⁰ This is investigated in the next chapter.

(h) Practical considerations in favour of the unilateral determination of price
Although practical considerations are not a policy consideration *per se*, they are relevant to establishing the purpose of the term in order to determine whether the term protects the interests of the favoured party more than reasonably necessary.⁵⁵¹ There are a number of practical considerations that would favour (or even necessitate) the use of discretionary powers in respect of the price.⁵⁵² As will be seen below, none of these would make it necessary for the seller to reserve an unlimited discretion to determine or adjust the price.

⁵⁴⁶ Kerr *Sale 72*; Kerr & Glover 2000 *SALJ* 207.

⁵⁴⁷ Kerr *Sale 72*; Kerr & Glover 2000 *SALJ* 207; See also Woker 2010 *Obiter* 230 and Naudé 2006 *Stell LR* 380, 384 discussing this issue in the context of consumer contracts.

⁵⁴⁸ Kerr *Sale 72*; Kerr & Glover 2000 *SALJ* 207.

⁵⁴⁹ *Afrox Healthcare v Strydom supra* para 12. *Jordan v Farber supra* is a good example where the court looked at the unequal bargaining relationship in context of various other considerations. See also Barnard & Nagel 2010 *PELJ* 457.

⁵⁵⁰ Kerr *Sale 72* where Kerr refers to the 1998 Final Report of the South African Law Commission Project 47 on "Unreasonable stipulations in contracts and the rectification of contracts".

⁵⁵¹ See para 3 3 5 3(f) *supra*.

⁵⁵² Van der Merwe *et al Contract* 236.

The discretion may be necessary as the final act to finalise the price.⁵⁵³ This could be the case where the contract contains a price escalation clause.⁵⁵⁴ Laing refers to the escalation clause in *Burroughs Machines v Chenille Corporation of SA*, where the court had to consider an escalation clause dealing with a change in the manufacturing costs of the goods.⁵⁵⁵ As pointed out by Laing, the price does not automatically change if the manufacturing costs change: the seller would have to exercise a discretion to determine what the change was and apply such a change to the price.⁵⁵⁶

It also possible that one of the parties is better equipped to determine what the price change should be.⁵⁵⁷ Using the same example above, the seller would be in a better position to determine what the change in manufacturing costs is and how to apply this to the price.⁵⁵⁸ The buyer may not have the necessary knowledge, skills or capabilities to make such an assessment.⁵⁵⁹

Furthermore, it may not be possible for the parties to agree on a purely objective method for adjusting the price. If the unilateral determination of a price is not allowed, the parties would have to agree on any price change.⁵⁶⁰ This may not be practical or in the interests of the parties.⁵⁶¹ This is especially true where there is an established and continuing relationship between the parties –

⁵⁵³ Laing LLM dissertation 124; Hawthorne 1992 *THRHR* 646–647.

⁵⁵⁴ Laing LLM dissertation 124.

⁵⁵⁵ *Ibid.* The clause read as follows: “It is not possible for Burroughs Machines Limited ... to quote a firm price for the new equipment offered in this order. We are informed by our factory that the price quoted as ‘approximate’ is not final and is subject to change at any time prior to delivery, to provide for possible changes in manufacturing costs, and fluctuations in the rate of exchange” (*Burroughs Machines v Chenille Corporation of SA supra* 672).

⁵⁵⁶ Laing LLM dissertation 124.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ This may make it more difficult for the buyer to prove that the seller exercised its discretion unreasonably (cf para 3 3 5 3(f) *supra*). Laing LLM dissertation 124 argues that this would also allow for a greater possibility of abuse of this power by the seller (especially in standard form contracts) that would need to be addressed (cf para 3 3 5 3(g) *supra*).

⁵⁶⁰ Laing LLM dissertation 125.

⁵⁶¹ *Ibid.*

for example, between a supplier and a supermarket.⁵⁶² It would be impractical, costly and time consuming if the parties had to agree on every price change every time such a change occurred.⁵⁶³ The buyer may feel it is more important to ensure the supply of the goods and may not be too concerned about slight or marginal adjustments to the price.⁵⁶⁴ This can be illustrated by the fact that in *Westinghouse Brake & Equipment v Bilger Engineering* the seller indicated that “98% of its customers accepted escalation clauses of this nature and were prepared to accept [its] figure of increased costs”.⁵⁶⁵

Finally, where a price escalation clause does not provide for a specific formula by which to calculate the price, it may result in the conclusion that “the determination of the amount of escalation might in the last resort be left to the decision of appellant [the seller]”.⁵⁶⁶ This is especially true in cases where the escalation clause includes increases that would be more difficult to determine - for example, increases in labour costs, as was the case in *Westinghouse Brake & Equipment v Bilger Engineering*.⁵⁶⁷ As mentioned above, the majority of Westinghouse’s clients were prepared to accept the increase in price (presumably because they found it reasonable). However, if our law were not to allow any discretionary powers in respect of price, it would leave all Westinghouse’s contracts open to attack and possibly void.⁵⁶⁸ As pointed out by Laing, that would be “quite bizarre”.⁵⁶⁹

3 3 5 4 Final remarks on the rule and public policy

It appears that in most cases public policy would dictate that a discretion to determine the price should be enforced, provided that such a discretion is not unfettered and subject to an external objective standard or reasonableness.

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Westinghouse Brake & Equipment v Bilger Engineering supra* 574.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ See eg the escalation clause in *Westinghouse Brake & Equipment v Bilger Engineering supra* 566.

⁵⁶⁸ Laing LLM dissertation 128.

⁵⁶⁹ *Ibid.*

However, in cases where an unfair bargaining position is present, public policy may dictate otherwise. As mentioned above, public policy is context-sensitive and dependent on the facts of a particular case.⁵⁷⁰ Whether a term providing for the unilateral determination of the price would be contrary to public policy will depend on the facts of the case.⁵⁷¹ In fact, the court may identify other factors that may be relevant to a public policy investigation in a specific case. However, it is submitted that, at a minimum, the considerations and factors discussed above should be taken into account when making such an assessment.

3 4 CONCLUSION

It has been shown that the rule that prohibits the unilateral determination of price should not be regarded as a manifestation of the requirement for certainty of price. Where a discretion to determine the price is subject to an external objective standard or reasonableness, this will result in the price being certain and consequently the contract of sale should be valid. This also seems to accord with the principle of contractual autonomy: where an unequal bargaining relationship is present, further investigation is required because the term could possibly be regarded as contrary to public policy.

This reasoning is reflected in recent developments in consumer law that have marked a departure from the traditional reverence reserved for contractual autonomy to a contractual order striving to protect consumers against unfair business practices (including unfair contract terms and prices).

The relevant consumer-law developments that may affect the legal status of the rule in South Africa are discussed and analysed in chapter 4.

⁵⁷⁰ See para 3 3 5 2 *supra*.

⁵⁷¹ Kruger 2012 *SALJ* 733.

CHAPTER 4 UNILATERAL PRICE DETERMINATION IN CONTRACTS OF SALES GOVERNED BY THE CONSUMER PROTECTION ACT

4 1 INTRODUCTION

It was shown in the previous chapter that the rule prohibiting the unilateral determination of price should not be seen as a manifestation of the requirement of certainty of price, but rather as a manifestation of public policy. Although it was shown that there are good reasons why such discretions should be allowed in certain contracts, an unequal bargaining relationship (together with other considerations) might render such a term contrary to public policy.

Occasionally, the Legislature will enact legislation to give effect to public policy.⁵⁷² This is the case with the Consumer Protection Act (“the CPA”).⁵⁷³ The CPA aims to address unequal bargaining relationships in certain consumer contracts.⁵⁷⁴ This chapter investigates the unilateral determination of price within the framework of the CPA.⁵⁷⁵

4 2 BRIEF HISTORICAL BACKGROUND TO THE CPA

While the Supreme Court of Appeal questioned the application of the rule against unilateral price determination,⁵⁷⁶ the existing consumer protection measures in South African law were criticised by legal scholars who recognised the need to protect consumers against unfair contract terms.⁵⁷⁷ Traditionally, contract law was based on the assumption that the parties have negotiated the terms of the contract and are on an equal footing during the negotiations.⁵⁷⁸ In

⁵⁷² Hutchison & Pretorius (eds) *Kontraktereg* 189.

⁵⁷³ Act 68 of 2008.

⁵⁷⁴ Woker 2010 *Obiter* 230.

⁵⁷⁵ The investigation of the rule governing the unilateral determination of the price in sales not governed by the CPA is outside the scope of this dissertation.

⁵⁷⁶ See ch 3 para 3 3 3.

⁵⁷⁷ Sharrock *Business law* 570; Van Eeden *Guide to the CPA* 23; Naudé 2006 *Stell LR* 361; Naudé 2009 *SALJ* 505; Sharrock 2010 *SA Merc LJ* 295; Du Preez 2009 *TSAR* 64.

⁵⁷⁸ Cockrell 1997 *Acta Juridica* 31; Woker 2010 *Obiter* 227; Van Eeden *Guide to the CPA* 30.

practice, this is not the case, as businesses use standard contracts that benefit them and are not open to negotiation.⁵⁷⁹ In addition, common-law remedies to address unfair contract terms were not sufficient.⁵⁸⁰ Previous legislative control in South Africa was limited to certain terms in certain contracts and contained in different pieces of legislation.⁵⁸¹ The different pieces of legislation were not coordinated, were not known to consumers and did not provide good protection for consumers.⁵⁸² Therefore, consumer law in South Africa was incomprehensive and fragmented.⁵⁸³ The courts were also hesitant to develop the common law to address these problems on a case-by-case basis.⁵⁸⁴ As pointed out by Van Eeden, “the courts have repeatedly stressed that they are simply not equipped for the task of legislation”.⁵⁸⁵ Finally, after years of debate and legal developments in consumer law, the CPA was promulgated.⁵⁸⁶

4 3 OVERVIEW OF THE CPA

4 3 1 Introduction

The CPA became fully operational on 31 March 2011.⁵⁸⁷ The Act consolidates most previous consumer legislation in South Africa and attempts to accommodate consumer legislation still in force.⁵⁸⁸ The Act aims to deal with unfair contract terms at a more general level in order to provide better protection to consumers.⁵⁸⁹ The Act follows a global trend in general consumer

⁵⁷⁹ Sharrock 2010 *SA Merc LJ* 296; Woker 2010 *Obiter* 227; Van Eeden *Guide to the CPA* 13.

⁵⁸⁰ Naudé 2006 *Stell LR* 362; Sharrock 2010 *SA Merc LJ* 296.

⁵⁸¹ Van Huyssteen *et al Contract* 39; Sharrock 2010 *SA Merc LJ* 296; Woker 2010 *Obiter* 218–219; Naudé 2006 *Stell LR* 362; Du Preez 2009 *TSAR* 58, 64.

⁵⁸² Woker 2010 *Obiter* 219.

⁵⁸³ Van Eeden *Guide to the CPA* 2; Woker 2010 *Obiter* 218–219; Gouws 2010 *SA Merc LJ* 79; Jacobs *et al* 2010 *PELJ* 303; Naudé 2006 *Stell LR* 361 n 4.

⁵⁸⁴ Van Eeden *Guide to the CPA* 2.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ Van Huyssteen *et al Contract* 39; Woker 2010 *Obiter* 228.

⁵⁸⁷ The CPA was supposed to come into full operation on 24 October 2010 (s 122 read with item 2(2) of Schedule 2) but the Minister deferred the date to 31 March 2011 in terms of item 2(3)(a) of Schedule 2 (see GN 917 in GG 33581 of 23 September 2010).

⁵⁸⁸ Melville & Palmer 2010 *SA Merc LJ* 272.

⁵⁸⁹ Bradfield & Lehmann (eds) *Sale and lease* 63; Van Huyssteen *et al Contract* 39; Sharrock 2010 *SA Merc LJ* 297; Du Preez 2009 *TSAR* 58.

protection⁵⁹⁰ and gives effect to South Africa's international-law obligations.⁵⁹¹ The CPA follows a rights-based approach, granting specific rights to consumers.⁵⁹²

As previously mentioned, the CPA has made substantial amendments to the law of purchase and sale.⁵⁹³ It will also play an important role in developing the common-law principles of purchase and sale.⁵⁹⁴

4 3 2 Purpose of the CPA

The main purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa.⁵⁹⁵ This must be accomplished by the establishment and maintenance of a fair, accessible, efficient and sustainable consumer market;⁵⁹⁶ also, by promoting fair business practices⁵⁹⁷ and protecting consumers from unfair trade practices and conduct.⁵⁹⁸ Specifically, the CPA aims to protect the rights of vulnerable persons.⁵⁹⁹ These would include persons from low-income and remote communities, minors, seniors, illiterate persons or persons with a low literacy level, the visually impaired and persons who have limited language skills in the language in which the advertisement, agreement or other visual representation is presented.⁶⁰⁰ Therefore, "[t]he more vulnerable the consumer is, the more protection is required".⁶⁰¹

⁵⁹⁰ Sharrock 2010 *SA Merc LJ* 297–298; Du Preez 2009 *TSAR* 62; Kirby "Goods and services like you've never seen them before: Consumer rights in South African law" 2007 available at http://www.werksmans.co.za/upload/02%20Neil_Kirby_Consumer_Rights_Feb2007.pdf (accessed 10 March 2011).

⁵⁹¹ Preamble to the CPA.

⁵⁹² Meiring 2010 *Without Prejudice* 28. See further para 4 3 5 *infra*.

⁵⁹³ See ch 3 para 3 2.

⁵⁹⁴ Van Eeden *Guide to the CPA* 24.

⁵⁹⁵ S 3(1).

⁵⁹⁶ S 3(1)(a).

⁵⁹⁷ S 3(1)(c).

⁵⁹⁸ S 3(1)(d).

⁵⁹⁹ S 3(1)(b).

⁶⁰⁰ *Ibid.*

⁶⁰¹ Du Preez 2009 *TSAR* 63.

4 3 3 Interpretation of the CPA

Section 2 of the CPA prescribes how the Act should be interpreted. Of special relevance to this discussion, the following can be mentioned: first, the CPA should be interpreted to give effect to the purposes detailed in section 3.⁶⁰² Secondly, when interpreting the CPA, the interpreter may consider international law, international conventions, declarations or protocols relating to consumer protection and foreign law.⁶⁰³ Finally, the CPA should not be interpreted in such a way as to preclude a consumer from exercising any of his or her common-law rights.⁶⁰⁴

When, in terms of the CPA, a matter is brought before a court, the court has the following obligations: first, the court must develop the common law to improve the realisation and enjoyment of consumer rights generally and, in particular, to improve the position of the vulnerable persons referred to above.⁶⁰⁵ Secondly, the court must promote the spirit and purposes of the CPA.⁶⁰⁶

Section 4(3) provides that if any provision in the CPA can have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the CPA and will best improve the realisation and enjoyment of consumer rights and, in particular, the position of the vulnerable persons mentioned above.

Furthermore, section 4(4)(a) provides that when the court must interpret a document prepared by the supplier and there are ambiguities in the document, the document must be interpreted to the benefit of the consumer. It has been argued that this is a confirmation (and possible extension) of the *contra proferentem* rule.⁶⁰⁷ Where the rights of the consumer are limited in the

⁶⁰² S 2(1). See para 4 3 2 *supra*.

⁶⁰³ S 2(2). See further ch 5.

⁶⁰⁴ S 2(10).

⁶⁰⁵ S 4(2)(a). See para 4 3 2 *supra* for the list of vulnerable persons.

⁶⁰⁶ S 4(2)(b)(i).

⁶⁰⁷ Jacobs *et al* 2010 *PELJ* 307 and the cases referred to in n 33; Naudé 2009 *SALJ* 506; Sharrock *Business law* 597. Du Preez 2009 *TSAR* 66 criticises this provision as creating

document, the court must interpret such limitation “to the extent that a reasonable person would ordinarily contemplate or expect”.⁶⁰⁸ Factors that the court must take into consideration include the content of the document, the manner and form in which it was prepared and presented, and the circumstances of the transaction or agreement.⁶⁰⁹

4 3 4 Application of the CPA

4 3 4 1 Introduction

The CPA applies to every transaction occurring in South Africa unless it is exempted from the operation of the Act.⁶¹⁰ A “transaction” is defined as:

[I]n respect of a person acting in the ordinary course of business –
(i) an agreement between or among that person and one or more other persons for the *supply or potential supply of any goods or services in exchange for consideration*⁶¹¹ (my emphasis).

“Supply” includes the sale of goods and therefore contracts of sale are governed by the Act.⁶¹² From the above, it is clear that a contract of sale will qualify as a consumer sale if it complies with the following requirements:

- (a) the contract of sale must occur in South Africa;
- (b) the contract of sale must be concluded in the ordinary course of business, and
- (c) the contract of sale must not fall under any exemptions.

“a subjective and unpredictable standard”. See further Cornelius *Interpretation* 191–192 in respect of the application of the rule in the law of contract.

⁶⁰⁸

Section 4(4)(b).

⁶⁰⁹

Ss 4(4)(b)(i)–(iii). Naudé 2009 *SALJ* 507 criticises this provision as allowing the interpreter to ignore clear worded limitations where the limitation was not reasonably foreseeable in the circumstances. She argues that this is a deviation from the principles of strict interpretation and unnecessary in light of the powers of the court to strike out unfair contract terms in terms of ss 48 and 52 (see further para 4 5 *infra*) and the common-law principles dealing with surprising terms. Consequently, she proposes that this provision should be deleted.

⁶¹⁰

S 5(1)(a).

⁶¹¹

S 1 *sv* “transaction”.

⁶¹²

S 1 *sv* “supply” and “agreement”.

Each of these requirements is dealt with separately below.

(a) The contract of sale must occur in South Africa

Section 5(1)(a) requires that the transaction must occur in South Africa. Does this, for example, refer to the conclusion or execution of the contract? Du Preez refers to the dictionary meaning of “occur”, which means “come to pass”, “to be found to exist”, “to happen”, “to take place”, “to come about”, “to present itself” or “to befall”, and concludes that the term is subject to more than one interpretation.⁶¹³ Therefore, the meaning of “occur” in this context is unclear.⁶¹⁴ However, it would probably include contracts of sale concluded in South Africa.

(b) The contract of sale must be concluded in the ordinary course of business
Only contracts of sale in the ordinary course of the supplier’s business will be governed by the CPA. What would constitute “in the ordinary course of business” is not defined in the Act, but it must be considered from the viewpoint of the supplier’s business.⁶¹⁵ As pointed out by Otto, consumers acting within and/or outside the ordinary course of their businesses are protected by the Act.⁶¹⁶ The test is “whether the making of the contract falls within the scope of that business and whether ordinary business persons would have concluded the contract”.⁶¹⁷ This means that once-off sale agreements are not subject to the Act.⁶¹⁸ Sharrock argues that where a supplier dealing exclusively in certain goods agrees to supply other goods to a consumer as a once-off transaction, the agreement will not be governed by the Act.⁶¹⁹

⁶¹³ Du Preez 2009 *TSAR* 67–68.

⁶¹⁴ Jacobs *et al* 2010 *PELJ* 309 n 51; Du Preez 2009 *TSAR* 68.

⁶¹⁵ Otto 2011 *THRHR* 536; Sharrock 2010 *SA Merc LJ* 302.

⁶¹⁶ Otto 2011 *THRHR* 536. See also Sharrock *Business law* 576.

⁶¹⁷ Sharrock 2010 *SA Merc LJ* 302 referring to *Amalgamated Banks of South Africa Bpk v De Goede* 1997 4 SA 66 (SCA) and the further case law cited in n 43.

⁶¹⁸ Otto 2011 *THRHR* 538; Jacobs *et al* 2010 *PELJ* 312; Van Huyssteen *et al Contract* 117.

⁶¹⁹ Sharrock 2010 *SA Merc LJ* 302.

(c) The contract of sale must not fall under any exemptions

Section 5(2)(b) provides that the CPA does not govern contracts of sale where the consumer is a juristic person⁶²⁰ whose asset value or annual turnover at the time of the transaction equals or exceeds the threshold determined by the Minister.⁶²¹ A “consumer” is defined as a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business.⁶²² A “supplier” is defined as a person who markets any goods or services.⁶²³ “Market” refers to the promotion or supply of goods.⁶²⁴ As already pointed out, the supply of goods includes the sale of goods.⁶²⁵ Therefore, in a contract of sale, “supplier” refers to the seller and “consumer” refers to the buyer. The Act will, of necessity, therefore apply only where the buyer is an individual or a juristic person with a turnover below the determined threshold.

Furthermore, specific exemptions that can be mentioned include goods sold to the State⁶²⁶ or where the Minister exempts the specific transaction from the application of the Act.⁶²⁷ Credit sales governed by the National Credit Act⁶²⁸ are also excluded from the ambit of the CPA, but not the goods that are the subject of such a credit sale agreement.⁶²⁹ The CPA also does not apply to transactions

⁶²⁰ A juristic person includes a body corporate, partnership, association or trust (see s 1 sv “juristic person”).

⁶²¹ The current threshold is R2 million (see GN 294 in GG 34181 of 1 April 2011). The Minister also prescribed a method for the calculation of the value and annual turnover for purposes of the threshold determination.

⁶²² S 1 sv “consumer”.

⁶²³ S 1 sv “supplier”.

⁶²⁴ S 1 sv “market”.

⁶²⁵ Cf n 612 *supra*.

⁶²⁶ S 5(2)(a). The meaning of “State” is unclear. As pointed out by Jacobs *et al* 2010 *PELJ* 209 n 52, “State” is not defined in the CPA, although “organ of state” is defined in s 1 of the Act as an organ of state as defined in s 239 of the Constitution of the Republic of South Africa, 1996.

⁶²⁷ S 5(2)(c).

⁶²⁸ Act 34 of 2005.

⁶²⁹ S 5(2)(d). Otto 2011 *THRHR* 535, 543; Sharrock *Business law* 578. In respect of issues arising from this exemption see Otto & Otto *The NCA explained* 135; Melville & Palmer 2010 *SA Merc LJ* 272; Jacobs *et al* 2010 *PELJ* 310 n 55. See also ss 5(2)(e)–(g) for further exemptions that are not relevant for the purposes of this discussion.

or agreements concluded and goods supplied to a buyer before the general effective date.⁶³⁰

The CPA also provides that certain contracts will always be governed by the Act. The sale of goods to a franchisee in terms of a franchise agreement will always be regarded as a transaction.⁶³¹ Therefore, the threshold determination does not apply to such transactions.⁶³²

4 3 4 2 Conclusion

The CPA is applicable to certain contracts of sale only. Therefore, the CPA divides contracts of sale into sales governed by the CPA (“consumer sales”) and sales not governed by the CPA (“commercial sales”).⁶³³ Therefore, where a seller concludes a contract of sale with a buyer who is an individual or a juristic person (whose annual turnover is below the determined threshold) in the course of the seller’s business and in South Africa, that contract of sale is governed by the CPA. The unilateral determination of the price in consumer sales is considered below.⁶³⁴

4 3 5 Focus on promotion and protection of specific consumer rights

The CPA promotes and protects specific fundamental *consumer* rights.⁶³⁵ Therefore, the CPA focuses on buyers’ rights. As such, in the context of the

⁶³⁰ Item 3(1) of Schedule 2 to the CPA. The general effective date is 31 March 2011. See para 4 3 1 *supra*.

⁶³¹ S 5(6)(e). The unilateral determination of price in a franchise agreement governed by the CPA is outside the scope of this dissertation as it warrants a separate investigation and analysis.

⁶³² Jacobs *et al* 2010 *PELJ* 312–313. Jacobs *et al* submit that the reason for this inclusion is that franchisee agreements are mostly concluded between a large franchisor (as the seller) and a smaller juristic person or an individual (as the buyer)

⁶³³ Van Eeden *Guide to the CPA* 2; Van Huyssteen *et al Contract* 216.

⁶³⁴ The investigation of the rules governing the unilateral determination of the price in commercial sales is outside the scope of this dissertation.

⁶³⁵ They are the following: the right to equality in the consumer market (ss 8–10); the right to privacy (ss 11–12); the right to choose (ss 13–21); the right to disclosure and information (ss 22–28); the right to fair and responsible marketing (ss 29–39); the right to fair and honest dealing (ss 40–47); the right to fair, just and reasonable terms and conditions (ss 48–52); and the right to fair value, good quality and safety (ss 53–61).

CPA, the question arises whether the seller can be granted a discretion to determine the price in a consumer sale. Two of these rights must be investigated in order to determine whether the unilateral determination of price in a consumer sale is allowed. First, the consumer's right to disclosure and information. Secondly, the consumer's right to fair, just and reasonable terms and conditions.

4 4 CONSUMER'S RIGHT TO DISCLOSURE AND INFORMATION

The consumer's right to disclosure and information includes the right to disclosure of the price of the goods and the right to a sales record for each transaction with a supplier.⁶³⁶

4 4 1 Right to disclosure of price

4 4 1 1 Introduction

The consumer's right to disclosure of information includes the right to disclosure of the price of goods.⁶³⁷ Section 23(3) of the CPA prohibits a retailer from displaying any goods for sale without displaying a price in relation to those goods.⁶³⁸ This prohibition requires the investigation of four separate issues: first, the definition of retailer; secondly, what would qualify as a display of goods for sale; thirdly, what constitutes a display of price; and, fourthly, the consequences of displaying the price.

4 4 1 2 Definition of retailer

A "retailer" is defined as a person who, in the ordinary course of business, supplies the particular goods to a consumer.⁶³⁹ "Supply" would include the sale of goods.⁶⁴⁰ Therefore, "retailer" would refer to the seller of the goods.

⁶³⁶ Ss 22, 23 and 26, respectively.

⁶³⁷ S 23.

⁶³⁸ S 23 does not apply to a transaction where an estimate was given for repair and maintenance services in terms of s 15 of the CPA or a transaction governed by s 43 of the Electronic Communications and Transactions Act 25 of 2002.

⁶³⁹ S 1 sv "retailer".

4 4 1 3 Display of goods for sale

“Display” in respect of goods is defined as placing, exhibiting or exposing goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect and select those or similar goods for supply to a consumer.⁶⁴¹ Therefore, goods will be displayed only if they are placed before the public and provided they are displayed in the ordinary course of business as an open invitation to the public to inspect and select the goods. As such, it would not seem to indicate that the retailer must make an offer to sell, but a mere invitation to sell would suffice⁶⁴² and, therefore, this would probably cover all advertisements and forms of marketing used for most goods. However, it would not cover goods that are not placed before the public as an open invitation. Such goods could include goods specifically requested by a consumer or special-order goods.⁶⁴³

A further exception is contained in section 23(4). It provides as follows:

A *retailer* is not required to display a price for any goods that are displayed predominantly as a form of advertisement of the supplier, or of goods or services, in an area within the *supplier's* premises to which the public does not ordinarily have access (my emphasis).

Section 23(4) refers, on the one hand, to a retailer and, on the other hand, to a supplier. It would seem that the Legislature wanted to indicate that it is referring to different persons, which is problematic. Under what circumstances would a retailer display goods in another supplier's premises and do so in an area to

⁶⁴⁰ S 1 *sv* “supply”.

⁶⁴¹ S 1 *sv* “display”.

⁶⁴² This is indicated by the words “open invitation to the public”. In *Crawley v R* 1909 TS 1105 the court held that where a tradesman advertises the price at which he sells the goods it would not amount to an offer to sell, but “simply to an announcement of his intention to sell” (at 1108). See further Christie *Contract* 41–44 for a discussion of this case and the common-law rules applicable to advertisements.

⁶⁴³ “Special-order goods” are defined as goods that a supplier expressly or implicitly was required or expected to procure, create or alter specifically to satisfy the consumer's requirements (s 1 *sv* “special-order goods”).

which the public does not usually have access? A closer look at the definitions of “retailer” and “supplier” indicates that they can refer to the same person.

A supplier is the person who *markets* the goods.⁶⁴⁴ “Market” is defined as the promotion or supply of any goods.⁶⁴⁵ Supply of goods includes the selling of the goods.⁶⁴⁶ Therefore, a supplier can refer to the seller of the goods. As indicated above, a retailer will also refer to the seller of the goods.⁶⁴⁷ However, retailer will not refer to the person promoting the goods. In short, the supplier is the person who markets and/or sells the goods. A retailer is the person who sells the goods. Thus, where the retailer and the supplier are the same person, this will not create any problems. However, where they are different persons, this would mean that the *retailer* (the seller) does not have to display a price for the goods in the *supplier’s* (the marketer’s) premises to which the public does not normally have access. This does not make sense and it is suggested that the last reference to supplier should in fact refer to the retailer.

If it is accepted that retailer and supplier refer to the same person, there is still a difference of opinion as to the meaning of this provision. First, it is interpreted to refer to goods that are displayed (as an advertisement of the supplier or the goods) in an area within the supplier’s premises to which the public does not ordinarily have access.⁶⁴⁸ Secondly, it is interpreted to refer to goods that are displayed for advertising *or* where they are in an area to which the public does not normally have access.⁶⁴⁹ If the first interpretation is followed, this exception seems to be unnecessary in the light of the specific definition given to a display of goods. As the goods are displayed in an area to which the public does not ordinarily have access, it is difficult to see how it could be argued that the goods are placed before the public as an open invitation. Rather, section 23(4) then seems to be an example of when goods would not be considered as displayed

⁶⁴⁴ S 1 sv “supplier”.

⁶⁴⁵ S 1 sv “market”.

⁶⁴⁶ S 1 sv “supply”.

⁶⁴⁷ See para 4 4 1 2 *supra*.

⁶⁴⁸ Sharrock *Business law* 631.

⁶⁴⁹ Jacobs *et al* 2010 *PELJ* 331; Van Eeden *Guide to the CPA* 203.

for the purposes of section 23(3). However, if the second interpretation is followed, section 23(4) would exempt goods where they are displayed “predominantly as a form of advertisement”. This indicates that the Legislature intended a difference in meaning between placing “goods before the public in the ordinary course of business in a manner consistent with an open invitation to members of the public to inspect, and select, those or similar goods for supply to a consumer”⁶⁵⁰ and goods displayed “predominantly as a form of advertisement”. “Advertisement” is defined as:

[A]ny direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to –

- (a) bring to the attention of all or part of the public –
 - (i) the existence or identity of a supplier; or
 - (ii) the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which any goods or services are available for supply;
- (b) promote the supply of any goods or services; or
- (c) promote any cause.⁶⁵¹

The fact that an advertisement includes any type of representation to “bring to the attention of all or part of the public” the conditions under or the prices at which the goods are available is similar to the meaning given to a price advertisement at common law,⁶⁵² which is similar in meaning to “goods placed before the public as an open invitation to inspect, and select, those or similar goods for supply to a consumer”. It becomes even more confusing when considering the meaning of “promote”.⁶⁵³ As such, the meaning of this provision is unclear.

⁶⁵⁰ S 1 *sv* “display” as discussed above.

⁶⁵¹ S 1 *sv* “advertisement”; my emphasis.

⁶⁵² See *Crawley v R* as discussed in n 642 *supra*.

⁶⁵³ “Promote” includes “advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration”, to “make any representation in the ordinary course of business that could reasonably be inferred as

4 4 1 4 Display of price

Once it has been established that a retailer is displaying goods for sale, he must display a price for those goods. "Display" in relation to price refers to the placing or publishing of anything in a manner that reasonably creates an association between that price and any particular goods.⁶⁵⁴

For the purposes of interpreting section 23, "price" includes any mark, notice or visual representation that may reasonably be inferred to indicate or express an association between any goods or services and the value of the consideration for which the supplier is willing to sell those goods.⁶⁵⁵ Therefore, the price displayed should indicate the value of the consideration for the goods. "Consideration" is defined as anything of value given in exchange for goods, and will include almost anything (for example, money, property, labour and credit).⁶⁵⁶ However, the value of the consideration must be given.⁶⁵⁷ This is clear from section 23(5), which provides that a price is adequately displayed if it is expressed in the currency of the Republic.

Furthermore, the price must be affixed to or stamped on the goods, applied to the shelf where the goods are displayed, published in a catalogue or brochure or represented in any way as long as it may reasonably be inferred that the price represented is the price applicable to the goods in question.⁶⁵⁸ If the price is displayed in a brochure or catalogue and the brochure or catalogue states that the price is applicable for a certain time only, then the price is considered

expressing a willingness to supply any goods or services for consideration" or to "engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction" (cf s 1 sv "promote"). It is unclear how this differs from placing goods before the public as an open invitation to inspect, and select, those or similar goods for supply to a consumer.

654

S 1 sv "display".

655

S 1 sv "price". Furthermore, a price would include a unit price (s 23(2)).

656

S 1 sv "consideration".

657

"Value" refers to material or monetary worth (The Dictionary Unit for SA English (ed) SA Oxford dictionary 1298 sv "value").

658

S 23(5).

as the displayed price for that time only.⁶⁵⁹ If no time is stated, the price in the brochure or catalogue will be the displayed price for as long as it may reasonably not be regarded as out of date.⁶⁶⁰

4 4 1 5 Consequences of a displayed price

What is considered as the displayed price is very important, because section 23(6)(a) provides that the supplier may not require a consumer to pay a higher price than the displayed price.⁶⁶¹ It is important to note that section 23(6) applies to all prices whether or not the supplier is obliged to display a price.⁶⁶² There are a few exceptions to this rule: first, where the price is determined by public regulation;⁶⁶³ secondly, where the price is covered completely by a second displayed price;⁶⁶⁴ thirdly, where the displayed price contains an inadvertent and obvious error, provided the error has been corrected and reasonable steps were taken to inform consumers;⁶⁶⁵ finally, if the displayed price was altered, covered or removed by an unauthorised person.⁶⁶⁶

4 4 1 6 Conclusion

Once a retailer displays his or her goods, the price must be displayed. The price must indicate the value of the consideration for which the seller is willing to sell the goods. The value must be expressed in South African rands and this implies that a numerical value is required. The retailer is bound to the displayed price (whether obliged to display a price or not), and may not require the consumer to pay a higher price than the one displayed.⁶⁶⁷ If two prices are displayed

⁶⁵⁹ S 23(5)(c)(i).

⁶⁶⁰ S23(5)(c)(ii).

⁶⁶¹ Here again, the Legislature deviates from the wording used in s 23(3) and refers to supplier. However, in this context, the supplier would probably always refer to the seller.

⁶⁶² Section 23(6) refers to “a price for any goods or services”.

⁶⁶³ S 23(7).

⁶⁶⁴ S 23(8).

⁶⁶⁵ S 23(9). This section also refers to supplier.

⁶⁶⁶ S 23(10). This section also refers to supplier.

⁶⁶⁷ S 23(6)(a).

concurrently in respect of the same goods, the retailer is bound to the lower displayed price.⁶⁶⁸

It would seem that this provision has extensively amended the common-law requirements of price in most consumer sales.⁶⁶⁹ The price must be fixed by the seller prior to the sale being concluded,⁶⁷⁰ and the buyer has the right to insist on paying this price.⁶⁷¹ This would seem to exclude the possibility that the price can be determined by the seller exercising an objective or reasonable discretion.⁶⁷² This could be problematic where the price might be subject to escalation due to factors outside the control of the seller. For example, a supplier supplying goods to a small business may need to include a price escalation clause in the supply agreement to make provision for possible fluctuations in delivery costs. However, it should be noted that it is possible for a consumer to waive a right provided such a waiver is not on unfair terms or such unfair terms are not imposed as a condition for entering into the transaction.⁶⁷³ It is submitted that the inclusion of a term granting the seller the discretion to determine or adjust the price could be seen as a waiver of the buyer's right to a displayed price in terms of section 23. This is discussed in more detail in paragraph 4 5 2 below.

⁶⁶⁸ S 23(6)(b).

⁶⁶⁹ S 23 is not applicable to estimates for repair governed by s 15 or sales governed by s 43 of the Electronic Communications and Transactions Act (see para 4 4 1 1 *supra*).

⁶⁷⁰ Van Huyssteen *et al Contract* 215.

⁶⁷¹ *Contra* Sharrock *Business law* 631–632. Sharrock argues that s 23 has not amended the common law rule that a display of goods with a price is only an invitation to the customer to submit offers. He argues that if a seller requires a consumer to pay a higher price than the displayed price this would constitute a contravention of s 30(1) of the CPA and should be dealt with accordingly (at 55). As such, the seller should not “be compelled to sell at that [displayed] price” (at 632). Considering that the Legislature specifically uses the word “bound” in ss 23(9) and 23(10), it would seem that it was the intention of the Legislature that the seller would be bound to the displayed price. The meaning of “bind” seems clear, namely to “impose a legal or contractual obligation” (see *The Dictionary Unit for SA English* (ed) *SA Oxford dictionary* 109 *sv* “bind”).

⁶⁷² Cf ch 3 paras 3 3 4 3(b) and 3 3 4 3(c).

⁶⁷³ S 48(1)(c)(i). See also Du Preez 2009 *TSAR* 76.

4 4 2 Right to a sales record for every transaction with a supplier

Section 26 of the CPA requires that each supplier must provide a written record (sales record) of each transaction to the relevant consumer.⁶⁷⁴ This sales record must include the unit price, the total price (before any applicable taxes), the amount of the applicable taxes and the total price (including any applicable taxes).⁶⁷⁵ This information is required for goods that are supplied or are to be supplied.⁶⁷⁶ “Price” has a different meaning than the meaning given to it in section 23 above. In all the other provisions of the CPA, “price” is defined as the total amount paid or payable by the consumer to the supplier in terms of that transaction, including any amount that the supplier is required to impose, charge or collect in terms of any public regulation.⁶⁷⁷ The definition refers to the “total amount paid or payable”, which indicates that a numerical value must be given. In practice, a sales record would probably take the form of an invoice or a receipt for a specific transaction. The information required is the minimum information that must be contained on the sales record and it does not preclude the inclusion of any other terms or conditions. Therefore, although the sales record must include a specific price, it does not seem to preclude the inclusion of a discretionary power to the supplier to amend the price stated in the sales record. Furthermore, where the consumer expressly does not require a sales record, the supplier does not have to provide one.⁶⁷⁸

4 4 3 Right to information in plain and understandable language

Both rights discussed above require the provision of information to the consumer. First, the seller must provide the price of the goods that are displayed. Secondly, the seller must provide the consumer with a sales record

⁶⁷⁴ S 26(2). S 26 does not apply to transactions in terms of s 43 of the Electronic Communications and Transactions Act or other transactions exempted by the Minister in terms of s 26(4). The Minister exempted hawkers and suppliers where the consumer expressly does not require a sales record from the application of s 26(2)–(3) (see GN R293 in GG 34180 of 1 April 2011).

⁶⁷⁵ Ss 26(3)(e), (g)–(i).

⁶⁷⁶ *Ibid.*

⁶⁷⁷ S 1 *sv* “price”.

⁶⁷⁸ Such transactions are exempt from the provisions in s 26(2)–(3). See n 674 *supra*.

for every transaction. The information provided to the consumer must meet the requirements for plain language in section 22 of the CPA.⁶⁷⁹ Therefore, if a discretion to determine the price were included in either of these documents, it would have to meet the plain language requirements set out in section 22.⁶⁸⁰

Section 22(1)(b) provides that if a document must be provided to the consumer, such document must be in plain language. A document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills⁶⁸¹ and minimal experience as a consumer of the relevant goods, could be expected to understand the content, significance and import of the document without undue effort.⁶⁸² Gouws argues that whether the document requires “undue effort” to be understood will depend on the facts of the case.⁶⁸³ However, he proposes that “the consumer must be able understand the content, significance and import of the [document] by merely reading the [document]”.⁶⁸⁴ If the consumer must take any further action to understand the document, for example by obtaining advice from an attorney, that would be considered as “undue effort”.⁶⁸⁵

Factors to be taken into account are:

- (a) the context, comprehensiveness and consistency of the notice;
- (b) the organisation, form and style of the notice;
- (c) the vocabulary, usage and sentence structure of the notice, and

⁶⁷⁹ Gouws 2010 *SA Merc LJ* 82 argues that the need for plain language is based on the “unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality of consumers in the country”. This would accord with the purpose of the CPA (cf para 4 3 2 *supra*).

⁶⁸⁰ This is also one of the factors that must be taken into account when assessing whether such a discretion is an unfair, unreasonable or unjust term or waiver of a right. See further para 4 5 2 5(g) *infra*.

⁶⁸¹ Gouws 2010 *SA Merc LJ* 87 refers to UNESCO definition of literacy, namely “the ability to identify, understand, interpret, create, communicate, compute and use printed and written materials associated with varying contexts”.

⁶⁸² S 22(2).

⁶⁸³ Gouws 2010 *SA Merc LJ* 88.

⁶⁸⁴ *Idem* 88–89.

⁶⁸⁵ *Ibid.*

- (d) the use of any illustrations, examples, headings or other aids to reading and understanding.⁶⁸⁶

The requirements and factors set out in section 22 are very general and do not provide clear guidance on how a document should be assessed, although the Commission may publish guidelines for methods of assessing whether a document satisfies these requirements.⁶⁸⁷ It has not done so yet, but hopefully it will and such guidelines will provide better assessment methods for determining whether a document meets the requirements of plain language.⁶⁸⁸

Furthermore, section 22 is silent on the consequences of non-compliance (ie where the discretion is not drafted in plain language). Non-compliance with a statutory provision usually renders the term or transaction void.⁶⁸⁹ However, Naudé argues that the Act seems to indicate otherwise, because non-compliance with section 22 is listed as a mere factor that must be considered when assessing whether a term is unfair.⁶⁹⁰

4 5 CONSUMER'S RIGHT TO FAIR, JUST AND REASONABLE TERMS

This section is divided into four different subsections, namely:

- (a) the right to an itemised breakdown of the consumer's financial obligations in a written consumer contract;
- (b) the right to fair, reasonable and just contract terms;
- (c) the right to a fair, reasonable and just price, and
- (d) prohibited terms.

⁶⁸⁶ S 22(2)(a)–(d). Gouws 2010 *SA Merc LJ* 89 argues that as these factors are guidelines, non-compliance with them will not necessarily mean that the document does not meet the requirements of plain language.

⁶⁸⁷ S 22(3).

⁶⁸⁸ Gouws drafted comprehensive guidelines in respect of how to draft in plain language (see Gouws 2010 *SA Merc LJ* 91–94). It is submitted that these guidelines could also be used to assess whether or not a document is written in plain language.

⁶⁸⁹ Naudé 2009 *SALJ* 513 referring to Van der Merwe *et al Contract* 172 and the authorities listed there.

⁶⁹⁰ See further para 4 5 2 5(g) *infra*.

4 5 1 Right to an itemised breakdown of the consumer's financial obligations in written consumer contracts

Section 50(2)(b) provides that if an agreement between a consumer and a supplier is in writing (whether required or voluntary),⁶⁹¹ the contract must meet the requirements for plain language in section 22.⁶⁹² It must also set out an itemised breakdown of the consumer's financial obligations under such agreement. If the formulation of the discretion is set out in plain language as required by section 22, this provision does not seem to prevent an itemised breakdown that includes a term that the price is subject to the discretion of the supplier. However, section 50(2)(b) is silent on the consequences of non-compliance (ie where the discretion is not drafted in plain language). Non-compliance with a statutory provision usually renders the term or transaction void.⁶⁹³ However, Naudé argues that the Act seems to indicate otherwise, because non-compliance with section 22 is listed as a mere factor that must be considered when assessing whether a term is unfair.⁶⁹⁴

4 5 2 Right to fair, reasonable and just contract terms

4 5 2 1 Introduction

Section 48(1)(a)(ii) provides that a supplier must not offer to sell, sell or enter into an agreement to sell, any goods on terms that are unfair, unreasonable or unjust. Furthermore, section 48(1)(c)(i) provides that a supplier may not require a consumer to waive any rights on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition for entering into the transaction. Therefore, section 48 covers terms in a contract of sale as well as any terms of an offer made by a supplier to a consumer.⁶⁹⁵ The question is whether a discretion to determine the price granted to the supplier would be regarded as

⁶⁹¹ In terms of s 50(1) the Minister may prescribe which consumer agreements must be in writing. Currently, the Minister has not prescribed any consumer agreements that must be in writing (see Nagel (ed) *Commercial law* 740).

⁶⁹² See para 4 4 3 *supra*.

⁶⁹³ Naudé 2009 *SALJ* 513 referring to Van der Merwe *et al Contract* 172 and the authorities listed there.

⁶⁹⁴ See further para 4 5 2 5(g) *infra*.

⁶⁹⁵ Naudé 2009 *SALJ* 514.

an unfair term in terms of section 48(1)(a)(ii) or as an unfair waiver of a consumer's rights in terms of section 48(1)(c)(i).

4 5 2 2 The CPA and the common-law position

As mentioned above, the CPA should not be interpreted in such a way as to preclude a consumer from exercising any of his or her common-law rights.⁶⁹⁶ It has been established that an unfettered discretion to determine the price is not permitted.⁶⁹⁷ Although some uncertainty exists, there is authority that such a discretion would be lawful where it is subject to an external objective standard or reasonableness.⁶⁹⁸ However, the court is obligated to develop the common law to improve the realisation and enjoyment of consumer rights generally and, in particular, the position of the vulnerable persons listed in section 3.⁶⁹⁹ This is investigated below.

4 5 2 3 Difference of approach between pure consumer sales and business-to-business consumer sales

The Act itself does not contain any provision dealing with the *onus* of proof when a consumer alleges that a term is unfair and the *onus* rests on the consumer to prove that the term is unfair. However, there are exceptions, because certain terms are presumed to be unfair.⁷⁰⁰ These terms are contained in the regulations made by the Minister in terms of section 120(1)(d) of the CPA ("the CPA Regulations").⁷⁰¹ Regulation 44(3) of the CPA Regulations lists these presumed unfair contract terms, but it is important to note that this list applies only to a term in a consumer contract:

... between a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession and

⁶⁹⁶ See para 4 3 3 *supra*.

⁶⁹⁷ See ch 3 para 3 3 5 3(b).

⁶⁹⁸ See ch 3 paras 3 3 4 3(b) and 3 3 4 3(c).

⁶⁹⁹ See para 4 3 3 *supra*.

⁷⁰⁰ This is also referred to as the "grey list" of unfair terms (Nagel (ed) *Commercial law* 737). See also Naudé 2006 *Stell LR* 381; Naudé 2007 *SALJ* 130; Sharrock *Business law* 591.

⁷⁰¹ See GN R293 in *GG* 34180 of 1 April 2011.

an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession.⁷⁰²

Therefore, the CPA regulations distinguish between two types of consumer sale. First, a sale where the consumer is an individual and the transaction is unrelated to the consumer's business or profession ("a pure consumer sale") and, secondly, all other transactions where the transaction is related to the consumer's business or profession ("business-to-business consumer sales").

A term in a pure consumer sale is presumed to be unfair if it has the purpose or effect of a term listed in regulation 44(3) but it does not fall under the exceptions listed in regulation 44(4). Two of these listed terms are relevant to the discussion. First, a term is presumed unfair if it allows the supplier to increase the price agreed on when the agreement was concluded without the consumer having the right to terminate the agreement.⁷⁰³ However, regulation 44(4)(b) provides for the following exceptions:

- (i) a transaction in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in stock exchange quotation or index or a financial market rate that the trader does not control;
- (ii) an agreement for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
- (iii) a price-indexation clause, where lawful, but the method by which prices vary must be explicitly described.

Secondly, a term in a pure consumer sale is presumed unfair if it allows the supplier to alter the terms of the contract unilaterally.⁷⁰⁴ The same exceptions contained in regulation 44(4)(b)(i) and (ii) apply.⁷⁰⁵ A further exception is where

⁷⁰² Reg 44(1).

⁷⁰³ Reg 44(3)(h).

⁷⁰⁴ Reg 44(3)(i).

⁷⁰⁵ Reg 44(4)(c)(ii)–(iii).

the supplier has the right to amend the terms of an open-ended agreement unilaterally, provided the supplier informs the consumer of the amendment and the consumer has the right to dissolve the agreement immediately.⁷⁰⁶ Therefore, a discretion to adjust the price in a pure consumer sale would be presumed to be unfair, subject to three exceptions.

The first exception is where the price of the goods is linked to fluctuations in the stock exchange or financial markets outside the supplier's control or the goods sold are foreign currency, traveller's cheques or international money orders denominated in foreign currency.⁷⁰⁷ There does not seem to be any problem with the application of these exceptions as all of them refer to objective standards that could be ascertained.

The second exception is where the discretion is contained in a price-indexation clause, provided the clause is lawful and the method for determining the price variation is explicitly described. This exception requires further discussion. First, the meaning of an "explicitly described" method should be determined. "Describe" is defined as giving "a detailed account in words".⁷⁰⁸ This meaning produces no problems. "Explicit" means "clear and detailed, with no room for confusion or doubt".⁷⁰⁹ It has been shown that a discretion to determine the price is not *per se* vague or uncertain, provided it in clear language.⁷¹⁰ As such, this provision does not contain anything more than what is already provided for at common law.

Secondly, the meaning of a price indexation clause should be determined. An index in this context refers to "a number representing the relative value or

⁷⁰⁶ Reg 44(4)(c)(iv). As pointed out by Sharrock *Business law* 592 the term "open-ended agreement" is not defined and therefore its meaning is not clear.

⁷⁰⁷ The regulation refers to a "trader" (which is not defined in the CPA of the CPA Regulations), but in the context of the provision it is submitted that "trader" refers to the supplier.

⁷⁰⁸ The Dictionary Unit for SA English (ed) *SA Oxford dictionary* 314 *sv* "describe".

⁷⁰⁹ *Idem* 406 *sv* "explicit".

⁷¹⁰ See ch 3 para 3 3 4 2(c).

magnitude of something in terms of a standard”.⁷¹¹ Therefore, the variation in price must be linked to some index (eg the consumer price index) that would refer to an objective standard. As such, it would seem that this exception would include a discretion to determine the price linked to an objective external standard, but that a reference to reasonableness alone may not be allowed.

Thirdly, the meaning of “where lawful” should be determined. As mentioned above, there is authority that a discretion to determine a price would be lawful where it is subject to an objective external standard or reasonableness.⁷¹² However, in most of the case law directly supporting such discretions the purpose of the contract of sale was related to both the parties’ businesses.⁷¹³ Therefore, the reasons for distinguishing between business-to-business consumer sales and pure consumer sales should be investigated. Generally, the distinction is based on the proposition that certain terms required for business efficacy in business-to-business consumer sales would be unacceptable in pure consumer sales.⁷¹⁴ Naudé argues that “the diversity of commercial transactions requires more flexible treatment than [pure consumer sales]”.⁷¹⁵ As shown earlier, price discretionary clauses are more necessary in contracts (especially supply agreements) between two business entities. In such contracts there is a greater need for price escalation clauses due to the continuing nature of the contract, and it would be impractical, time consuming and costly if the parties had to agree on every single price change.⁷¹⁶

It was also argued that it could be that the supplier is better equipped to determine what the price change should be. The consumer may not have the

⁷¹¹ The Dictionary Unit for SA English (ed) *SA Oxford dictionary* 586 sv “index”.

⁷¹² See para 4 5 2 2 *supra*. See further ch 3 paras 3 3 4 3(b) and 3 3 4 3(c).

⁷¹³ For cases dealing with the discretion to determine the price subject to an objective standard see *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) and *Stead v Conradie* 1995 2 SA 111 (A) 123 as discussed in ch 3 para 3 3 4 3(b). For cases dealing with the discretion to determine the price subject to reasonableness see *Dickinson & Fisher v Arndt & Cohn* 1909 30 NLR 172 and *Lichtheim v Stern* 1910 WLD 284 as discussed in ch 3 para 3 3 4 3(c).

⁷¹⁴ Naudé 2007 *SALJ* 139.

⁷¹⁵ *Ibid.*

⁷¹⁶ See ch 3 para 3 3 5 3(d).

necessary knowledge, skills or capabilities to make such an assessment.⁷¹⁷ This is especially true in pure consumer sales, where the consumer is acquiring the goods for a purpose unrelated to his or her business or profession. However, this places the consumer at a greater risk that the supplier would abuse this power, especially in standard-term contracts. The consumer in such a contract would not have the knowledge, skills or capabilities to assess the reasons for including the discretion.⁷¹⁸ This is especially true of the list of vulnerable persons listed in section 3.⁷¹⁹ This would make it very difficult for the consumer to prove that the discretion is an unfair term under section 48(1)(a)(ii). Furthermore, attacking the discretion would be a time consuming and costly endeavour that, in most instances, would exceed the price of the goods.⁷²⁰ Shifting the *onus* of proof to the supplier would mean that the supplier would have to provide evidence of the reasons for including the discretion.⁷²¹ This would put the court in a better position to assess whether the inclusion of the discretion is justified.⁷²² Therefore, it seems that there are good reasons for grey listing a discretion to determine the price in a pure consumer sale, even where such a discretion refers to an objective standard or reasonableness. If the court determines that the term is justified and fair, the consumer should then have the necessary information to attack the exercise of the discretion, if necessary. The consumer would be able to attack the exercise of the discretion on common-law grounds⁷²³ or in terms of section 48(1)(a)(i) of the CPA dealing with unfair prices.⁷²⁴

The last exception deals with the situation where a discretion to determine the price would be allowed where the supplier informed the consumer of it and the consumer has the right to resile from the contract immediately thereafter. There

⁷¹⁷

Ibid.

⁷¹⁸

Naudé 2009 SALJ 521.

⁷¹⁹

See para 4 3 2.

⁷²⁰

See ch 3 para 3 3 5 3(c).

⁷²¹

Naudé 2009 SALJ 520.

⁷²²

Ibid.

⁷²³

See ch 3 paras 3 3 4 3(b) and 3 3 4 3(c). The *onus* of proof would rest on the consumer to prove that the price determined by the supplier is unfair (see ch 3 para 3 3 5 3(b)).

⁷²⁴

See further para 4 5 3 *infra*. As the Act is silent on the burden of proof, the *onus* of proof would rest on the consumer.

seems to be nothing wrong with this exception as it provides the consumer with a way out of a transaction in which a discretionary power was granted and exercised, and the consumer does not wish to be bound to the determined price. This also seems to accord with the rules applicable to third-party price determinations, which could be applied to discretionary price determinations.⁷²⁵ However, there are two arguments to the contrary. First, our courts do not seem to favour such a right to resile when dealing with a discretionary power to determine the price.⁷²⁶ In *Diners Club SA v Thorburn*, the court distinguished between contracts of sale (which aim to define the rights and obligations of the parties once and for all) and contracts of lease (which can endure for an indefinite time and which aim to define the rights and obligations of the parties in the future).⁷²⁷ The court held that a right to amend the contract of sale would amount to a rewriting of the rights and obligations and would have to operate retrospectively, while a right to amend a contract of lease need not operate retrospectively but only for future rights and obligations.⁷²⁸ In such a case, the party would have the option to accept the amendment or to resile from the contract and therefore such a contract would not be void.⁷²⁹ It would seem that the court was of the view that a right to resile would make more sense in a continuing contract such as a lease agreement but not in a contract where the obligations are fixed at the conclusion of the contract, as in a contract of sale. Of course, there are contracts of sale where this argument would not apply, for example a supply agreement. There are also good reasons for allowing a right to resile where one of the parties may determine the price, based on the same considerations applicable to third-party price determinations.⁷³⁰ However, Kerr criticises such a right to resile because it leaves the aggrieved party with only two choices: He or she must agree to be bound to the change or resile from the

⁷²⁵ *Ibid.*

⁷²⁶ Otto 1998 TSAR 605.

⁷²⁷ *Diners Club SA (Pty) Ltd v Thorburn* 1990 2 SA 870 (C) 873–874.

⁷²⁸ *Idem* 874.

⁷²⁹ *Ibid.* The court referred to *Theron v Joynt* 1951 1 SA 498 (A) as authority. Kerr criticises the reference on the basis that the facts in *Theron v Joynt* was unusual and should not merely be applied to an ordinary commercial contract (see Kerr *Contract* 134).

⁷³⁰ The right to resile in third-party price determination is based on the argument that the parties should have a choice not to become involved in the time-consuming and expensive endeavour of obtaining the court's determination (cf ch 3 para 3 3 4 3(c)).

contract.⁷³¹ Therefore, the aggrieved party would not be able to keep the contract in place and attack the reasonableness of the change.⁷³² This is especially true where it would be difficult for the consumer to acquire the goods from another supplier or to do so on better terms.⁷³³ Therefore, it is submitted that there may be circumstances where such a right to resile could also be considered unfair. This is supported by Naudé's proposal that the specific exceptions should not be interpreted to mean that such terms would always be considered fair, but that they should be subject to the test for unfairness as with any other term.⁷³⁴

Finally, it should be noted that regulation 44(2)(a) states that the list in regulation 44(3) is indicative only, and such terms could be fair depending on the facts of the case. The list is also non-exhaustive, and other terms may be unfair for the purposes of section 48 of the Act.⁷³⁵ Furthermore, such terms are still subject to the provisions of sections 48–52 of the Act.⁷³⁶ The test for unfairness must therefore still be considered.

4 5 2 4 *The test for unfairness*

The test for unfairness is set out in section 48(2). Section 48(2)(a) provides that a term is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than a consumer. Section 48(2)(b) states that if a term of an agreement is so adverse to the consumer as to be inequitable, the term will be unfair, unreasonable or unjust. As pointed out by Naudé, “inequitable” and “unfair” are synonyms and as such section 48(2)(b) does not provide any real guidance to test whether a term is unfair.⁷³⁷ However, the test in section 48(2)(a) bears much resemblance to the public policy consideration of simple

⁷³¹ Kerr *Contract* 135.

⁷³² *Ibid.*

⁷³³ See further para 4 5 2 5(i) *supra*.

⁷³⁴ Naudé 2007 *SALJ* 153 referring to the English and Scottish Law Commission Report.

⁷³⁵ Reg 44(2)(b).

⁷³⁶ Reg 44(2)(c).

⁷³⁷ Naudé 2009 *SALJ* 516. See also Sharrock 2010 *SA Merc LJ* 308; Sharrock *Business law* 590.

justice between man and man. As mentioned previously, this policy consideration provides that where a term goes further than what would reasonably be necessary to protect the interests of the party in whose favour it is, this could indicate that the term is contrary to public policy.⁷³⁸ This is supported by Naudé's view that the court should consider the concepts of good faith and fair dealing when assessing whether a term is unfair.⁷³⁹ She refers to Lubbe's view of the role of good faith in public policy, which requires that "the pursuit of the supplier's own interest 'must be tempered by a reasonable measure of concern' for those of the consumer".⁷⁴⁰ She further argues that the consumer's right to dignity in a contractual relationship incorporates the same standard.⁷⁴¹

4 5 2 5 Factors listed in section 52(2) to consider when assessing unfairness

When determining whether a term is unfair, the court must consider all the factors listed in section 52(2). These factors are considered below.

(a) The fair value of the goods in question

The court must consider the fair value of the goods in question.⁷⁴² How this factor should guide the court to determine whether the unilateral price determination is unfair is unclear. However, once the price has been determined by the supplier, this factor would be relevant in determining whether the price determined by the supplier is fair.⁷⁴³

⁷³⁸ Cf ch 3 para 3 3 5 3(b).

⁷³⁹ Naudé 2009 *SALJ* 517.

⁷⁴⁰ *Idem* 518. See also Jacobs *et al* 2010 *PELJ* 355 n 364 referring to the role of reasonableness and fairness in public policy when discussing s 48 of the CPA.

⁷⁴¹ Naudé 2009 *SALJ* 518. However, s 48(2) states that it does not limit the generality of s 48(1). Therefore, a term may be unfair even if it is not excessively one-sided in favour of the supplier or any other person other than the consumer (Sharrock 2010 *SA Merc LJ* 308).

⁷⁴² S 52(2)(a).

⁷⁴³ See further para 4 5 3 2 *infra*.

(b) The nature of the parties

The nature of the parties, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position must be considered.⁷⁴⁴ As discussed earlier, the relevant bargaining positions of the parties alone should not render the term fair (where there is equal bargaining powers) or unfair (where one party has a greater bargaining power than the other party).⁷⁴⁵ Other factors that should be considered are whether the consumer had a realistic opportunity to obtain independent advice, make an informed judgement about the transaction or conclude a contract with another supplier on better terms.⁷⁴⁶

When considering the education, experience and sophistication of the consumer, the court should consider whether the consumer is a vulnerable person as envisaged in section 3 of the CPA.⁷⁴⁷ Furthermore, the distinction between business-to-business consumer sales and pure consumer sales is important in this context. As mentioned above, a price discretion provided for in a pure consumer sale is more likely to be unfair than a price discretion included in a business-to-business sale.⁷⁴⁸

(c) The circumstances of the agreement

In terms of section 52(2)(c), the circumstances of the agreement that existed or were reasonably foreseeable when the contract was concluded must be considered. Sharrock argues that these circumstances should be limited to circumstances that both parties knew about or should reasonably have foreseen.⁷⁴⁹ He further argues that a term should not be unfair merely because a change in circumstances makes it more burdensome or costly for the consumer to comply with it.⁷⁵⁰ With a discretionary power to determine or adjust

⁷⁴⁴ S 52(2)(b).

⁷⁴⁵ See ch 3 para 3 3 5 3(c) *supra*. See further Sharrock 2010 *SA Merc LJ* 310–311.

⁷⁴⁶ Sharrock 2010 *SA Merc LJ* 311.

⁷⁴⁷ See para 4 3 2 *supra*.

⁷⁴⁸ See para 4 5 2 3 *supra*.

⁷⁴⁹ Sharrock 2010 *SA Merc LJ* 311.

⁷⁵⁰ *Ibid.*

the price, it would reasonably have been foreseeable that the price could be adjusted upwards by the seller, and so an increase in the price should not render the term unfair *per se*.

(d) The conduct of the supplier and the consumer

The CPA also requires that the conduct of the seller and the buyer must be investigated.⁷⁵¹ The term “conduct” is not defined in the Act and it would seem that the court would be able to consider any conduct by the parties.⁷⁵²

(e) The negotiations between the supplier and the consumer

Section 52(2)(e) requires the court to consider whether there was any negotiation between the supplier and the consumer and the extent of such negotiation.⁷⁵³ Sharrock argues that the court should distinguish between negotiated and non-negotiated terms.⁷⁵⁴ Naudé also supports such a distinction,⁷⁵⁵ especially in business-to-business consumer sales.⁷⁵⁶ She is of the view that the test for fairness in business-to-business consumer sales should be limited to standard terms.⁷⁵⁷ She argues that the common law and constitutional control mechanisms provide ample remedies to deal with core and negotiated terms in business-to-business consumer sales.⁷⁵⁸ Where a discretionary power to determine the price was negotiated between the parties in a business-to-business sale, it would indicate that such a discretion is the result of bargaining between the parties and therefore fair. As our law does not

⁷⁵¹ S 52(2)(d).

⁷⁵² Sharrock 2010 *SA Merc LJ* 312.

⁷⁵³ Jacobs *et al* 2010 *PELJ* 361 are of the opinion that this factor will amend the parol evidence rule as the court will need to look at evidence outside the terms of the contract. See also Levenstein & Barnett “Fair and just terms: let’s leave it to the courts!” 2010 available at http://www.werksmans.co.za/content/2010%2011%20CPA%20fair%20and%20just%term_s_EL_and_LB_FINAL.pdf (accessed 10 March 2011).

⁷⁵⁴ Sharrock 2010 *SA Merc LJ* 307.

⁷⁵⁵ Naudé 2009 *SALJ* 532–533.

⁷⁵⁶ *Idem* 522.

⁷⁵⁷ *Ibid.*

⁷⁵⁸ *Ibid.*

provide for unfettered price discretions, such a negotiated discretion should result in a discretion limited by objective standards or reasonableness.⁷⁵⁹

This approach accords with the differential treatment of price discretionary powers in business-to-business sales and pure consumer sales as discussed above.⁷⁶⁰

(f) Whether the consumer was required to do anything not reasonably necessary for the legitimate interests of the supplier

The court must consider whether, because of the seller's conduct, the buyer was required to do anything not reasonably necessary for the legitimate interests of the seller.⁷⁶¹

(g) The extent to which the agreement satisfied plain language requirements
The court has to consider whether the agreement satisfies the plain language requirements set out in section 22.⁷⁶² As shown previously, if a discretion to determine the price would be included in a display of the price or in the sales record of the transaction, it would have to meet the requirements for plain language.⁷⁶³ Where the discretion to determine the price is included in a written contract of sale, it must also meet the requirements of plain language.⁷⁶⁴ However, it would seem that non-compliance does not render the term invalid, but is merely a factor that must be considered to determine whether the term is unfair.⁷⁶⁵

⁷⁵⁹ See para 4 5 2 4 *supra*. See further ch 3 paras 3 3 4 3(b), 3 3 4 3(c) and 3 3 5 3(b).

⁷⁶⁰ See para 4 5 2 3 *supra*.

⁷⁶¹ S 52(2)(f).

⁷⁶² S 52(2)(g).

⁷⁶³ See para 4 4 3 *supra*.

⁷⁶⁴ See para 4 5 1 *supra*.

⁷⁶⁵ See para 4 5 2 5(g) *supra*.

(h) Whether the consumer was aware or should have been aware of the relevant term

Section 52(2)(h) requires that the court consider:

whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any –

- (i) custom of trade; and
- (ii) any previous dealings between the parties.

The question is whether the consumer knew or reasonably ought to have known of the seller's discretion to determine the price, having regard to customs of trade and the previous dealings between the parties.

The meaning of “custom of trade” is unclear in South African law.⁷⁶⁶ It could be argued that the term refers to what is known as a *custom* or *trade usage* under South African common law.⁷⁶⁷ Generally, there are four requirements for the existence of a custom or trade usage, namely, it must: have existed for a long time; be uniformly observed by the community; be reasonable, and be certain.⁷⁶⁸ There are two further requirements for a trade usage to be incorporated as a term in a contract.⁷⁶⁹ First, it must not conflict with the other

⁷⁶⁶ This provision was copied from Schedule 2 to the United Kingdom Unfair Contract Terms Act 1977. Schedule 2 contains a list of factors that must be considered to determine whether an exclusion or limitation of liability clause is reasonable or not. In English law, a custom of trade is defined as “a particular rule which has existed either actually or presumptively from time immemorial in a particular locality and obtained the force of law in that locality although contrary to, or not consistent with, the general common law of the realm” (MacKay (ed) *Halsbury's laws of England Vol 12(1)* para 601).

⁷⁶⁷ There is no difference between a custom and a trade usage under South African law. See *Catering Equipment Centre v Friesland Hotel* 1967 4 SA 336 (O) 338 as approved by *Tolgaz Southern Africa v Solgas (Pty) Ltd; Easigas (Pty) Ltd v Solgas (Pty) Ltd* 2009 4 SA 37 (W) para 29; Van Huyssteen *et al Contract* 136. This is different to the situation in English law where a distinction is made between customs and usage (see *Catering Equipment Centre v Friesland Hotel supra* 338–339; MacKay (ed) *Halsbury's laws of England Vol 12(1)* para 605).

⁷⁶⁸ *Catering Equipment Centre v Friesland Hotel supra* 338; *Tolgaz Southern Africa v Solgas supra* para 30. See also Otto 1998 *TSAR* 618; Sharrock *Business law* 31.

⁷⁶⁹ Notoriety is also sometimes mentioned as a requirement (see eg *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 2 SA 642 (C) 645). However, it has been argued that it is merely a different expression of the requirement that the practice should be uniformly

terms of the contract.⁷⁷⁰ Secondly, it may not be contrary to the law (ie the parties are attempting to alter a rule of law which they cannot alter by agreement).⁷⁷¹

It has already been shown that in certain business-to-business consumer sales there could be a need to include discretionary powers to determine the price in the form of price escalation clauses.⁷⁷² In *Westinghouse Brake & Equipment v Bilger Engineering* the seller indicated that almost all of its clients accepted its escalation clause and were prepared to accept any increase in the price.⁷⁷³ This would therefore indicate that in certain business-to-business consumer sales price escalation clauses could possibly form part of the trade usage of that specific trade and could reasonably be expected in such contracts. However, it is submitted that an unfettered discretion would not be expected, but rather a limited discretion referring to some external standard or reasonableness.⁷⁷⁴

Furthermore, the dealings between the parties could indicate the existence of such knowledge or that such discretion should reasonably have been known to the consumer. Sharrock proposes that the court should also consider the information supplied by the supplier to the consumer before a contract is concluded and whether the consumer had a reasonable opportunity to consider this information and take advice where necessary.⁷⁷⁵ In pure consumer sales where the consumer is not acting in the course of his or her business or

observed (Hosten “Custom and usage” in Joubert (ed) *LAWSA Vol 5 Part 2* para 395). Notoriety refers to the requirement that “the party concerned is only bound by the usage if he or she had knowledge of it or if it was so notorious that he or she must be presumed to have had knowledge of it and to have intended to include it in the contract” (Hosten “Custom and usage” in Joubert (ed) *LAWSA Vol 5 Part 2* para 395).

⁷⁷⁰ *Golden Cape Fruits v Fotoplate supra* 645. See also Hosten “Custom and usage” in Joubert (ed) *LAWSA Vol 5 Part 2* para 395.

⁷⁷¹ *Golden Cape Fruits v Fotoplate supra* 645. See also Hosten “Custom and usage” in Joubert (ed) *LAWSA Vol 5 Part 2* para 395. For example, this requirement would exclude an unfettered discretion to determine the price, which is not allowed under South African law.

⁷⁷² See ch 3 para 3 3 5 3(d). See also para 4 5 2 3 *supra*.

⁷⁷³ *Westinghouse Brake & Equipment v Bilger Engineering* 1986 2 SA 555 (A) 574.

⁷⁷⁴ This is because South African law does not allow for unfettered price discretions as there does not seem to be a need for the supplier to reserve an unlimited discretion to determine or adjust the price (cf ch 3 paras 3 3 5 3(b) and 3 3 5 3(d)).

⁷⁷⁵ Sharrock 2010 *SA Merc LJ* 313.

profession, and is more ignorant of the customs of trade that could be applicable, these considerations would be particularly relevant.

- (i) The amount for which the consumer could obtain the goods from a different supplier

The court must consider the amount for which, and the circumstances under which, the consumer could have bought identical or equivalent goods from a different supplier.⁷⁷⁶ If the consumer could have acquired the same goods for the same price without the term, this would indicate that the consumer knew or should have known that he or she could acquire the goods on better terms from a different supplier.⁷⁷⁷ Consequently, this would not indicate that the term was unfair. This could be the case where the consumer could obtain the goods without the inclusion of the discretionary power to adjust the price or with the discretionary power but subject to more limitations. However, if the consumer could not obtain the same goods on better terms from another supplier, it indicates that the consumer did not have a choice but to contract on these terms to acquire the goods.⁷⁷⁸ This could be an indication that the term is unfair.

- (j) Whether the goods were manufactured or adapted to the special order of the consumer

Finally, the court must consider whether the goods were manufactured, processed or adapted to the special order of the buyer.⁷⁷⁹ It could be necessary for the supplier to include a discretionary power to adjust the price to allow for uncertainties in respect of the manufacture, processing or adaptation of the goods and, therefore, such a discretion could be fair. However, there could be other reasons why the supplier would need to include a discretionary power to determine the price, and any such reasons should also be considered.⁷⁸⁰

⁷⁷⁶ S 52(2)(i).

⁷⁷⁷ Sharrock 2010 SA Merc LJ 313.

⁷⁷⁸ *Ibid.*

⁷⁷⁹ S 52(2)(j).

⁷⁸⁰ See further para 4 5 2 6 *infra*.

4 5 2 6 Other relevant factors not listed in section 52(2)

Section 52(2) does not state whether the factors listed constitute an exhaustive list or whether other relevant factors may also be considered.⁷⁸¹ The list of factors in section 52(2) has been criticised as dealing more with *procedural* fairness than *substantive* fairness.⁷⁸² Consequently, it has been argued that the list should not be considered a closed one and that the court should be able to consider any other relevant factors.⁷⁸³

Other factors could also be considered with reference to terms dealing with the unilateral determination of price. Most noteworthy of these are the “balance of the parties’ interests” proposed by Naudé.⁷⁸⁴ This has already been addressed to some extent when discussing the test for unfairness and would entail that the purpose and reasons for the term must be weighed against the interests of the consumer.⁷⁸⁵ However, this would also include an investigation into whether another provision of the contract confers a benefit on the consumer to counterbalance the detriment caused by the term.⁷⁸⁶ This could be a right to resile from the contract after the supplier has exercised the discretion as envisaged by the CPA Regulations.⁷⁸⁷ Alternatively, in a business-to-business consumer sale, it may be important for the consumer’s business to ensure a steady supply of goods from the supplier and that this can be achieved only by including a price indexation clause, which in turn could include a discretionary power.⁷⁸⁸ Another relevant factor could be whether the supplier could be expected to incur greater costs if the term was omitted from the contract.⁷⁸⁹

⁷⁸¹ Sharrock 2010 *SA Merc LJ* 314.

⁷⁸² *Idem* 309–310; Sharrock *Business law* 591; Naudé 2009 *SALJ* 529.

⁷⁸³ Sharrock 2010 *SA Merc LJ* 314. This is especially true where the court must consider whether the price is unfair (cf para 4 5 3 2 *infra*).

⁷⁸⁴ Naudé 2009 *SALJ* 530.

⁷⁸⁵ See para 4 5 2 4.

⁷⁸⁶ Sharrock 2010 *SA Merc LJ* 314.

⁷⁸⁷ See para 4 5 2 3 *supra*.

⁷⁸⁸ See ch 3 para 3 3 5 3(d).

⁷⁸⁹ Sharrock 2010 *SA Merc LJ* 314.

In such a case, it is submitted that where the test of unfairness in section 48(2) requires other relevant factors not included in section 52(2) to be considered, the court should be obliged to consider such factors.⁷⁹⁰

4 5 2 7 Consequences of unfair terms

Section 52(1) provides that, if the court is dealing with a matter in terms of section 48 and the Act does not provide for a remedy sufficient to correct the unfairness, the court must consider the factors set out in section 52(2). Thereafter, the court may make an order contemplated in section 52(3).⁷⁹¹ Section 52(3) provides for different remedies where the court determines that an agreement (in whole or in part) is unfair. The court may declare the agreement (in whole or in part) unfair and make any further order the court considers just and reasonable in the circumstances. This may include an order to restore money to the consumer, to compensate the consumer for losses or expenses related to the transaction or the court proceedings, or requiring the supplier to cease or alter any practice or document to avoid a repetition of the supplier's conduct.⁷⁹²

4 5 2 8 Conclusion

It would seem that it is more likely that a discretion to determine the price would seem unfair in a pure consumer sale than in a business-to-business consumer sale. However, whether the discretion would be unfair would depend on various factors and considerations, including the circumstances and facts of the specific case. Therefore, it is possible that a discretionary power to determine the price would be considered fair in a pure consumer sale under specific circumstances. Still, the distinction between business-to-business consumer sales and pure

⁷⁹⁰ Van Eeden *Guide to the CPA* 184.

⁷⁹¹ The exact meaning of this provision is unclear. Naudé 2009 *SALJ* 525–526 questions whether this means that the consumer first has to approach the alternative dispute resolution agents or the provincial consumer courts before approaching the ordinary court. See also Sharrock 2010 *SA Merc LJ* 316.

⁷⁹² Ss 52(3)(b)(i)–(iii).

consumer sales is welcomed as it provides a good starting point for the courts to assess whether a discretionary power to determine the price would be unfair.

Even if the discretionary power to determine the price survives the unfairness test, that is not the end of the enquiry, because the CPA also prohibits an unfair price. This is considered below.

4 5 3 Right to a fair, reasonable and just price

4 5 3 1 Introduction

At common law the parties are free to agree upon any amount to be paid as the price.⁷⁹³ The price does not have to reflect the value of the thing at the time the contract is concluded.⁷⁹⁴ This is, of course, subject to any statute to the contrary.⁷⁹⁵ Now, under section 48(1)(a)(i) of the CPA, a seller may not offer to sell, sell or enter into an agreement to sell, any goods at a price that is unfair, unreasonable or unjust. If the discretion granted to the seller to determine the price is not an unfair term, the question arises whether the price determined by the supplier would be considered an unfair price in terms of section 48(1)(a)(i).

4 5 3 2 The test for unfairness of price

The test of unfairness contained in section 48(2) is not applicable to price,⁷⁹⁶ but the test that must be used is not provided for in the CPA.⁷⁹⁷ The courts will therefore have to create a test that must be applied when determining whether the price is unfair.⁷⁹⁸ However, the factors listed in section 52(2) must be considered.⁷⁹⁹ As already mentioned above, the factors listed in section 52(2) deal predominantly with procedural fairness and not substantive fairness, but

⁷⁹³ Kerr *Sale* 30.

⁷⁹⁴ *Ibid.*

⁷⁹⁵ *Ibid.*

⁷⁹⁶ Sharrock 2010 *SA Merc LJ* 308; Van Eeden *Guide to the CPA* 184.

⁷⁹⁷ *Idem* 185.

⁷⁹⁸ *Idem* 186.

⁷⁹⁹ S 52(2)(a) refers to s 48 as a whole, which would include s 48(1)(a)(i) prohibiting an unfair price.

some of them could provide some guidance as to when a price would be considered unfair.⁸⁰⁰

As mentioned above, the court must consider the fair value of the goods in question.⁸⁰¹ Van Eeden proposes that the court will first have to determine the fair price for the goods, which would refer to the market price of the goods.⁸⁰² However, even if the price exceeds the market price for the goods it should not necessarily render the price unfair, because this would lead to uncertainty.⁸⁰³

Furthermore, the market price is not always an indication of the fair price for the *goods in question*. The court would have to consider other factors to determine the fair price for the *specific goods in question*. For example, the court should also refer to the amount for which and the terms on which the consumer could obtain the goods from a different supplier,⁸⁰⁴ and consider whether the goods were manufactured, processed or adapted to the special order of the buyer.⁸⁰⁵ More importantly, the court would need to consider the other terms of the contract.⁸⁰⁶ The court would have to consider the limitations and standards in the contract dealing with the discretionary power to determine the price.⁸⁰⁷ Where the court has decided that the standard of *arbitrio boni viri* should apply to the exercise of the discretion, the tests and guidelines discussed in chapter 3 should be considered.⁸⁰⁸

The question now arises when the price (as determined above) could be attacked. Must the price be *merely* unfair or *manifestly* unfair? It has been shown that in the context of a discretionary power to determine the price, it

⁸⁰⁰ See para 4 5 2 6 *supra*.

⁸⁰¹ See para 4 5 2 5(a) *supra*.

⁸⁰² Van Eeden *Guide to the CPA* 186.

⁸⁰³ Naudé 2009 *SALJ* 533; Sharrock 2010 *SA Merc LJ* 310.

⁸⁰⁴ See para 4 5 2 5(i) *supra*.

⁸⁰⁵ See para 4 5 2 5(j) *supra*.

⁸⁰⁶ Van Eeden *A Guide to the CPA* 186. Therefore, s 52(2) should not be seen as an exhaustive list of factors when assessing whether the price is fair (cf para 4 5 2 6 *supra*).

⁸⁰⁷ See ch 3 para 3 3 4 3(b).

⁸⁰⁸ See ch 3 para 3 3 4 3(c).

would seem appropriate to require that the price should be manifestly unfair.⁸⁰⁹ This is due to the similarities between price discretions and third-party price determinations.⁸¹⁰ Naudé argues that this principle should be extended to apply to all prices attacked in terms of section 48(1)(a)(i).⁸¹¹ She is of the view that the test for fairness in consumer sales should be limited to standard terms, and not be extended to core or negotiated terms such as the price.⁸¹² Therefore, she prefers that the courts refrain from interfering with the price unless the price is manifestly unjust.⁸¹³ She argues this, despite the fact that in the original version of the Consumer Protection Bill the word “manifestly” was contained in section 48(1)(a)(i), but it was omitted in a subsequent draft.⁸¹⁴

4 5 3 3 Conclusion

It is submitted that in the absence of a test in the Act to determine whether a price is unfair, the courts will have to look to existing principles. The Act requires that the factors listed in section 52(2) should be considered, but they have limited value. Further guidelines can be found in the existing principles that should apply to determine whether a discretion to determine the price was exercised reasonably. This would include the explicit and implied terms of the contract, factors usually considered by the court when dealing with discretionary powers and the application of the rules dealing with third-party price determinations *mutatis mutandis*.⁸¹⁵

⁸⁰⁹ *Ibid.*

⁸¹⁰ *Ibid.*

⁸¹¹ Naudé 2009 *SALJ* 533. Therefore, including prices specifically agreed between the parties.

⁸¹² *Idem* 532.

⁸¹³ *Idem* 533.

⁸¹⁴ S 48(1)(a)(i) of the Consumer Protection Bill [B19–2008]. See also Naudé 2009 *SALJ* 532.

⁸¹⁵ See ch 3 para 3 3 4 3(c).

4 5 4 Prohibited terms

Section 51 of the CPA contains a list of prohibited terms,⁸¹⁶ two of which should be discussed. Section 51(1)(a)(i) of the CPA prohibits a term, the general purpose of which is to defeat the purposes and policy of the Act.⁸¹⁷ Section 51(1)(b) prohibits a term that directly or indirectly purports to waive or deprive a consumer of a right in terms of the Act, avoids a supplier's obligation of any provision of the CPA or authorises the supplier to do anything that is unlawful or fail to do anything that is required in terms of the CPA. Naudé criticises these terms as "unnecessarily verbose".⁸¹⁸ Furthermore, these terms do not take the issue any further. Whether a discretion to determine the price falls foul of either these provisions will depend on whether the discretion would be considered unfair in terms of section 48. If the discretion survives the test for unfairness in section 48, it would not be possible to argue that it defeats the purposes of the Act or deprives the consumer of a right in terms of the Act.

4 6 CONCLUSION

It is clear that the CPA has made substantial amendments to the common-law principles applicable to contracts of sale. Specifically, the common-law rules dealing with certainty of price have been amended substantially and this will influence the rules governing the unilateral determination of price.

More importantly, the courts are obliged to develop the common law to improve the realisation and enjoyment of consumer rights generally and, in particular, the position of vulnerable persons. It was shown that the distinction between pure consumer sales and business-to-business sales might require that the common-law principles dealing with the unilateral determination of price might need to be adapted to cater for this distinction in order to promote the spirit and purpose of the Act and to strike a balance between the interests of consumers

⁸¹⁶ These terms are also known as "blacklist" terms (see Naudé 2009 *SALJ* 519). See also Naudé 2006 *Stell LR* 381; Naudé 2007 *SALJ* 130; Sharrock 2010 *SA Merc LJ* 316.

⁸¹⁷ See para 4 3 2 *supra* for the purpose of the CPA.

⁸¹⁸ Naudé 2009 *SALJ* 519.

and businesses. In the next chapter, the principles and rules governing the unilateral determination of price in consumer sales in English law are investigated to provide further guidance in this respect.

CHAPTER 5 UNILATERAL PRICE DETERMINATION IN ENGLISH LAW

5 1 INTRODUCTION

In *NBS Boland Bank v One Berg River Drive* the South African Supreme Court of Appeal questioned – but did not decide – whether the rule against the unilateral determination of price should still form part of South African law.⁸¹⁹ Specifically, the court stated that the views of the Roman-Dutch writers are “not only illogical but also *sadly out of step with modern legal systems*”.⁸²⁰ In chapter 2 it was shown that the views of the Roman-Dutch writers were illogical. In chapters 3 and 4 the South African legal position was investigated and analysed, and it was shown that various uncertainties exist in respect of the rule. This is especially true in consumer sales (ie contracts of sale governed by the Consumer Protection Act (“the CPA”)).⁸²¹

This chapter investigates the relevant principles of English law in order to answer the second part of the Supreme Court of Appeal’s question in respect of consumer sales.

5 2 GENERAL PRINCIPLES OF THE LAW OF PURCHASE AND SALE

The contract of sale is one of the most important and commonly used contracts in English law.⁸²² A sale is defined as “the transfer by mutual assent of the ownership of a thing from one person to another for a money price”.⁸²³ The English law of contract is not based on Roman law, but on the common law of England.⁸²⁴ It is important to note, therefore, that there is no general or

⁸¹⁹ *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 4 SA 928 (SCA) para 16.

⁸²⁰ *Ibid*; my emphasis.

⁸²¹ Act 68 of 2008. See ch 4 para 4 3 4 2.

⁸²² Tookey *Commercial law* 9.

⁸²³ MacKay (ed) *Halsbury’s laws of England Vol 41* para 1.

⁸²⁴ Whincup *Contract* 1. The term “common law” in this context refers to the law as laid down in case law (also referred to as “judge-made law”).

underlying principle of good faith in English law.⁸²⁵ Specifically, there is no general duty on contractual parties “to exercise in good faith their rights arising under the contract”.⁸²⁶ When the term “bona fides” or “good faith” is used in English law, it usually denotes honesty.⁸²⁷

English law provides for extensive consumer protection and this is discussed below;⁸²⁸ however, the general contract-law principles applicable to price in contracts of sale are considered first.

The sale of goods in English law is governed by the Sale of Goods Act 1979 (“the Sale of Goods Act”).⁸²⁹ Most of the common-law rules governing the sale of goods were incorporated into the Sales of Goods Act 1893,⁸³⁰ which, in turn, was repealed and replaced by the Sales of Goods Act.⁸³¹ However, section 62(2) of the Sales of Goods Act provides that the rules of the common law do apply to contracts for the sale of goods, provided they are not inconsistent with any of the provisions of the Sale of Goods Act.⁸³²

Section 2(1) of the Sale of Goods Act defines a contract of sale of goods as “a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price”. Therefore, a contract for the sale of goods in English law has a definition similar to that of a contract

⁸²⁵ MacKay (ed) *Halsbury’s laws of England Vol 9(1)* para 612; Cartwright *Contract* 58; Whincup *Contract* 147; Piers 2011 *Tul Eur & Civ LF* 130.

⁸²⁶ Cartwright *Contract* 59; Whincup *Contract* 147.

⁸²⁷ MacKay (ed) *Halsbury’s laws of England Vol 9(1)* para 612. However, this is not always the case (see para 5 6 1 5(a) *infra*). See also McKendrick *Contract* 497 and MacLeod *Consumer sales* 439.

⁸²⁸ See para 5 4 *infra*.

⁸²⁹ The Sale of Goods Act applies to all contracts of sale of goods made on or after 1 January 1894 (s 1(1)). See also Beale (ed) *Chitty on contracts: Specific contracts* para 43–001.

⁸³⁰ MacKay (ed) *Halsbury’s laws of England Vol 41* para 5; Fuller *Purchasing contracts* 49; MacLeod *Consumer sales* 1–2.

⁸³¹ The Act came into full force on 1 Jan 1980 (s 64(2)) and has been amended by the Sale of Goods (Amendment) Act 1994, the Sale and Supply of Goods Act 1994, the Sale of Goods (Amendment) Act 1995 and the Sale and Supply of Goods to Consumers Regulations 2002. See also Beale (ed) *Chitty on contracts: Specific contracts* para 43–001; Fuller *Purchasing contracts* 49; MacLeod *Consumer sales* 1.

⁸³² See further MacKay (ed) *Halsbury’s laws of England Vol 41* para 6.

of sale under South African law.⁸³³ Furthermore, price is an essential element of the contract of sale.⁸³⁴ From the definition of a contract of sale, it should be clear that the Sale of Goods Act does not govern contracts in terms of which goods *and* services are delivered.⁸³⁵ Furthermore, the term “goods” is defined as all personal chattels⁸³⁶ (excluding things in action⁸³⁷ and money), and includes emblements, industrial growing crops, and things attached to or part of the land but which will be severed before the sale.⁸³⁸ An undivided share in goods is also governed by the Act.⁸³⁹ As is the case in South African law, no formalities are required for the sale of goods – there are, however, exceptions.⁸⁴⁰

The sale of land is not governed by the Sale of Goods Act. The sale of land, including a disposition of an interest in land,⁸⁴¹ is governed by the common law⁸⁴² and the Law of Property (Miscellaneous Provisions) Act 1989. The contract for the sale of land must identify the parties, the property and the interest being sold, and the consideration for which it is sold (ie the price).⁸⁴³ The price is therefore an essential element of a contract for the sale of land.⁸⁴⁴

⁸³³ See ch 3 para 3.2. However, the Sale of Goods Act differs from South African law as it distinguishes between two types of contract of sale, namely a sale and an agreement to sell. S 2(4) provides that a sale is where the goods are transferred under the contract from the seller to the buyer. S 2(5) provides that an agreement to sell is where the goods are transferred at a future time or subject to a condition to be fulfilled after the conclusion of the contract. S 2(6) provides that an agreement to sell “becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred”. See further Beale (ed) *Chitty on contracts: Specific contracts* para 43–009; MacKay (ed) *Halsbury’s laws of England Vol 41* paras 27–28.

⁸³⁴ *May and Butcher Ltd v R* [1934] 2 KB 17 21. See also MacKay (ed) *Halsbury’s laws of England Vol 41* para 56 n 1.

⁸³⁵ Such contracts are governed by the Supply of Goods and Services Act 1982.

⁸³⁶ Personal chattels refer to “any tangible movable property except money”: Beale (ed) *Chitty on contracts: Specific contracts* para 43–005 n 22.

⁸³⁷ Things in action refer to shares, insurance policies, negotiable instruments and industrial property (Beale (ed) *Chitty on contracts: Specific contracts* para 43–005 n 22).

⁸³⁸ S 61(1) *sv* “goods”.

⁸³⁹ S 2(2).

⁸⁴⁰ S 4(1). For example, certain conditional sale agreements and credit-sale agreements are subject to certain formalities if they are governed by the Consumer Credit Act 1974. See further Beale (ed) *Chitty on contracts: Specific contracts* para 43–022 n 103.

⁸⁴¹ S 2(6) defines any “interest in land”, “any estate, interest or charge in or over land”.

⁸⁴² MacKay (ed) *Halsbury’s laws of England Vol 42* para 23.

⁸⁴³ *Idem* para 34.

⁸⁴⁴ *Milnes v Gery* (1807) 14 Ves 400 406.

A contract for the sale of an interest in land must be in writing, must incorporate all the terms that the parties have agreed in one document (or where contracts were exchanged in each document),⁸⁴⁵ and must be signed by or on behalf of both the parties.⁸⁴⁶

5 3 UNILATERAL DETERMINATION OF PRICE

5 3 1 The requirement of certainty in contracts

As is the case in South African law, the parties must agree on all the material aspects of the agreement. The material aspects must be objectively certain or capable of being ascertained without any further agreement by the parties being necessary.⁸⁴⁷ If the material aspects cannot be determined without further agreement between the parties, the contract is void for uncertainty.⁸⁴⁸

5 3 2 The requirement of certainty of price

As the price is an essential element of a contract of sale, it must be certain. In respect of sales of goods, section 8(1) of the Sale of Goods Act sets out the requirement for the certainty of price:

The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.

The price may therefore be fixed in the contract itself or may be left to be fixed in a manner agreed upon by the contract, or even determined by the course of dealing between the parties. If the parties do not determine the price in the manner described in section 8(1) above, the buyer is obliged to pay a

⁸⁴⁵ S 2(1).

⁸⁴⁶ S 2(3). See further MacKay (ed) *Halsbury's laws of England Vol 9(1)* para 624; MacKay (ed) *Halsbury's laws of England Vol 42* para 29.

⁸⁴⁷ *May and Butcher Ltd v R supra* 21. See also MacKay (ed) *Halsbury's laws of England Vol 9(1)* para 667; *Cartwright Contract* 110; *MacLeod Consumer sales* 378.

⁸⁴⁸ *May and Butcher v R supra* 21. MacKay (ed) *Halsbury's laws of England Vol 9(1)* para 667; *Cartwright Contract* 110.

reasonable price.⁸⁴⁹ Section 8(3) provides that what would be considered a reasonable price would depend on the facts and circumstances of the specific case. However, where the parties conclude a contract but agree that the price will be agreed in the future, the contract is usually regarded as unenforceable (the so-called “agreement to agree”).⁸⁵⁰ The parties may agree that a third party may determine the price.⁸⁵¹ If the third party does not determine the price, the contract is avoided.⁸⁵² However, if the third party is prevented from making the valuation due to the fault of either of the parties, the party not at fault may institute an action for damages against the party at fault.⁸⁵³ A valuation made by a third party is valid except in cases of fraud, collusion and where it can be shown that the valuation is based on a wrong principle.⁸⁵⁴

A contract for the sale of land must state either the consideration in the contract⁸⁵⁵ or how it should be ascertained.⁸⁵⁶ Where the parties have not agreed on the consideration or how it should be ascertained, a reasonable price will not be implied.⁸⁵⁷ This would include sales where the parties agree that the price would be negotiated or agreed between them at a later stage.⁸⁵⁸ As in the

⁸⁴⁹ S 8(2).

⁸⁵⁰ *May and Butcher v R supra* 17, 20–21; *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 300–301. See further Tookey *Commercial law* 14; Beale (ed) *Chitty on contracts: General principles* para 2–113; Dobson & Stokes *Commercial law* 19; Peel *Contract* para 2–085; Woodroffe & Lowe *Consumer law* para 6.48.

⁸⁵¹ S 9(1).

⁸⁵² *Ibid.* However, the contract will be valid, if on a proper construction thereof, it appears that a reasonable price was intended and the “valuation is merely convenient machinery for ascertaining the price” (see MacKay (ed) *Halsbury’s Laws of England Vol 41* para 60 and the authorities listed in n 8).

⁸⁵³ S 9(2).

⁸⁵⁴ Beale (ed) *Chitty on contracts: Specific contracts* para 43–041 and the authorities listed in n 161; Bridge (ed) *Benjamin’s sale of goods* para 2–051 and the authorities listed in n 304.

⁸⁵⁵ MacKay (ed) *Halsbury’s Laws of England Vol 42* para 37.

⁸⁵⁶ *Milnes v Gery supra* 408; *Wilks v Davis* (1817) 3 Mer 507 509. See also MacKay (ed) *Halsbury’s laws of England Vol 42* para 37.

⁸⁵⁷ *Gourlay v The Duke of Somerset* (1815) 19 Ves 429 431; *Morgan v Milman* (1853) 3 De GM & G 24 37. However, a contract for the sale of land at a “fair or reasonable price” would be sufficiently certain and enforceable (see MacKay (ed) *Halsbury’s laws of England Vol 42* para 37 and the authorities listed there).

⁸⁵⁸ See eg *Courtney and Fairbairn v Tolaini Brothers (Hotels) supra* 300–301.

case of the sale of goods, the parties may agree that the price may be fixed by an independent third party and the same principles would apply.⁸⁵⁹

5 3 3 Unilateral determination of the price

In *NBS Boland Bank v One Berg River Drive* the court specifically felt the need to refer to English law.⁸⁶⁰ The court particularly mentioned the English case of *May and Butcher Ltd v R* in which it was said that “it is a perfectly good contract to say that the price is to be settled by the buyer”.⁸⁶¹

The court in *NBS Boland Bank v One Berg River Drive* also referred to *Lombard Tricity Finance v Paton*.⁸⁶² In this latter case the court had to decide whether the discretion to vary the interest rate of a loan was an absolute (ie unfettered) discretion and whether it was lawful.⁸⁶³ The court observed that granting a right to one of the parties to vary the terms of contract in his or her absolute discretion would be unusual, and, generally, clear wording to such effect would have to be used.⁸⁶⁴ However, the court considered the fact that market rates varied from time to time, that in theory the borrower could end the loan by repaying the outstanding amount, that the credit industry is competitive and that the lender’s licence could be revoked if it capriciously treated borrowers unfavourably.⁸⁶⁵ In the light of these factors, the court concluded that the agreement granted an absolute discretion and that there was no reason to imply any restrictions in respect of this discretion.⁸⁶⁶ Thereafter, the court had to

⁸⁵⁹ MacKay (ed) *Halsbury’s laws of England Vol 42* para 37 n 6.

⁸⁶⁰ *NBS Boland Bank v One Berg River Drive supra* paras 10–11.

⁸⁶¹ *May and Butcher Ltd v R supra* 21. The price may also be determined by the seller (*Esso Petroleum Company Ltd v Harper’s Garage (Stourport) Ltd* [1966] 2 QB 514 563 and 573. See also Bridge (ed) *Benjamin’s sale of goods* para 2–045 n 267); MacKay (ed) *Halsbury’s laws of England Vol 9(1)* para 1019.

⁸⁶² *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918.

⁸⁶³ *Idem* 923. The only qualification in the contract was that the lender had to give notice of any change in the interest rate (at 920).

⁸⁶⁴ *Idem* 923. Referred to with approval and applied by *Amberley (UK) Ltd v West Sussex County Council* [2011] EWCA Civ 11 para 22. See also Reynold & Hendy 2012 *Ind Law J* 81.

⁸⁶⁵ *Lombard Tricity Finance v Paton supra* 923.

⁸⁶⁶ *Ibid.* A court will only imply a term into a contract “if it is so obvious that reasonable parties would not have thought it necessary to include it or if the implication of the term is

consider whether the absolute discretion was lawful and, with reference to *May and Butcher v R*, the court found that it was.⁸⁶⁷

However, in *Paragon Finance v Nash* the court expressly rejected the argument in *Lombard Tricity Finance v Paton* that an unfettered discretion would be allowed to adjust the interest rate in a loan.⁸⁶⁸ The court stated that the lender's power to determine the interest rate was not unfettered.⁸⁶⁹ The court held that, if this were the case, "it would mean that the claimant would be completely free, in theory at least, to specify interest rates at the most exorbitant level".⁸⁷⁰ The court implied a term into the contract that the rate of interest was not to be determined dishonestly, for an improper purpose, capriciously or arbitrarily,⁸⁷¹ or unreasonably.⁸⁷² The test for unreasonableness is whether the lender acted in a way which "no reasonable lender, acting reasonably, would do".⁸⁷³

In *Esso Petroleum Company v Addison* the court had to consider a discretion granted in terms of a licence agreement to adjust the margin, shop fees and

necessary to give the contract business efficacy" (*Lymington Marina Ltd v MacNamara* [2007] *Bus LR Digest* D29 para 37).

⁸⁶⁷ *Lombard Tricity Finance v Paton supra* 923. The court referred to the fact that the price may be settled by the buyer and stated that "[i]f that be the law where the other party is locked into the contract with no means of escape, we do not see that it can be different in a contract of loan".

⁸⁶⁸ *Paragon Finance Plc v Nash; Paragon Finance Plc v Staunton* [2002] 1 WLR 685 paras 34–36. See also Sims & Goddard 2002 *CLJ* 269.

⁸⁶⁹ *Paragon Finance v Nash supra* para 30.

⁸⁷⁰ *Ibid.*

⁸⁷¹ *Idem* para 36.

⁸⁷² *Idem* paras 37–38. The court referred to *Abu Dhabi National Tanker Company v Product Star Shipping Ltd (No 2) (The Product Star)* [1993] 1 *Lloyds Rep* 397 404 where it is stated:

Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.

⁸⁷³ *Paragon Finance v Nash supra* para 41. The court distinguished this from the question whether "the lender would not impose unreasonable rates".

operating cost allowance.⁸⁷⁴ Here, again, the court was prepared to accept that an unfettered discretion may be lawful.⁸⁷⁵ However, the court conceded that:

it would be an unusual thing to do and I do not think that one should readily accept that it was what the parties intended. In deciding the matter it is, of course, necessary to examine both at [*sic*] the language of the contract and its commercial context.⁸⁷⁶

The court considered the contract and commercial context and implied a similar term as that implied by the court in *Paragon Finance v Nash*.⁸⁷⁷ In coming to this conclusion, the court held that “[i]n general people enter into contracts on the understanding that the other party will act honestly and rationally (albeit in his own interests) rather than arbitrarily or capriciously”.⁸⁷⁸

Reynold and Hendy argue that, in this context, reasonableness does not refer to an entirely objective standard but rather a test of rationality.⁸⁷⁹ They refer to *Socimer International Bank v Standard Bank London*, where the court stated that reasonableness does not refer to “entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price” but rather that “the decision remains that of the decision maker”.⁸⁸⁰ Therefore, as formulated in *Paragon Finance v Nash*, the question is whether the party with the discretion acted in a way in which a reasonable party in his position, acting reasonably, would do. The test for the reasonableness of a discretionary power in South African law contains similar elements.⁸⁸¹

⁸⁷⁴ *Esso Petroleum Company Ltd v David, Christine Addison* [2003] EWHC 1730 (Comm) para 131.

⁸⁷⁵ *Ibid.*

⁸⁷⁶ *Ibid.*

⁸⁷⁷ *Idem* para 135.

⁸⁷⁸ *Idem* para 136. These principles were not in dispute in the subsequent appeal (see *Addison v Esso Petroleum Company Ltd* [2004] EWCA Civ 1470 para 2).

⁸⁷⁹ Reynold & Hendy 2012 *Ind Law J* 80.

⁸⁸⁰ *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] *Bus LR* 1304 para 66.

⁸⁸¹ See ch 3 para 3 3 4 3(c) where reference is made to *Koumantarakis Group CC v Mystic River Investment 45 (Pty) Ltd* 2007 6 SA 404 (D) para 42, where the court stated that the commercial rationality of the decision must be measured against a reasonable man in the mercantile world.

5 3 4 Conclusion

As is the case in South African law, the price is an essential element of a contract of sale and is subject to the requirement of certainty. A discretion to determine the price would be lawful, but the courts would imply terms into the contract to limit the discretion where the terms of the contract and the circumstances of the case would allow for such a limitation.⁸⁸² Such implied terms could refer to reasonableness, but in this context reasonableness would refer to the question whether the party with the discretionary power acted in a way in which a reasonable party in his or her position, acting reasonably, would have done.

5 4 ENGLISH CONSUMER SALES LAW

5 4 1 Introduction

The United Kingdom has a long history of enacting legislation prohibiting the use of unfair terms in consumer contracts.⁸⁸³ Furthermore, the English-law approach to preventing unfair contract terms has been applauded by the European Commission.⁸⁸⁴ It can therefore be seen that, in general, English law is far more advanced than South African law in controlling unfair terms. In addition, English consumer legislation has had an influence on some of the provisions contained in the CPA.⁸⁸⁵ Finally, section 2(2) of the CPA provides that when interpreting the Act, consideration may be given to applicable foreign law. For the reasons set out above, a comparative study with the English law is of great value.

⁸⁸² MacLeod *Consumer sales* 379. See McKendrick *Contract* 139 where the author states: "The difficulty with such a clause is that it appears to place the seller at the mercy of the buyer. But the courts may be able to imply a term into the agreement in order to place a limit on the power of the buyer." See also Beale (ed) *Chitty on contracts: General principles* para 22–039, and Peel *Contract* para 2–096, where both authors are of the view that the discretionary power may not be unlimited.

⁸⁸³ See eg the Unfair Contract Terms Act 1977 dealing with indemnity clauses as discussed in para 5 6 2 *infra*.

⁸⁸⁴ Naudé 2010 *SALJ* 518; Naudé 2007 *SALJ* 132.

⁸⁸⁵ Van Eeden *Guide to the CPA* 24; Naudé 2006 *Stell LR* 373, 384.

The discussion is divided into two main sections: first, the consumer's right to disclosure and information and, secondly, the consumer's right to fair, just and reasonable terms.

5 5 CONSUMER'S RIGHT TO DISCLOSURE AND INFORMATION

5 5 1 Introduction

The most relevant statutory instrument governing the mandatory display of prices in respect of products for sale to consumers is the Price Marking Order 2004.⁸⁸⁶

5 5 2 Price Marking Order 2004

5 5 2 1 Introduction

In terms of the section 4(1)(a) of the Prices Act 1974 ("the Prices Act"),⁸⁸⁷ the Secretary of State may by order make provision for securing "that prices are indicated on or in relation to goods which a person indicates are or may be for sale by retail, whether or not the goods are in existence when he does so".⁸⁸⁸ In accordance with this power, the Secretary of State made the Price Marking Order 2004 ("the Price Marking Order").⁸⁸⁹

5 5 2 2 Application

The Price Marking Order applies to "traders" and "consumers". A "trader" is defined as "any person who sells or offers or exposes for sale products which

⁸⁸⁶ Another statutory instrument is the Price Indication Regulations 1991 (SI 1991/199) made under s 26 of the Consumer Protection Act 1987, which governs the situation where a trader charges a different price when the consumer pays by a different payment method. See further MacLeod *Consumer sales* 298.

⁸⁸⁷ S 4(1) of the Prices Act 1974 was substituted by s 16(1) of the Price Commission Act 1977.

⁸⁸⁸ See further s 4(2) in respect of the powers of the Secretary of State in this respect. See also MacLeod *Consumer sales* 297.

⁸⁸⁹ (SI 2004/102). The Price Marking Order came into force on 22 July 2004 (art 1(1)).

fall within his [or her] commercial or professional activity”.⁸⁹⁰ A “consumer” refers to “any individual who buys a product for purposes that do not fall within the sphere of his [or her] commercial or professional activity”.⁸⁹¹ Therefore, the Price Marking Order applies to transactions similar to the “pure consumer sales” discussed in chapter 4.⁸⁹² This is in contrast to section 23 of the CPA, which also applies to business-to-business consumer sales. However, specific exclusions include products sold as part of the provision of services, auctions and the sale of art or antiques.⁸⁹³

5 5 2 3 Requirement to indicate selling price

Article 4(1) requires that where a trader indicates that any product is or may be for sale to a consumer, he or she must indicate the selling price in the prescribed manner. However, there are two exceptions, namely, products sold from bulk and advertisements for products.⁸⁹⁴

“Products sold from bulk” are defined as products that are not pre-packaged and which are weighed or measured at the request of the consumer.⁸⁹⁵ Article 5 governs these products and requires that the trader must indicate a unit price for such products.⁸⁹⁶ There are various exclusions to this rule and most advertisements for products sold from bulk would be excluded.⁸⁹⁷

An “advertisement” is defined as:

any form of advertisement which is made in order to promote the sale of a product but does not include any advertisement by means of

⁸⁹⁰ Art 1(2) *sv* “trader”.

⁸⁹¹ Art 1(2) *sv* “consumer”.

⁸⁹² See ch 4 para 4 5 2 3.

⁸⁹³ Art 3(1).

⁸⁹⁴ Art 4(2).

⁸⁹⁵ Art 1(2) *sv* “products sold from bulk”.

⁸⁹⁶ Art 5(1). Certain goods also fall under art 5(1) even if they are not sold in bulk if they fall under Parts IV and V of the Weights and Measures Act 1985 and must be marked by an indication of quantity or made up in a prescribed quantity.

⁸⁹⁷ Art 5(4). However, art 5(1) would apply to an advertisement where the selling price of the product is indicated in the advertisement. Other exceptions are listed in art 5(3).

which the trader intends to encourage a consumer to enter into a distance contract, a catalogue, a price list, a container or a label.⁸⁹⁸

From the above it is clear that any advertisement made to promote the sale of a product does not have to indicate the selling price. However, the definition provides for a number of exceptions that would not be regarded as an advertisement: first, an advertisement encouraging the consumer to enter into a distance contract. A distance contract refers to a contract concluded in any way, without the trader and consumer being in the physical presence of each other.⁸⁹⁹ The following items must also indicate the selling price: catalogues, price lists, containers and labels.

Therefore, a trader is not obliged to indicate the selling price of a product in an advertisement, except for the specific exclusions mentioned above. This is in contrast to South African law, where the provisions of section 23 of the CPA – including the exclusion relating to advertisements – are drafted in general terms. This has led to confusion and uncertainty as to when a retailer would be obliged to display a price.⁹⁰⁰

5 5 2 4 Manner of indication of selling or unit price

The term “selling price” refers to the final price of the product including VAT and other taxes. Furthermore, the price must be in sterling.⁹⁰¹ This indicates that the value of the consideration must be given. The Price Marking Order contains further provisions concerning the manner in which the selling and the unit price should be indicated. The following requirements can be mentioned: first, the selling or unit price must be unambiguous, easily identifiable and clearly

⁸⁹⁸ Art 1(2) *sv* “advertisement”.

⁸⁹⁹ Art 1(2) *sv* “distance contract”. In addition, distance contracts are governed by the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334). See further MacLeod *Consumer sales* 316.

⁹⁰⁰ See ch 4 para 4 4 1.

⁹⁰¹ Art 6(1). This is similar to the CPA, which requires that the price must be displayed in rands (see ch 4 para 4 4 1 4). If a trader is willing to accept foreign currency, art 6(2) prescribes how this must be dealt with.

legible.⁹⁰² Secondly, it must be given in proximity to the product or, in the case of distance contracts and advertisements, it must be given near the written description of the product.⁹⁰³ Finally, it must be available to consumers without their having to seek assistance in order to determine the price.⁹⁰⁴

5 5 2 5 Consequences of not indicating the selling or unit price

Non-compliance with the above provisions does not affect the validity of the contract.⁹⁰⁵ Furthermore, there is no provision or rule that the trader is bound to the displayed price, as is the case in South African law.⁹⁰⁶ Whether a trader would be bound to the selling price is governed by the relevant common-law principles. At common law, an advertisement will not be regarded as an offer to sell, but rather an “invitation to treat”.⁹⁰⁷ An “invitation to treat” refers to an invitation to enter into negotiations with the advertiser in respect of the product.⁹⁰⁸ However, it is possible that an advertisement can contain a firm offer that can be accepted and result in a binding contract.⁹⁰⁹ Whether an advertisement would constitute an offer or a mere invitation to treat will depend on whether there was an invitation to create legal relations, which is a factual question.⁹¹⁰ However, where a trader contravenes the provisions of the Price Marking Order, he or she may be found guilty of a criminal offence and fined accordingly.⁹¹¹

⁹⁰² Art 7(1)(a).

⁹⁰³ Art 7(1)(b). In case of distance contracts and advertisements it must be given near the written description of the product. This will not apply to an item of jewellery, an item of precious metal or a watch displayed in a window of the premises where it is (or may be) for sale and the selling price is above £3 000.

⁹⁰⁴ Art 7(1)(c).

⁹⁰⁵ Whincup *Contract* 274.

⁹⁰⁶ See ch 4 para 4 4 1 5.

⁹⁰⁷ Whincup *Contract* 20; MacLeod *Consumer sales* 292, 377 n 14.

⁹⁰⁸ Whincup *Contract* 20; MacKay (ed) *Halsbury's laws of England Vol 9(1)* para 633.

⁹⁰⁹ *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 261–262. See also Whincup *Contract* 20–21; MacKay (ed) *Halsbury's laws of England Vol 9(1)* para 633; MacLeod *Consumer sales* 291–292.

⁹¹⁰ MacKay (ed) *Halsbury's laws of England Vol 9(1)* para 633; MacLeod *Consumer sales* 291.

⁹¹¹ S 7 read with para 5(1) of Schedule 1 of the Prices Act 1974.

5 5 3 Lessons for South African law

There are a number of differences between English and South African law in respect of the display of prices in consumer sales. As discussed in chapter 4, the principles governing the display of prices in consumer sales in South African law are confusing and unclear, and it is submitted that English law could provide some guidance. First, the English law is very clear in respect of when a trader would be required to display a price. In South African law, advertisements are excluded from the mandatory display of prices in general. However, under English law, what constitutes an advertisement is set out clearly and all the exceptions are expressly mentioned.

Secondly, a trader is not automatically bound to the selling price, and this situation is still governed by the common law. The amount of case law dealing with the distinction between offers and invitations and the absence of a clear and fixed rule indicate that it should rather be dealt with on a case-by-case basis by the courts.⁹¹² Furthermore, the English-law approach of criminalising contravention of the Price Marking Order is more practical and ensures better protection for consumers at large.

5 6 CONSUMER'S RIGHT TO FAIR, JUST AND REASONABLE TERMS

At present, two legislative instruments deal with the fairness of contractual terms in English law. First, the Unfair Contract Terms Act 1977, which deals with exemption and limitation clauses in both consumer and commercial contracts. Secondly, the Unfair Terms in Consumer Contract Regulations 1999, which deals with the fairness of most contract terms in consumer contracts. These regulations are discussed below.⁹¹³

⁹¹² For a list of examples of the cases considered by the English courts over the years, refer to MacKay (ed) *Halsbury's laws of England Vol 9(1)* para 634.

⁹¹³ See para 5 6 1 *infra*.

In 2005, the English and Scottish Law Commissions investigated both these instruments and proposed that they be replaced by one Act.⁹¹⁴ The result of this investigation is the Unfair Contract Terms Bill of 2005, which is also considered below.⁹¹⁵

5 6 1 The Unfair Terms in Consumer Contract Regulations 1999

5 6 1 1 Introduction

In 1993, the European Community Council issued the Council Directive on Unfair Terms in Consumer Contracts (“the Directive”).⁹¹⁶ The Directive was implemented in English law by the Unfair Terms in Consumer Contracts Regulations 1994.⁹¹⁷ These regulations were revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999⁹¹⁸ (“the Unfair Terms Regulations”) currently in force.⁹¹⁹

5 6 1 2 Interpretation

Regulation 7(2) provides that where the meaning of a term is unclear, it must be interpreted in favour of the consumer.⁹²⁰

5 6 1 3 Application

(a) Types of contract

The Unfair Terms Regulations apply to unfair terms in contracts concluded between a seller or supplier and a consumer.⁹²¹ A “seller” or “supplier” is defined as a natural or legal person acting for the purposes of his or her trade,

⁹¹⁴ English and Scottish Law Commissions *Report on unfair terms* 2.

⁹¹⁵ See para 5 6 2 *infra*.

⁹¹⁶ Council Directive 93/13/ECC (1993) (OJ No L95, 21.4.93, 29).

⁹¹⁷ (SI 1994/3159). See also Cartwright *Contract* 205; Bridge (ed) *Benjamin's sale of goods* para 14–031; McKendrick *Contract* 463; Peel *Contract* para 7–095.

⁹¹⁸ (SI 1999/2083).

⁹¹⁹ The Unfair Terms Regulations came into force on 1 October 1999.

⁹²⁰ Except in respect of preventative actions governed by reg 12.

⁹²¹ Reg 4(1).

business or profession and includes publicly or privately owned entities.⁹²² A “consumer” is defined as a natural person acting outside the purposes of his or her trade, business or profession.⁹²³ Therefore, the Unfair Terms Regulations apply to pure consumer sales only.⁹²⁴ Although there was uncertainty at one stage, the Court of Appeal decided that sales of land are also governed by the Unfair Terms Regulations.⁹²⁵ Therefore, the Unfair Terms Regulations apply to sales of both goods and land. The Regulations also apply to certain non-physical property.⁹²⁶

(b) Types of term

Only certain terms can be tested for unfairness. First, the term must be a non-negotiated term.⁹²⁷ For the purposes of the Unfair Terms Regulations, a non-negotiated term is a term that was drafted in advance which prevented the consumer from influencing the substance of the term.⁹²⁸ The Unfair Terms Regulations therefore do not apply to negotiated terms but are rather aimed at controlling the fairness of terms contained in standard form contracts.⁹²⁹ Furthermore, the *onus* rests on the seller who claims that a term was individually negotiated to prove that it was.⁹³⁰ This contrasts with the CPA, which applies to all contractual terms, whether negotiated or not.⁹³¹

⁹²² Reg 3(1) *sv* “seller or supplier”.

⁹²³ Reg 3(1) *sv* “consumer”. There are differing authorities on whether the consumer must be the recipient of the goods (ie the buyer) or whether the consumer may also be the seller (see Beale (ed) *Chitty on contracts: General principles* para 15–032). In South African law, the consumer will always be the buyer (see ch 4 para 4 3 4 1(c)).

⁹²⁴ See ch 4 para 4 5 2 3.

⁹²⁵ *Regina (Khatun) v Newham London Borough Council* [2005] QB 37 para 83; *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch) para 30. See also Beale (ed) *Chitty on contracts: General principles* para 15–020; McKendrick *Contract* 465; Peel *Contract* para 7–098.

⁹²⁶ The Unfair Terms Regulations apply to transferable securities, financial instruments, the sale of foreign currency, traveller’s cheques and international money orders denominated in foreign currency (para 2(c) of Schedule 2). Beale (ed) *Chitty on contracts: General principles* para 15–021 argues that contracts of assignment and licensing of contractual rights should also be included. See also Peel *Contract* para 7–098.

⁹²⁷ Reg 5(1).

⁹²⁸ Reg 5(2).

⁹²⁹ McKendrick *Contract* 467.

⁹³⁰ Reg 5(4).

⁹³¹ See ch 4 para 4 5 2 5(e).

Secondly, regulation 6(2) excludes terms relating to the “definition of the main subject-matter of the contract” and “the adequacy of the price”, provided such terms are drafted in plain intelligible language.⁹³² Such terms are generally referred to as “core terms”.⁹³³ This exclusion reflects the point of view that the focus should be on unfair terms as opposed to unfair contracts and should not cover the appropriateness of the price;⁹³⁴ and that if the price were subjected to the test of unfairness, it would conflict with the fundamental principle of a free-market economy that contracting parties can mould the principal rights and obligations as they see fit.⁹³⁵ As a result, the focus should rather be on ensuring that prices are transparent, which would ensure that the consumer could compare prices in the market in order to obtain the best contract under the circumstances.⁹³⁶ However, the exclusion of price terms relates to the adequacy of the price only, and a price term may be subject to the test for unfairness according to other criteria.⁹³⁷

This is in contrast to South African law, where all terms, including those that deal with the price and subject-matter of the contract, are subject to the test for unfairness.⁹³⁸

⁹³² In *Office of Fair Trading v Abbey National Plc* [2010] 1 AC 696 para 99, the court held that whether a term deals with the price depends on whether the consumer’s liability for the specific product “is the [price] or part of the ‘price or remuneration’ in exchange for which” the goods are supplied. Therefore, the exclusion does not refer only to the essential price terms, but any price or remuneration payable in terms of the contract would fall under the exception (para 41). For a more detailed discussion on this issue see Bridge (ed) *Benjamin’s sale of goods* para 14–035; McKendrick *Contract* 470.

⁹³³ Beale (ed) *Chitty on contracts: General principles* para 15–049.

⁹³⁴ *Ibid.* See also Bridge (ed) *Benjamin’s sale of goods* para 14–033 referring to *Director General of Fair Trading v First National Bank Plc* [2002] 1 AC 481 para 64 and *Office of Fair Trading v Abbey National supra* para 4.

⁹³⁵ Beale (ed) *Chitty on contracts: General principles* para 15–050. This is in accordance with the common law rule that the courts will not investigate the adequacy of the price (Peel *Contract* para 7–105). Peel argues that the reason for this is that the courts “*should not* interfere with the bargain actually made by the parties” (para 3–013).

⁹³⁶ *Ibid.*

⁹³⁷ *Office of Fair Trading v Abbey National supra* para 60. See also McKendrick *Contract* 470; Peel *Contract* para 7–107.

⁹³⁸ See ch 4 para 4 5.

5 6 1 4 *The requirement of plain intelligible language*

Although only certain terms are subject to the test of unfairness, all written terms must be drafted in plain intelligible language.⁹³⁹ If a term is not drafted in plain language, this could be taken into account when assessing whether the term is unfair.⁹⁴⁰ The Office of Fair Trading has published various guidelines on assessing whether the plain language requirement has been met.⁹⁴¹

5 6 1 5 *Test for unfairness*

The test for unfairness is detailed in regulation 5(1), which provides that a term shall be unfair if:

contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights arising under the contract, to the detriment of the consumer.

Therefore, two requirements must be met, namely, that a contract must be contrary to the requirement of good faith; and it must cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.⁹⁴² Each of these requirements is dealt with separately below:

(a) *Contrary to the requirement of good faith*

The Regulations contain no definition of the term "good faith". As indicated above, good faith is not a familiar concept in English law.⁹⁴³ It was included in

⁹³⁹ Reg 7(1).

⁹⁴⁰ McKendrick *Contract* 471. He argues that even core terms can be reviewed if they are not drafted in plain language referring to Bright 2000 *Legal Studies* 329. See also Peel *Contract* para 7–118.

⁹⁴¹ See Woodroffe & Lowe *Consumer law* para 9.20 for a short overview of the various guidelines issued by the Office of Fair Trading. These guidelines could also be used when considering whether a term is drafted in plain language under s 22 of the CPA (see ch 4 para 4 4 3).

⁹⁴² Peel *Contract* para 7–103. As pointed out in Bridge (ed) *Benjamin's sale of goods* para 14–036 there is an overlap between these two requirements, although the first requirement refers more to procedural fairness and the second requirement to substantive fairness.

⁹⁴³ See para 5 2 *supra*.

the Unfair Terms Regulations from the provisions of the Directive.⁹⁴⁴ In *Director of Fair Trading v First National Bank Plc* the court stated that:

The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the consumer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any factor listed in or analogous to those listed in Schedule 2 to the Regulations.⁹⁴⁵

Therefore, good faith is a wide concept and can refer to both substantive and procedural fairness.⁹⁴⁶ Furthermore, good faith requires a court to look at any factor that may be relevant to the enquiry.⁹⁴⁷ As such, it is proposed that the list of factors contained in section 52(2) of the CPA should not be a closed list and the court should be able to consider other relevant factors.⁹⁴⁸

(b) A significant imbalance in the parties' rights and obligations to the detriment of the consumer

This part of the test encompasses two enquiries. First, it must be determined whether the term causes an imbalance in the parties' rights and obligations to the detriment of the consumer. Secondly, such an imbalance must be significant.⁹⁴⁹

⁹⁴⁴ For a detailed discussion on the inclusion of the term, see Beale (ed) *Chitty on contracts: General principles* para 15-065 to 15-067.

⁹⁴⁵ *Director General of Fair Trading v First National Bank supra* para 17. (This case was decided under the Unfair Terms in Consumer Contracts Regulations 1994.)

⁹⁴⁶ Beale (ed) *Chitty on contracts: General principles* para 15-069; *Peel Contract* para 7-108.

⁹⁴⁷ *Idem* para 15-067.

⁹⁴⁸ See ch 4 para 4 5 2 6.

⁹⁴⁹ Beale (ed) *Chitty on contracts: General principles* para 15-071.

When determining whether the term causes an imbalance, the potential unfairness of the term is relevant.⁹⁵⁰ Therefore, the fact that the term is never used according to its potential and that it was never the intention to use the term in such a way would not render the term fair.⁹⁵¹ For example, where a price variation clause gives the seller an unlimited power to adjust the price but only use it to make minor adjustments, the term will still not be binding on the consumer.⁹⁵²

In *Director of Fair Trading v First National Bank* the court stated the following:

The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour.⁹⁵³

Furthermore, when determining the significance of the imbalance, other terms that could possibly counterbalance the balance are considered.⁹⁵⁴ For example, the imbalance caused by a price variation clause could be counterbalanced by a term granting the consumer a right to cancel the contract when the seller adjusts the price in accordance with a price variation clause.⁹⁵⁵

5 6 1 6 Factors to consider when assessing unfairness

Regulation 6(1) requires that certain factors must be considered when assessing whether a term is unfair, namely:

- (a) the nature of the goods,⁹⁵⁶
- (b) the circumstances at the conclusion of the contract,⁹⁵⁷ and

⁹⁵⁰ McKendrick *Contract* 469.

⁹⁵¹ Beale (ed) *Chitty on contracts: General principles* para 15–072.

⁹⁵² *Ibid.*

⁹⁵³ *Director of Fair Trading v First National Bank supra* para 17.

⁹⁵⁴ Beale (ed) *Chitty on contracts: General principles* para 15–073.

⁹⁵⁵ *Ibid.* Cf para 5 6 1 7 *infra*.

⁹⁵⁶ This is covered to some extent by s 52(2)(j) of the CPA which requires the court to consider whether the goods are special order goods. See ch 4 para 4 5 2 5(j).

(c) other terms of the contract or a dependent contract.⁹⁵⁸

However, as was shown above, other relevant factors outside the terms of the contract may also be considered.⁹⁵⁹

5 6 1 7 Terms that may be unfair

The Unfair Terms Regulations contain an indicative and non-exhaustive list of terms that may be regarded as unfair.⁹⁶⁰ In other words, this list contains examples of possible unfair terms, and is merely illustrative.⁹⁶¹ Two of these listed terms are similar to those found in the CPA Regulations. First, a term enabling the seller to alter the contract terms unilaterally without a valid reason, which is specified in the contract.⁹⁶² Exceptions include where the price of the goods is linked to fluctuations in the stock exchange or financial markets outside the supplier's control or the goods sold are foreign currency, traveller's cheques or international money orders denominated in foreign currency.⁹⁶³ A further exception is contained in paragraph 2(b) of Schedule 2 and provides for:

terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

⁹⁵⁷ This is similar to s 52(2)(c) of the CPA which requires that the court consider the circumstances of the transaction that existed or were reasonably foreseeable at conclusion of the contract. See ch 4 para 4 5 2 5(c).

⁹⁵⁸ There is no similar factor listed in s 52(2) of the CPA and it is argued that it would be necessary to consider the other terms of the contract (see ch 4 para 4 5 2 6).

⁹⁵⁹ See para 5 6 1 5(a) *supra*. See also Beale (ed) *Chitty on contracts: General principles* para 15–074. As such, the list in s 52(2) of the CPA should also not be considered as a closed list (see ch 4 para 4 5 2 6).

⁹⁶⁰ Reg 5(5) read with Schedule 2. Also known as the “grey list” (Bridge (ed) *Benjamin's sale of goods* para 14–038).

⁹⁶¹ Bridge (ed) *Benjamin's sale of goods* para 14–041. See further para 5 6 1 8 *infra*.

⁹⁶² Para 1(j) of Schedule 2.

⁹⁶³ Para 2(c) of Schedule 2.

The Office of Fair Trading has published helpful guidelines that can be used when applying the above terms to a specific case.⁹⁶⁴ The *OFT Guidelines* provide that the intention of the term is irrelevant. If the term is intended solely for minor variations but can be used to make substantial changes, it is more likely to be regarded as unfair.⁹⁶⁵ The narrower the application of the power and the clearer the reasons for the power, the more likely it is that the term could be considered fair.⁹⁶⁶ A reference to reasonableness is not considered sufficient, especially where it is vague and refers to “the best commercial interests of the business”.⁹⁶⁷ Where both a reasonable consumer and a reasonable supplier would share a common view as to what would be reasonable, it is more likely to be acceptable.⁹⁶⁸

The second term reads as follows:

providing for the price of goods to be determined at the time of delivery or allowing a seller of goods ... to increase their price without in both cases giving the consumer the corresponding right to cancel the contract *if the final price is too high in relation to the price agreed when the contract was concluded.*⁹⁶⁹

In respect of this term, the *OFT Guidelines* reiterate the principles set out above in respect of general unilateral variation powers.⁹⁷⁰ Furthermore, a pure discretionary right to determine or amend the price is regarded as objectionable.⁹⁷¹ Interestingly, the *OFT Guidelines* provide that a price variation

⁹⁶⁴ Office of Fair Trading: *Unfair contract terms guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999* OFT311 (2008) (“the *OFT Guidelines*”).

⁹⁶⁵ *OFT Guidelines* 52.

⁹⁶⁶ *Ibid.*

⁹⁶⁷ *Idem* 53. The supplier should not be able to exercise his or her discretion merely to protect his or her profit margins.

⁹⁶⁸ *OFT Guidelines* 53.

⁹⁶⁹ Para 1(l) of Schedule 2, my emphasis. Although the term is very similar to the term included under the CPA Regulations, the term in the CPA Regulations does not contain the phrase “if the final price is too high in relation to the price agreed when the contract was concluded” (see ch 4 para 4 5 2 3). This phrase has also been omitted from the relevant provisions of the Unfair Contract Terms Bill (see para 5 6 2 6 *infra*).

⁹⁷⁰ *OFT Guidelines* 57.

⁹⁷¹ *Ibid.*

clause is not automatically fair because it is not discretionary.⁹⁷² The reason is that suppliers are in a better position to foresee and control changes in their own costs than the consumer ever could be.⁹⁷³ As such, the consumer is particularly vulnerable because he or she does not have the knowledge or skills to confirm that the increases actually match the cost increases.⁹⁷⁴

Exactly the same exceptions as found in the CPA Regulations are also found in the Unfair Terms Regulations.⁹⁷⁵ However, it would seem that the *OFT Guidelines* have a narrower interpretation of “explicitly described”, as they require that the level and timing of the price increases must be specified and should be “clearly and adequately drawn to the consumer’s attention”.⁹⁷⁶ Furthermore, in respect of the right to cancel a contract, the *OFT Guidelines* require that a consumer must not be in a worse position for having entered into the contract and that this would include financial losses, serious inconvenience or any other adverse consequences.⁹⁷⁷

5 6 1 8 *Burden of proof*

The Unfair Terms Regulations are silent in respect of the burden of proof that would apply to proceedings in terms of the Regulations.⁹⁷⁸ As such, the burden of proof rests on the consumer.⁹⁷⁹ However, McKendrick is of the opinion that it is possible to argue that the effect of the list of terms in Schedule 2 is that it raises “a presumption that the term is unfair”. Following this line of argument, the burden of proof in respect of such terms would rest on the seller, whereas in respect of terms not listed in Schedule 2, the *onus* would rest on the

⁹⁷² *Ibid.*

⁹⁷³ *Ibid.*

⁹⁷⁴ *Idem* 57–58.

⁹⁷⁵ Paras 2(c) and 2(d) of Schedule 2.

⁹⁷⁶ *OFT Guidelines* 58. See ch 4 para 4 5 2 3.

⁹⁷⁷ *OFT Guidelines* 58.

⁹⁷⁸ McKendrick *Contract* 468.

⁹⁷⁹ *Idem* 468–469.

consumer.⁹⁸⁰ This uncertainty will be resolved by the Unfair Contract Terms Bill of 2005 that will include specific provisions dealing with the burden of proof.⁹⁸¹

5 6 1 9 Consequences of unfair terms

Unfair terms are not binding on the consumer.⁹⁸² However, if a contract can exist without the unfair term, the contract remains in force.⁹⁸³

5 6 1 10 Lessons for South African law

Although there are similarities between the Unfair Terms Regulations and the CPA, they do differ in some important respects.

First, the Unfair Terms Regulations apply only to pure consumer sales.⁹⁸⁴ However, as is shown below, draft legislation now also includes protection for small businesses.⁹⁸⁵

Secondly, core terms are excluded from the test of unfairness, whereas core terms are also subject to the test for unfairness under the South African law. As discussed, there are good reasons for excluding core terms from the test for unfairness.⁹⁸⁶ It was also argued in chapter 3 that the South African common law provides sufficient remedies to control the eventual price determined by the party with the discretionary power.⁹⁸⁷ Furthermore, the common-law principles are better suited to this task than the test and factors set out in the CPA.⁹⁸⁸

⁹⁸⁰ *Idem* 468.

⁹⁸¹ See para 5 6 2 7 *infra*.

⁹⁸² Reg 8(1).

⁹⁸³ Reg 8(2).

⁹⁸⁴ See para 5 6 1 3(a) *supra*.

⁹⁸⁵ See para 5 6 2 3(b) *infra*.

⁹⁸⁶ See para 5 6 1 3(b) *supra*.

⁹⁸⁷ See ch 3 para 3 3 4 3(c).

⁹⁸⁸ See ch 4 para 4 5 3.

Thirdly, negotiated terms are also excluded from the test for unfairness.⁹⁸⁹ However, this is subject to changes contained in the Unfair Contract Terms Bill of 2005, which are discussed below.⁹⁹⁰

Fourthly, although the Unfair Term Regulations list factors that must be taken into account when assessing unfairness, any other relevant factors may also be considered.⁹⁹¹ Although it is unclear whether the list of factors in the CPA is exhaustive, it is submitted that any other relevant factors should also be considered by the courts.⁹⁹²

Finally, the terms contained in the CPA regulations dealing with price discretions⁹⁹³ are similar to the terms contained in the indicative list of unfair terms under the Unfair Terms Regulations.⁹⁹⁴ As such, the South African courts can take guidance from the guidelines and examples of unfair terms published in the *OFT Guidelines*.

5 6 2 Unfair Contract Terms Bill of 2005

5 6 2 1 Introduction

As mentioned above, unfair terms are governed by the Unfair Terms Regulations and the Unfair Contract Terms Act 1979 (“the Unfair Terms Act”).⁹⁹⁵ It was also mentioned that the English and Scottish Law Commissions investigated both these instruments and proposed that they be replaced by one Act, namely the Unfair Contract Terms Bill of 2005 (“the Unfair Terms Bill”).⁹⁹⁶ This is because the Unfair Terms Regulations and Unfair Terms Act contain

⁹⁸⁹ See para 5 6 1 3(b) *supra*.

⁹⁹⁰ See para 5 6 2 3 *infra*.

⁹⁹¹ See para 5 6 1 6 *supra*.

⁹⁹² See ch 4 para 4 5 2 6.

⁹⁹³ See ch 4 para 4 5 2 3.

⁹⁹⁴ See para 5 6 1 7 *supra*.

⁹⁹⁵ See para 5 4 1 *supra*.

⁹⁹⁶ The Unfair Contract Terms Bill is annexed to the report. See also Beale (ed) *Chitty on contracts: General principles* para 15–010; Bridge (ed) *Benjamin’s sale of goods* para 14–031; McKendrick *Contract* 491; Woodroffe & Lowe *Consumer law* para 9.01.

overlapping and inconsistent provisions, have different scopes of application⁹⁹⁷ and use different language and terminology.⁹⁹⁸ Consequently, this has resulted in practical problems and uncertainties in English law in respect of unfair terms.⁹⁹⁹ Furthermore, the Commission was tasked with investigating the possible extension of the scope of the Unfair Terms Regulations to protect small businesses.¹⁰⁰⁰ The Unfair Terms Bill will replace the Unfair Terms Regulations and the Unfair Terms Act, and will address unfair terms in small-business contracts.

5 6 2 2 Interpretation

Similar to South African law, the Unfair Terms Bill provides that if a term in a consumer contract can reasonably be interpreted in more than one way, it must be interpreted in the way most favourable to the consumer.¹⁰⁰¹ However, as will be seen below, an English consumer contract has a more limited definition than in South African law.¹⁰⁰²

5 6 2 3 Application

The Unfair Terms Bill will apply to what it calls “consumer contracts” and “small business contracts”.¹⁰⁰³ Each of these is dealt with separately below:

(a) Consumer contracts

A consumer contract is defined as a contract between:

⁹⁹⁷ The Unfair Terms Act has a wider application than the Unfair Terms Regulations as it applies to contracts between suppliers and individual consumers, contracts between two businesses, and even to contracts where neither of the parties is acting inside the scope of his or her business. See further Woodroffe & Lowe *Consumer law* para 9.02.

⁹⁹⁸ English and Scottish Law Commissions *Report on unfair terms* 8.

⁹⁹⁹ *Ibid.*

¹⁰⁰⁰ *Idem* 3. Specifically, protection against price variation clauses was considered (at 16).

¹⁰⁰¹ S 8(1). S 8(1) does not apply to proceedings under Schedule 1 of the Bill (s 8(2)). Schedule 1 of the Bill deals with preventative proceedings.

¹⁰⁰² See para 5 6 2 3(a) *infra*.

¹⁰⁰³ The Unfair Terms Bill also applies to so-called “business contracts” and “private contracts”, but only as far as it deals with exclusion and liability clauses. These types of contract are therefore not relevant to the discussion.

- (a) an individual (“the consumer”) who enters into it wholly or mainly for purposes unrelated to a business of his, and
- (b) a person (“the business”) who enters into it wholly or mainly for purposes related to his business.¹⁰⁰⁴

This definition is very similar to that of pure consumer sales discussed in chapter 4.¹⁰⁰⁵ A term in a consumer contract that is detrimental to the consumer cannot be relied upon, unless the term is fair and reasonable.¹⁰⁰⁶ However, terms defining the main subject-matter¹⁰⁰⁷ and the price payable¹⁰⁰⁸ are not subject to the test for unfairness.¹⁰⁰⁹ Therefore, negotiated and non-negotiated terms (but not core terms) in a consumer contract will be subject to the test of unfairness. This differs from the position under South African law, where the price must also be fair.¹⁰¹⁰

(b) Small-business contracts

A small-business contract is defined as a business contract where at least one of the parties is a small business and the contract does not fall under any of the four exceptions.¹⁰¹¹ A small-business contract must be a business contract and therefore this provision applies only to contracts where both parties enter into it

¹⁰⁰⁴ S 26(1). An employment contract is explicitly excluded from this definition.

¹⁰⁰⁵ See ch 4 para 4 5 2 3. However, the Unfair Terms Bill does not prescribe whether the consumer must act as the buyer or the seller, whereas under South African law the consumer will always be the buyer (see ch 4 para 4 3 4 1(c)).

¹⁰⁰⁶ S 4(1).

¹⁰⁰⁷ S 4(2). However, a term which defines the main subject-matter of the contract must be transparent and the definition must be substantially the same as the definition the consumer reasonably expected.

¹⁰⁰⁸ S 4(3). However, a term setting out the price must be transparent and the price must be payable in substantially the same circumstances and calculated in substantially the same way as what the consumer reasonably expected.

¹⁰⁰⁹ This is similar to the exceptions contained in the Unfair Terms Regulations (see para 5 6 1 2 *supra*). However, it is interesting to note that the Unfair Terms Bill makes a further exemption for transparent terms that “leads to substantially the same result as would be produced as a matter of law if the term were not included” (s 4(4)). This means that common-law rules included in a consumer contract is not subject to test for unfairness (English and Scottish Law Commissions *Report on unfair terms* 36). This is not the case under South African law where the courts are specifically mandated to develop the common law to improve the realisation and enjoyment of consumer rights (see ch 4 para 4 3 3).

¹⁰¹⁰ See ch 4 para 4 5 3.

¹⁰¹¹ S 29(1).

wholly or mainly for purposes related to their businesses.¹⁰¹² A small business is limited to businesses with a maximum of nine employees.¹⁰¹³ A small-business contract is therefore comparable to the so-called “business-to-business sale” where an annual turnover threshold applies,¹⁰¹⁴ except that contracts entered into by a small business wholly or mainly unrelated to its business will not be governed by the Unfair Terms Bill.¹⁰¹⁵ The English and Scottish Law Commissions preferred the employee number threshold to the annual turnover threshold, as it “is most likely to be accessible to the other contracting party and is, therefore, most likely to promote certainty and predictability”.¹⁰¹⁶

There are further exemptions: first, small businesses that are associated with a larger business are exempt from the definition of small business.¹⁰¹⁷ Secondly, large transaction value contracts (greater than £500 000) are also exempt.¹⁰¹⁸ The Unfair Terms Bill also exempts financial services contracts¹⁰¹⁹ as they are already regulated by the Financial Services Authority.¹⁰²⁰

A term in a small-business contract that is detrimental to the small business cannot be relied upon, unless the term is fair and reasonable.¹⁰²¹ As with consumer contracts, terms defining the main subject-matter¹⁰²² and the price

¹⁰¹² A business contract is defined as “a contract between two persons, each of whom enters into it wholly or mainly for purposes related to his business” (s 26(2)).

¹⁰¹³ S 27(1)(a). The number of employees must be calculated in accordance with Schedule 4 of the Bill (s 27(3), and the Secretary of State may specify another number of employees for purposes of this provision (s 27(1)(b)).

¹⁰¹⁴ See ch 4 paras 4 3 4 1(c) and 4 5 2 3.

¹⁰¹⁵ This is not the case with business-to-business consumer contracts in South Africa (see ch 4 para 4 3 4 1(b)).

¹⁰¹⁶ English and Scottish Law Commissions *Report on unfair terms* 17. They rejected the annual turnover threshold for the following reasons: first, because turnover is not an accurate guide to the size of a business. Secondly, it is more difficult to determine the annual turnover of a business than counting the number of employees. Thirdly, there are good reasons for a small business not to reveal its annual turnover to a business as it could be prejudicial to the small business’ interests (at 87).

¹⁰¹⁷ S 27(2) read with s 28.

¹⁰¹⁸ Ss 29(2)–29(3) and 29(5)–29(6).

¹⁰¹⁹ S 29(4) read with s 29(10).

¹⁰²⁰ English and Scottish Law Commissions *Report on unfair terms* 18.

¹⁰²¹ S 11(2).

¹⁰²² S 11(3). However, a term which defines the main subject-matter of the contract must be transparent and the definition must be substantially the same as the definition the consumer reasonably expected.

payable¹⁰²³ are not subject to the test for unfairness.¹⁰²⁴ Furthermore, written standard terms put forward during negotiation and which were not changed in favour of the small business as a result of negotiation are also not subject to the test for unfairness.¹⁰²⁵ Sale of land contracts¹⁰²⁶ and international supply contracts¹⁰²⁷ are also exempt from the operation of section 11.

Therefore, only non-negotiated standard terms – excluding core terms – will be subject to the test for unfairness. This differs from the position under South African law, where negotiated terms¹⁰²⁸ and the price¹⁰²⁹ must also be fair in business-to-business consumer sales. The English and Scottish Law Commissions found that where a small business acts as a customer for goods and services, it is in a similar position to that of a consumer.¹⁰³⁰ In many cases they do not have the resources to obtain legal advice in respect of unfair terms and do not understand the standard terms forming part of the contract.¹⁰³¹ However, the Commissions were reluctant to interfere where the term was negotiated. They gave the following reason for their view:

Where the parties have been prepared to negotiate a term, if at the end of the day the term is left unaltered, it is probable that this is because the original term represents the most efficient balance of risk and price.¹⁰³²

¹⁰²³ S 11(4). However, a term setting out the price must be transparent and the price must be payable in substantially the same circumstances and calculated in substantially the same way as what the consumer reasonably expected.

¹⁰²⁴ Common-law rules that are included in a small-business contract are also not subject to the test for unfairness (s 11(5)). See also n 1009 *supra*.

¹⁰²⁵ S 11(1).

¹⁰²⁶ Para 4 of Schedule 3.

¹⁰²⁷ Para 8 of Schedule 3. This refers to international supply contracts where the goods are supplied outside the United Kingdom.

¹⁰²⁸ See ch 4 para 4 5 2 5(e).

¹⁰²⁹ See ch 4 para 4 5 3.

¹⁰³⁰ English and Scottish Law Commissions *Report on unfair terms* 81.

¹⁰³¹ *Idem* 82.

¹⁰³² *Idem* 83.

5 6 2 4 Test for unfairness

The test for unfairness is set out in section 14 of the Unfair Terms Bill. The test states that a term is fair and reasonable if so determined by considering the extent to which the term is transparent, the substance and effect of the term, and all the circumstances existing at the time the contract is or was concluded.¹⁰³³

The reference to the requirement of good faith as contained in the Unfair Terms Regulations was deleted because the concept of good faith is unfamiliar in English law.¹⁰³⁴ However, the test is considered to be the same as that contained in the Unfair Terms Regulations.¹⁰³⁵

Section 14(3) provides that “transparent” means expressed in reasonably plain language,¹⁰³⁶ legible, clearly presented and readily available to a person likely to be affected by the term. This may be the sole ground for determining that a term is unfair.¹⁰³⁷ The reference to the substance and effect of the term and the circumstances existing at the time of conclusion refers to both substantive and procedural fairness.¹⁰³⁸

5 6 2 5 Factors to consider when assessing unfairness

Section 14(4) lists relevant factors that must be considered when assessing the fairness of a term. This list is not exhaustive and other relevant factors may be

¹⁰³³ Section 14(1). The Unfair Terms Bill does not refer to the requirement of good faith as contained in the Unfair Terms Regulations. In the English and Scottish Law Commissions *Report on unfair terms* 39 it was stated that as the concept of good faith is unfamiliar to English law it should rather be deleted (see para 5 2 *supra*).

¹⁰³⁴ English and Scottish Law Commissions *Report on unfair terms* 39; Naudé 2009 *SALJ* 517. See also para 5 2 *supra*.

¹⁰³⁵ English and Scottish Law Commissions *Report on unfair terms* 145 (see para 5 6 1 4 *supra*).

¹⁰³⁶ The plain language requirement will not be met “if the term is in print that is difficult to read, the layout of the contract document is difficult to follow or if the terms are not readily accessible to the consumer” (English and Scottish Law Commissions *Report on unfair terms* 145).

¹⁰³⁷ English and Scottish Law Commissions *Report on unfair terms* 159. As such, core terms can be declared unfair if they are not drafted in plain language (see Naudé 2009 *SALJ* 514).

¹⁰³⁸ English and Scottish Law Commissions *Report on unfair terms* 159.

considered.¹⁰³⁹ Some of the factors listed in section 14(4) are similar to those found in section 52(2) of the CPA. These include the knowledge and understanding of the party adversely affected by the term,¹⁰⁴⁰ and the strength of the parties' bargaining positions.¹⁰⁴¹ Worthy of note is the English and Scottish Commissions' proposal that the following should be considered when assessing the parties' respective bargaining positions:¹⁰⁴²

- (a) whether the transaction was unusual for either or both of them;
- (b) whether the party was offered a choice over the term;
- (c) whether the party had a reasonable opportunity to seek a more favourable term;
- (d) whether the party had a realistic opportunity to enter into a similar contract with another, but without the term;¹⁰⁴³
- (e) whether that party's requirements could have been met in other ways, and
- (f) whether it was reasonable, given that party's abilities, for him or her to have taken advantage of the choice under (b) or any alternatives under (e).

As already mentioned in chapter 4, the list in section 52(2) of the CPA does not contain all the factors that would have to be considered (especially in respect of price discretions).¹⁰⁴⁴ Some of the missing factors are found in section 14(4),

¹⁰³⁹ English and Scottish Law Commissions *Report on unfair terms* 161. It is unclear whether the factors listed in s 52(2) of the CPA are exhaustive or not (see ch 4 para 4 5 2 6).

¹⁰⁴⁰ S 14(4)(h).

¹⁰⁴¹ S 14(4)(i). Section 14(4)(j) provides that the nature of the goods to which the contract relates can be considered. The nature of the goods is also considered in South African law, as s 52(2)(j) of the CPA requires that the court must consider whether the goods are special order goods (see ch 4 para 4 5 2 5(j)).

¹⁰⁴² English and Scottish Law Commissions *Report on unfair terms* 161. Naudé 2006 *Stell LR* 373 argues that these factors could provide good guidance when dealing with the parties' respective bargaining powers.

¹⁰⁴³ This is similar to s 52(2)(i) of the CPA which provides that the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods from another supplier must be considered (see ch 4 para 4 5 2 5(i)).

¹⁰⁴⁴ See ch 4 para 4 5 2 6.

namely, that the other terms of the contract,¹⁰⁴⁵ and the balance of the parties' interest must be considered.¹⁰⁴⁶

Factors not discussed in chapter 4 but which could also be relevant include the following: the risks to the party adversely affected by the term;¹⁰⁴⁷ the possibility and probability of insurance;¹⁰⁴⁸ other ways in which the interests of the party adversely affected by the term may have been protected;¹⁰⁴⁹ the extent to which the term (whether alone or with others) differs from what would have been the case in its absence.¹⁰⁵⁰

Therefore, some of the factors listed in the Unfair Terms Bill should also be included in assessing the fairness of a term in South African law.¹⁰⁵¹ Furthermore, the Unfair Terms Bill acknowledges that the list is not exhaustive and it is submitted that a similar interpretation should be given to the list of factors contained in the CPA.

5 6 2 6 Terms that may be regarded as unfair

Schedule 2 contains terms in consumer and small-business contracts that may be regarded as unfair. Similar terms and exceptions to those discussed under the Unfair Terms Regulations are also found here.¹⁰⁵² The first relevant term reads as follows:

A term requiring [the consumer or the small business] to pay whatever price is set for the goods at the time of delivery (including a case where the price is set by reference to a list price), unless there is also

¹⁰⁴⁵ S 14(4)(a). This could also include the terms of any other contract on which the contract depends (s 14(4)(b)).

¹⁰⁴⁶ S 14(4)(c).

¹⁰⁴⁷ S 14(4)(d).

¹⁰⁴⁸ S 14(4)(e).

¹⁰⁴⁹ S 14(4)(f).

¹⁰⁵⁰ S 14(4)(g). As pointed out by Naudé 2006 *Stell LR* 373, these factors are more relevant in respect of substantive fairness, whereas the CPA list of factors does not contain enough factors dealing with substantive fairness.

¹⁰⁵¹ This is supported by Naudé 2006 *Stell LR* 373–374.

¹⁰⁵² See para 5 6 1 7 *supra*.

a term entitling [the consumer or the small business] to cancel the contract if that price is higher than the price indicated to [the consumer or the small business] when the contract was made.¹⁰⁵³

Secondly, a term entitling the business to increase the price subject to the the consumer or small business's cancelling the contract if the business does increase the price.¹⁰⁵⁴

The following exceptions apply. First, contracts where the price is linked to fluctuations in prices quoted on a stock exchange or a financial index or market rate that the business does not control.¹⁰⁵⁵ Secondly, contracts of sale of foreign currency (including traveller's cheques or international money orders).¹⁰⁵⁶ Thirdly, a term providing for the price of the goods to be varied by reference to an index of prices, the contract specifying how a change to the index is to affect the price.¹⁰⁵⁷ These exceptions do not mean that such terms are automatically fair. Such terms are still subject to the test for unfairness.¹⁰⁵⁸

In contrast to South African law, the grey list applies to both consumer contracts and small-business contracts. This is because the English and Scottish Law Commissions found that small businesses were also vulnerable to harsh terms "requiring the small business to renew contracts at escalating prices; or terms giving the supplier excessive discretion over prices".¹⁰⁵⁹ However, as mentioned above, this will not apply to negotiated discretionary price clauses.¹⁰⁶⁰ Furthermore, despite the listing of the term in respect of a small business on the grey list, this has not influenced the burden of proof in respect of the unfairness of terms in small-business contracts.¹⁰⁶¹

¹⁰⁵³ Para 13 of Schedule 2.

¹⁰⁵⁴ Para 14 of Schedule 2.

¹⁰⁵⁵ Para 24(2) of Schedule 2.

¹⁰⁵⁶ Para 24(3) of Schedule 2.

¹⁰⁵⁷ Para 25 of Schedule 2.

¹⁰⁵⁸ English and Scottish Law Commissions *Report on unfair terms* 47.

¹⁰⁵⁹ *Idem* 80 (references to footnotes in the quotation were omitted).

¹⁰⁶⁰ See para 5 6 2 3(b) *supra*.

¹⁰⁶¹ See para 5 6 2 7 *infra*.

5 6 2 7 Burden of proof

The Unfair Terms Bill deals with the burden of proof explicitly and distinguishes between consumer contracts and small-business contracts. In a consumer contract, the burden of proof rests on the business to prove that a term is fair and reasonable where it is detrimental to the consumer.¹⁰⁶² In South African law this is not the case with all terms in pure consumer contracts. However, the grey list contained in the CPA Regulations has improved the situation for consumers and is to be welcomed.¹⁰⁶³ Furthermore, under English law, the person who claims that a contract is not a consumer contract must prove it.¹⁰⁶⁴

In a small-business contract, the burden of proof rests on the person claiming that the term is unfair (ie the small business). This is also the case in South African law, including price discretionary clauses in business-to-business consumer sales.¹⁰⁶⁵

5 6 2 8 Consequences

Unfair terms cannot be relied upon, but, as far as practicable, the contract will remain in force in every other respect.¹⁰⁶⁶

5 6 2 9 Lessons for South African law

As with the Unfair Terms Regulations, there are various similarities between the Unfair Terms Bill and the CPA. However, there are also important differences between the two instruments, and it is in some of these differences that the English law can provide guidance to the South African law.

Similarly to the CPA, the Unfair Terms Bill will apply to both consumer contracts and small-business contracts. However, the Unfair Terms Bill contains a more

¹⁰⁶² S 16(1). This is not the case for proceedings in terms of Schedule 1, where the burden of proof rests on the person claiming that the term is unfair (s 16(2)). See n 1001 *supra*.

¹⁰⁶³ See ch 4 para 4 5 2 3.

¹⁰⁶⁴ S 16(3).

¹⁰⁶⁵ See ch 4 para 4 5 2 3.

¹⁰⁶⁶ S 24.

workable definition for a small-business contract than the CPA.¹⁰⁶⁷ Furthermore, negotiated terms in small-business contracts are excluded from the test for unfairness to prevent undue interference in free-market practices.¹⁰⁶⁸ However, the indicative list of terms in the Unfair Terms Bill is also applicable to small-business contracts (although the burden of proof is similar to that in South African law); this ensures better protection for small businesses as they are also particularly vulnerable to unfair price-variation clauses.¹⁰⁶⁹

Secondly, core terms are excluded from the test for unfairness in both consumer sales and small-business contracts.¹⁰⁷⁰ This is preferred for the same reasons set out above.¹⁰⁷¹

Finally, the list of factors included in the Unfair Terms Bill is not exhaustive and includes various factors relevant to substantive fairness.¹⁰⁷² The Bill also contains detailed guidelines that could assist when assessing the relevant bargaining positions of the parties.¹⁰⁷³ Therefore, the list of factors in the CPA should not be regarded as exhaustive and a court should take further guidance from the factors listed in the Unfair Terms Bill.

5 7 CONCLUSION

In English law the unilateral determination of price is lawful and would seem to allow for unfettered discretions. However, recent trends in case law indicate that the courts are far more prepared to imply terms into a contract to limit the discretion, and that such limitations would include a reference to reasonableness. In this respect, the English law does not differ substantially from South African law. The English consumer-law approach to price discretions in consumer contracts should therefore provide a sound basis for comparison.

¹⁰⁶⁷ See para 5 6 2 3(b) *supra*.

¹⁰⁶⁸ *Ibid.*

¹⁰⁶⁹ See paras 5 6 2 6 and 5 6 2 7 *supra*.

¹⁰⁷⁰ See para 5 6 2 3 *supra*.

¹⁰⁷¹ See para 5 6 1 10 *supra*.

¹⁰⁷² See para 5 6 2 5 *supra*.

¹⁰⁷³ *Ibid.*

Furthermore, many of the provisions of the CPA were inspired by English consumer law. This is not surprising as English consumer law is far more advanced than South African consumer law and has been lauded for its approach to preventing unfair terms in consumer contracts. In contrast, in some instances the provisions of the CPA are unclear, ambiguous, insufficient and impractical. It is in respect of these provisions that English consumer law could provide guidance in the interpretation and application of the CPA by the South African courts.

CHAPTER 6 CONCLUSION

6 1 INTRODUCTION

This chapter is a summary of the research findings covered in the dissertation and contains proposals for possible legal developments.

6 2 SUMMARY OF RESEARCH FINDINGS AND PROPOSALS

6 2 1 Unilateral price determination in Roman law

The unilateral determination of price has been a controversial issue for an extended period of time. In chapter 2, this controversy is observed in the different interpretations given to the original Roman-law texts dealing with the unilateral determination of price.¹⁰⁷⁴ This is caused, in part, by the difficulty in translating these texts from Latin and ascertaining the true meaning of the Roman-law principles from the fragments of texts scattered throughout the *Digest*. The main arguments for and against the unilateral determination of price based on the original Roman-law texts were considered. Specifically, the legal-historical research method was employed by reading these texts in their original context as compiled by Lenel in his *Palingenesia*.¹⁰⁷⁵

As was shown in chapter 2, the majority of the arguments that sought to illustrate that such a contract was void in Roman law are open to criticism. Although there are many arguments favouring the view that the contract would be valid but imperfect, not all of these stand up to scrutiny. The most widely held view gives the impression that a discretion to determine the price did not invalidate the contract provided that the discretion was exercised *arbitrio boni viri*.

¹⁰⁷⁴ Ch 2 para 2 2 4.

¹⁰⁷⁵ See eg ch 2 para 2 2 4 4(b) dealing with the meaning of *D* 50 17 22 1 and *D* 18 1 7pr.

6 2 2 Unilateral price determination in Roman-Dutch law

Unfortunately, the majority of the Roman-Dutch writers (including Voet) regarded a contract granting a discretion to one of the parties to determine the price as void.¹⁰⁷⁶ Their views were based on a very conservative interpretation of the Roman-law texts and a misplaced reliance on the rules dealing with pure potestative conditions. Two Roman-Dutch writers criticised these views and were of the view that such a contract would be valid, as the discretion would have to be exercised *arbitrio boni viri*.¹⁰⁷⁷ However, their views were not incorporated into South African law.

6 2 3 Unilateral price determination in South African law prior to the Consumer Protection Act

Prior to the enactment of the Consumer Protection Act 68 of 2008 (“the CPA”), the unilateral determination of price was governed by common-law principles alone. As was shown in chapter 3, the confusion between the unilateral determination of price and pure potestative conditions continued in South African case law.¹⁰⁷⁸ Furthermore, unilateral price determinations were considered too vague to be enforceable and falling short of the requirement of certainty of price.¹⁰⁷⁹ These views were criticised by the Supreme Court of Appeal in *Benlou Properties v Vector Graphics*.¹⁰⁸⁰ Subsequently, in *NBS Boland Bank v One Berg River Drive*, the court questioned whether the rule should still form part of South African law.¹⁰⁸¹ Furthermore, as shown in chapter 3 and remarked on by Laing “there has also appeared alongside [these cases] a body of case law prepared at most to give effect to merely a *qualified* version of the rule”.¹⁰⁸² These judgments require that the discretion to determine the price should not be unfettered and should be subject to some objective standard.

¹⁰⁷⁶ Ch 2 para 2 3 3 3.

¹⁰⁷⁷ Ch 2 para 2 3 3 4.

¹⁰⁷⁸ Ch 3 para 3 3 4 2(b).

¹⁰⁷⁹ Ch 3 paras 3 3 4 2(c) and 3 3 4 2(a), respectively.

¹⁰⁸⁰ *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) 185–186.

¹⁰⁸¹ *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 4 SA 928 (SCA) para 16.

¹⁰⁸² Laing LLM dissertation 123. See also ch 3 para 3 3 4 3.

This can be done expressly or tacitly in the contract or an objective standard (in the form of reasonableness) will be implied by law.

From these requirements it was possible to determine the real reason for the rule, namely, that allowing a discretion to determine the price would result in a greater possibility that the party with the discretionary power would abuse it.¹⁰⁸³ Therefore, it was argued that whether the unilateral determination of price should be allowed must rather be assessed with reference to public policy. The relevant public policy considerations were considered in chapter 3.¹⁰⁸⁴ It was shown that in most cases public policy would dictate that a discretion to determine the price should be enforced, provided that such a discretion is not unfettered and subject to an external objective standard or reasonableness.¹⁰⁸⁵ However, in cases where an unfair bargaining position is present, public policy may dictate otherwise.

6 2 4 Unilateral price determination in contracts of sales governed by the Consumer Protection Act

6 2 4 1 Introduction

As indicated in chapter 4, the CPA was enacted to address unequal bargaining relationships in certain consumer contracts and gives effect to public policy.¹⁰⁸⁶ The CPA substantially changed the law of sale in respect of sales governed by the Act. Therefore, the CPA divides contracts of sale into sales governed by the CPA (“consumer sales”) and sales not governed by the CPA (“commercial sales”).¹⁰⁸⁷ Generally, where a seller concludes a contract of sale with a buyer who is an individual or a juristic person (whose annual turnover is below the determined threshold) in the course of the seller’s business and in South Africa, that contract of sale is governed by the CPA. The CPA follows a rights-based approach in granting specific rights to consumers and, as such, focuses on

¹⁰⁸³ Kerr *Sale* 66.

¹⁰⁸⁴ Ch 3 para 3 3 5.

¹⁰⁸⁵ *Ibid.*

¹⁰⁸⁶ Ch 4 para 4 1.

¹⁰⁸⁷ Ch 4 para 4 3 4.

buyers' rights. Two of these rights were investigated in order to determine whether the unilateral determination of price in a consumer sale is allowed.

6 2 4 2 Consumer's right to disclosure of information

First, the consumer's right to disclosure of information was considered.¹⁰⁸⁸ It was shown that once a retailer displays his or her goods, he or she must display the price.¹⁰⁸⁹ The price must indicate the value of the consideration for which the seller is willing to sell the goods.¹⁰⁹⁰ The retailer is bound to the displayed price and may not require the consumer to pay a higher price than the one displayed. If two prices are displayed concurrently in respect of the same goods, the retailer is bound to the lower displayed price. It was submitted that these provisions extensively amended the common-law requirements of price in most consumer sales. The price must be fixed by the seller prior to the sale being concluded, and the buyer has the right to insist on paying this price. Although this would seem to exclude the possibility that the price can be determined by the seller exercising an objective or reasonable discretion, it was argued that it is possible for a consumer to waive a right provided such a waiver is not on unfair terms or such unfair terms are not imposed as a condition for entering into the transaction.

Furthermore, it was shown that section 26 of the CPA requires that each supplier must provide a written record (sales record) of each transaction to the relevant consumer, which would include the price payable. It was argued, however, that this provision does not seem to preclude the inclusion of a

¹⁰⁸⁸ Part D of the CPA (ss 22–28). The research focused on s 23 (right to disclosure of price), s 26 (right to a sales record) and s 22 (right to information in plain and understandable language).

¹⁰⁸⁹ S 23(3). All the relevant provisions contained in s 23 were discussed in ch 4 para 4 4 1.

¹⁰⁹⁰ Although it was noted that s 23(4) appears to exclude goods displayed predominantly as a form of advertisement from the operation of s 23(3), it was shown that the meaning of s 23(4) is unclear and problematic (cf ch 4 para 4 4 1 3).

discretionary power to the supplier to amend the price stated in the sales record.¹⁰⁹¹

Finally, it was noted that a price discretion would have to meet the requirements of plain and understandable language as set out in section 22.¹⁰⁹²

6 2 4 3 Consumer's right to fair, just and reasonable terms

Secondly, the consumer's right to fair, just and reasonable terms and conditions was investigated.¹⁰⁹³ Section 50(2)(b) was considered and provides that if an agreement between a consumer and a supplier is in writing, the contract must meet the requirements for plain language and must also set out an itemised breakdown of the consumer's financial obligations under such agreement.¹⁰⁹⁴ It was submitted that this provision does not preclude the inclusion of a discretion to determine the price, provided it meets the above requirements.

Thereafter, the question whether a discretion to determine the price granted to the supplier would be regarded as an unfair term in terms of section 48(1)(a)(ii) or as an unfair waiver of a consumer's rights in terms of section 48(1)(c)(i) was considered.¹⁰⁹⁵ The difference in approach between pure consumer sales and business-to-business consumer sales was discussed. After analysing the relevant provisions, it was submitted that a discretion to determine the price would be presumed to be unfair in a pure consumer sale, unless it referred to an objective external standard in the form of a price index. It was argued that a mere reference to reasonableness would not be sufficient. Although discretions in business-to-business consumer sales are not presumed to be unfair, and are therefore more likely to be allowed, they are still subject to the test for

¹⁰⁹¹ Ch 4 para 4 4 2.

¹⁰⁹² Ch 4 para 4 4 3.

¹⁰⁹³ Part G of the CPA (ss 48–52). The research focused on ss 48 and 52 (the right to fair, reasonable and just terms and price), s 50 (right to an itemised break-down of the consumer's financial obligations in a written consumer contract) and s 51 (prohibited terms).

¹⁰⁹⁴ Ch 4 para 4 5 1.

¹⁰⁹⁵ Ch 3 para 4 5 2.

unfairness. Likewise, it would also be possible for a supplier in a pure consumer sale to prove that a price discretion is not unfair.

Ultimately, whether the discretion would be unfair would depend on various factors and considerations including the circumstances and facts of the specific case. Nevertheless, the distinction between business-to-business consumer sales and pure consumer sales was welcomed. It provides a good starting point for the courts to assess whether a discretionary power to determine the price would be unfair. Furthermore, it addresses problems that arise in pure consumer sales because the consumer does not have the necessary knowledge or information to attack an unreasonable price determination. However, the test for unfairness presents some problems as the list of factors in section 52(2) deals more with procedural fairness than substantive fairness. Furthermore, relevant factors that should be considered in determining whether a price discretion is unfair are not listed in section 52(2). Finally, it was considered whether negotiated price discretions should not be subject to the test for unfairness provided they are lawful (ie refer to some external standard or reasonableness). The reason proposed for this distinction is that a negotiated price discretionary clause is the result of bargaining between the parties and therefore fair.

The dissertation also considered section 48(1)(a)(i) of the CPA, which enshrines the consumer's right to a fair, reasonable and just price.¹⁰⁹⁶ It was submitted that, in the absence of a test in the Act to determine whether a price is unfair, the courts would have to consider existing common-law principles. It was also argued that the factors listed in section 52(2) have limited value, and that existing guidelines dealing with whether a discretion to determine the price was exercised reasonably should be used in such an assessment. As such, the provisions in the CPA requiring a fair, reasonable and just price seemed unnecessary as the common law already provided the necessary guidelines and remedies.

¹⁰⁹⁶ Ch 4 para 4 5 3.

Finally, it was shown that the list of prohibited terms contained in section 51 would not apply to unilateral price discretions.¹⁰⁹⁷

6 2 5 Unilateral price determination in English law

6 2 5 1 General principles governing the unilateral determination of price

In chapter 5 it was shown that in English law the unilateral determination of price is lawful and would seem to allow for unfettered discretions. However, it was shown that recent trends in English case law indicated that the courts are far more prepared to imply terms into a contract to limit a discretion, and that such limitations would include a reference to reasonableness.¹⁰⁹⁸ As such, it was submitted that the English law provides a good comparative basis for the unilateral determination of price in consumer sales.

6 2 5 2 Consumer legislation

Various statutes, statutory instruments and draft legislation dealing or indirectly affecting price discretions in consumer sales were considered in chapter 5.¹⁰⁹⁹ It was shown that many of the provisions of the CPA were inspired by English consumer law as various similarities were found between the English consumer legislation and the CPA. However, in some instances the provisions of the CPA differ from the English consumer law. It is in respect of these provisions that the English consumer law could provide guidance in the interpretation and application of the CPA by the South African courts.

(a) Consumer's right to disclosure and information

First, the English law is very clear regarding when a trader would be required to display a price. As in South African law, advertisements are excluded from the mandatory display of prices in general. However, under English law, what

¹⁰⁹⁷ Ch 4 para 4 5 5.

¹⁰⁹⁸ Ch 5 para 5 3.

¹⁰⁹⁹ Chapter 5 para 5 4.

constitutes an advertisement is set out clearly and all the exceptions are expressly mentioned. It is submitted that similar amendments will need to be made to section 23 of the CPA in order to rectify its unclear wording.

Secondly, a trader is not automatically bound to the selling price, and these situations are still governed by the common law and dealt with on a case-by-case basis. Prior to the enactment of the CPA, this was also the case in South African law.¹¹⁰⁰ The common-law principles in South Africa dealing with this issue also indicate that this should rather be dealt with on a case-by-case basis and that these common-law principles are adequate in this respect.¹¹⁰¹ To ensure better protection for consumers at large, the English-law approach of criminalising contraventions of obligations to display prices should rather be followed.¹¹⁰²

(b) Consumer's right to fair, reasonable and just terms

First, core terms are excluded from the test of unfairness. This exclusion reflects the point of view that the focus should be on unfair terms as opposed to unfair contracts and should not cover the appropriateness of the price. If the price were subject to the test of unfairness, it would conflict with the fundamental principle of a free market economy that contracting parties can mould the principal rights and obligations as they see fit.¹¹⁰³ Furthermore, as already indicated, the South African common law provides adequate remedies to control the eventual price determined by the party with the discretionary power and is better suited to this task.¹¹⁰⁴

Secondly, the Unfair Terms Bill contains a more workable definition of a small business contract than the CPA.¹¹⁰⁵ Furthermore, negotiated terms in small

¹¹⁰⁰ Sharrock *Business law* 54–60.

¹¹⁰¹ See eg Van der Merwe *et al Contract* 58; Sharrock *Business law* 54–56.

¹¹⁰² This view is supported by Sharrock *Business law* 632 who argues that where a retailer contravenes s 23 of the CPA, he or she is guilty of a prohibited conduct in terms of the CPA.

¹¹⁰³ See ch 5 para 5 6 1 3(b).

¹¹⁰⁴ See ch 4 para 4 5 3.

¹¹⁰⁵ See ch 5 para 5 6 2 3(b).

business contracts are excluded from the test for unfairness to prevent undue interference in free-market practices.¹¹⁰⁶ However, the indicative list of terms in the Unfair Terms Bill will also be applicable to small-business contracts (although the burden of proof is similar to that in South African law), which ensures better protection for small businesses as they are also particularly vulnerable to unfair price variation clauses.¹¹⁰⁷

Thirdly, although a list of factors is provided for determining whether a term is unfair, this list is not exhaustive. The courts are permitted to consider any other relevant factor.¹¹⁰⁸ Although it is unclear whether the list of factors in the CPA is exhaustive, it is submitted that any other relevant factors should also be considered by the courts, specifically in the light of the fact that the list of factors in the CPA does not contain relevant factors that should be considered when dealing with price discretions.

Finally, the terms contained in the CPA regulations dealing with price discretions¹¹⁰⁹ are similar to the terms contained in the indicative list of unfair terms under the Unfair Terms Regulations.¹¹¹⁰ The South African courts should therefore take guidance from the guidelines and examples of unfair terms published in the *OFT Guidelines*.

6 3 CONCLUSION

In *NBS Boland Bank v One Berg River Drive* the Supreme Court of Appeal questioned the applicability of the common-law rule against unilateral price determination.¹¹¹¹ Further research indicated that the courts are prepared to allow a discretionary power to determine the price, provided such a discretion refers to an objective external standard or reasonableness. In addition, there

¹¹⁰⁶ *Ibid.*

¹¹⁰⁷ See paras 5 6 2 6 and 5 6 2 7 *supra*.

¹¹⁰⁸ See ch 5 paras 5 6 1 6 and 5 6 2 5.

¹¹⁰⁹ See ch 4 para 4 5 2 3.

¹¹¹⁰ See ch 5 para 5 6 1 7.

¹¹¹¹ *NBS Boland Bank v One Berg River Drive supra* para 16.

are indications that the courts would be prepared to imply reasonableness unless the discretion is clearly unfettered. These developments can be traced from the underlying principle or public policy consideration of contractual autonomy and practical considerations necessitating the use of price discretions in a modern society where prices are constantly subjected to market fluctuations. In contrast, the enactment of recent consumer legislation has amended the South African law of sale and has marked a departure from the traditional reverence reserved for contractual autonomy to a contractual order striving to protect consumers against unfair business practices flowing from the unequal bargaining relationship usually found in such contracts.

The result of the tension between these two principles is that the law should allow for the necessary flexibility in modern consumer sales while preventing the unjust and unfair exercise of a discretionary power by the seller to determine the price. Naudé refers to this tension between the different interests when she remarks that:

Unfair terms legislation should strike a balance between the interests of consumers and th[ose] of businesses, and this implies an optimum balance between fairness or flexibility and legal certainty.¹¹¹²

The CPA has brought a substantial improvement in addressing the use of unfair terms (including unfair price discretions) in consumer sales. However, in some instances its provisions are unclear and in others impractical, and until these legal uncertainties and impracticalities are addressed, the “optimum balance” will not be achieved.

¹¹¹² Naudé 2006 *Stell LR* 382.

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ABBREVIATIONS

<i>Afr J Int'l & Comp L</i>	<i>African Journal of International and Comparative Law</i>
<i>C</i>	Codex Iustinianus (Krueger (ed) <i>Codex Iustinianus</i>)
<i>CLJ</i>	<i>Cambridge Law Journal</i>
<i>D</i>	Digesta Iustinianus (Mommsen & Krueger (eds), Watson (ed/tr) <i>Digest of Justinian</i>)
<i>De Groot Inl</i>	<i>Inleidinge tot de Hollandsche Rechts-Geleerdheid</i> (Van Apeldoorn (ed) <i>De Groot's Inleidinge</i>)
<i>Gaius Inst</i>	Institutiones (Whittuck (ed) <i>Gai Institutiones translated by Poste</i>)
<i>GG</i>	<i>Government Gazette</i>
<i>GN</i>	<i>Government Notice</i>
<i>I</i>	Institutes Iustinianus (Thomas (tr) <i>Institutes of Justinian</i>)
<i>PELJ</i>	<i>Potchefstroom Electronic Law Journal</i>
<i>SA Merc LJ</i>	<i>South African Mercantile Law Journal</i>
<i>SALJ</i>	<i>South African Law Journal</i>
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
<i>THRHR</i>	<i>Tydskrif vir die Hedendaagse Romeins-Hollandse Reg</i>

TSAR

Tydskrif vir Suid-Afrikaanse Reg

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- Van Leeuwen *CF Censura Forensis* (Barber & MacFadyen (trs) *Van Leeuwen's CF*)
- Van Leeuwen *RHR Het Rooms-Hollands-Regt* (Decker (ed) *Van Leeuwen's Commentaries*)
- Voet *Comm ad Pand Voet Commentarius ad Pandectas* (Gane (tr) *The Selective Voet*)