

**The influence of the Consumer Protection Act 68 of 2008 on the
common law obligations of the seller *vis-à-vis* risk and duty to take
care, eviction, and defects**

by

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Abstract

This dissertation considers the possible influence of the Consumer Protection Act 68 of 2008 on the common law obligations of the seller vis-à-vis: 1) risk and duty to take care, 2) eviction and 3) defects.

Before one can have a look at the influence of new legislation on the common law, it is necessary to first go backward to look at where it all started in order to understand any possible influence. In the first chapter there is therefore a historical overview of the common law in general as well as the law of contract. Reference is also made to the Roman law perspective as well as the Roman concept of contract; the Roman-Dutch law perspective as well as the Roman-Dutch concept of contract; and the South African law perspective as well as the South African concept of contract.

In chapter 2 the common law and the law of contract is discussed in general with reference to concepts such as ownership, law of obligation, and the *emptio venditio*.

Chapter 3 deals with the essence of this dissertation as we look at the common law obligations of the seller and in specific the risk and duty of the seller to take care of the thing sold until it is handed over to the buyer (factors that influence the duty to take care, passing of risk, and passing of risk in sales by way of consignment); the seller's warranty against eviction (including the obligations of the buyer when there is a threat of possible eviction); and the seller's warranty against latent defects (*ex lege* warranties, *ex contractu* warranties, the *actio empti* and the *aedilitian* actions).

In chapter 4 there is a very short discussion on the influence of the Constitution of South Africa, 1996 in general as well as specifically on the law of contract.

Chapter 5 deals with the influence of the Consumer Protection Act 68 of 2008 in general, specifically on the law of contract (why an Act to protect the interests of consumers?) and then the influence on risk and the seller's duty to take care of the thing sold (the consumer's right to return goods; the supplier's obligation to draw potential risk of an unusual character or that the consumer could not reasonably be expected to be aware of or that could result in serious injury or death to the attention of the consumer), the influence on the seller's warranty against eviction (the consumer's right to assume that the supplier is entitled to sell the goods; sections 44 and 51) and the influence on the seller's warranty against latent defects (disclosure of reconditioned or grey market goods; quality of goods).

The conclusion follows in chapter 6.



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CHAPTER 1

HISTORICAL OVERVIEW

1 GENERAL

In order to understand certain principles in the law and the reasons for the establishment of those principles as we know it today, one has to look back into the broad history and development of the law of the country.

Edwards AB¹ quoted Allen ((Ed), (1964), *Law in the Making* 7, 285 quoting Oliver Wendell Holmes Jr., (1897), *The Path of the Law*, Harvard LR, 457 466) as follows:

“Law to those who crave the ‘illusion of legal certainty’ is usually defined simply as a set of rules aimed at regulating the community. On the other hand, those who are bent on securing justice believe that a legal system must be seen as a more flexible concept in which the promotion of justice takes priority over legal certainty.”

According to Edwards a legal system is a product of the history of a specific community and would therefore be influenced by certain factors such as geography, politics, religion and others that shaped that specific community. Von Savigny, for example, believed that the law was not “made” but rather “found” and that the law should follow and not lead.

South African law has a history stemming from mixed systems of law and has been compared to a three-layer cake.² These three layers refer to three very distinct periods in the history of South African law, namely the Roman period, the Roman-

¹ Edwards AB, *The History of South African Law an Outline* (1996) (further referred to as Edwards) 1.

² Hahlo and Kahn, *The South African Legal System and Its Background* (1973) 584.

Dutch period and the South African period. The term “Roman-Dutch” is problematic according to the writers of legal text books in the sense that it creates confusion. The term “Dutch” can be used to describe people from Holland, a province of the Netherlands, or to people from the Netherlands in general. However, Roman-Dutch law seems to refer rather to the period in which Roman law in a certain form was received into the Germanic customary law of the Netherlands.³

1.1 Historical overview on the law of contract

The law of contract is of great significance and has an impact on everyday economic activity. In the literature there are three theoretical bases for the enforcement of contracts, namely (1) the subjective consensual theory (i.e. “*wilsteorie*”) which entails that enforceability is based on the *consensus ad idem* of the contracting parties; (2) the objective declaration theory (i.e. “*verklaringsteorie*”) which entails that enforceability is based on those intensions that the contracting parties declared; and (3) the reliance theory (i.e. “*vertrouensteorie*”) which entails that enforceability is based on the reasonable expectations of each of the contracting parties created by the words or conduct of the other party.

Our courts have a long tradition of developing the common law from case to case. There is also an obligation on the courts in terms of the Constitution⁴ to develop the common law, which is discussed fully in Chapter 4 *infra*. The object of the courts is to apply and, where necessary, to develop the law in order to achieve justice.

³ Edwards (1996) 1-3; Van Jaarsveld SR (Ed), Boraine A, Coetzee WN, Du Plessis PW, Franzen RCD, Grové NJ, Joubert DJ, Joubert NL, Otto JM, Piek JN, Scott TJ, Van Rhijn TAR, Vivier PJ, *Suid Afrikaanse Handelsreg Volume I* (1988) (further referred to as Van Jaarsveld en Oosthuizen) 1; Van Zyl DH, *Geskiedenis van die Romeins-Hollandse Reg* (1987)1-9.

⁴ Constitution of the Republic of South Africa, 1996.

Christie⁵ suggests that a working definition of a contract in the modern Roman-Dutch law of South Africa may be as follows:

“...an agreement (arising from either true or quasi-mutual assent) which is, or is intended to be, enforceable at law.”

In order to try and understand our current position in enforcing contractual obligations, it is necessary to go back to where it all started.

2 THE ROMAN LAW PERSPECTIVE

The Roman law has developed over a period of approximately 12 centuries. Between 753 and 509/510 B.C. the period is called the period of the Kings. The Romans clearly distinguished between law and religion, but the law was strongly influenced by religion. During this period concepts such as private ownership, *mancipatio* (a formalistic mode of transfer of property) and *sponsio* (a verbal form of contract) started to emerge. The main source of the law during this period was custom (*gewoonte*, *mos* or *consuetudo*), that is the habits or norms that was transferred from one generation to the next (*mores maiorum*).⁶

The period 509/510 to 27 B.C. is known as the Republic. Throughout this period the law remained mainly based on custom. However, this period saw the beginning of legal science in Rome as the 450 B.C (a rather primitive codification of the existing customary law of the time), formed the basis for systematic exposition and interpretation of the law by jurists and magistrates. The importance of this codification is that it was regarded by the Romans as the source of all public and

⁵ Christie RH, *The Law of Contract in South Africa* (2006) (further referred to as Christie) 2.

⁶ Edwards (1996) 4-5; Thomas J Ph, *Essentialia van die Romeinse Reg* (1988) (further referred to as Thomas) 13-14 and 17; Van Jaarsveld en Oosthuizen (1988) 1-2; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1987) 22.

private law, it marked the final division between law and religion and the law was now accessible to all.⁷

The period 27 B.C. to 284 A.D. is known as the Principate (*Prinsipiaat i.e. princeps i.e. princeps senatus*).⁸ This period started the period of the Emperor. All the power was in the hands of the emperor. The law of this period is referred to as “classical” Roman law, since this period saw a level of development in the law that was never to be surpassed.⁹

The period 284 to approximately 300 A.D. is known as the Dominate (*Dominaat i.e. dominus i.e. meester*).¹⁰ This period is known for the economical retrogression, civil wars, degeneration of morals, and invasion of Rome by the barbarians.

During the period of approximately 300 to 476 A.D. there was a division between Eastern- and Western Rome. This period saw strong Germanic influences and invasions as well as Hellenistic and Eastern influences.

The period 476 to 527 A.D. saw the fall of the Western-Roman Empire and it disbanded into Germanic states.

From 527 to 565 A.D. saw the end of the period of the Emperor. Important about this period is Justinian, who ruled the Eastern Empire during this period. It was his ambition to restore the Roman Empire to its ancient glory and these ideals of him led

⁷ Edwards (1996) 7; Thomas (1988) 14-21; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1987) 14-15.

⁸ Postma F Dr, *Beknopte Woordeboek Latyn-Afrikaans* (1985) (further referred to as Postma) 249.

⁹ Edwards (1996) 9; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1987) 16.

¹⁰ Postma (1985) 97.

to his codification of the law with a view to introduce a uniform and complete legal system for the whole of the Roman Empire within the compass of a limited number of books. Justinian's codification consisted of four parts, (i) the *Codex*, (ii) the *Digesta* or *Pandectae*, (iii) the *Institutiones*, and (iv) the *Novellae*.¹¹

2.1 The Roman concept of contract¹²

The (to us) best known classification of the Roman law is that of Gaius' *Institutes*. It formed the basis for the teaching of Roman law up until the time of Justinian, when it was replaced by Justinian's *Institutes*. The private law, which law concerns the interests of private individuals as opposed to the interests of the state (government), was divided into (i) the law of persons, (ii) the law of things and (iii) the law of actions.

According to Christie,¹³ Justinian defined an obligation as:

“a legal bond by virtue of which we are compelled to perform some act for the benefit of another according to the laws of our state.”

An obligation was not necessarily to pay money, but also to give something (*dare*), to do something (*facere*) or to perform (*praestare*) in some or the other way. The words *dare*, *facere* and *praestare* were used by the Roman lawyers to include everything which might form the substance of an obligation.

Gaius¹⁴ classified contractual obligations as arising from an act (*re*), words (*verbis*), writing (*litteris*) or consent (*consensu*). In Justinian's time the *Institutes* limited

¹¹ Edwards (1996) 12-13; Nagel CJ (Ed), Boraine A, Delport PA, Lötz DJ, Olivier L, Otto JM, Prozesky-Kuschke B, Roestoff M, Van Eck BPS en Van Jaarsveld SR, Commercial Law (2006) (further referred to as Nagel *et al*) 4-5; Thomas (1988) 26-30; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1987) 16-17.

¹² See Lötz *De Jure* (vol 2) 1991 217 on the historic overview of contracts of sale specifically.

¹³ Christie (2006) 3.

¹⁴ Gaius 3.89.

contracts to ten in number, namely *mutuum*, *commodatum*, *depositum*, *pignus* (all contracts *re*), *stipulatio* (the contract *verbis*), the contract *litteris*, and the *emptio venditio*, *locatio conductio*, *societas*, and *mandatum* (the contracts *consensu*). The Romans never reached the conclusion that every serious agreement creates a contractual obligation.¹⁵

3 THE ROMAN-DUTCH LAW PERSPECTIVE

3.1 Introduction

According to the writers¹⁶ there is no proof that there was ever such a thing as “Netherlands law”. Each province basically operated under its own separate rules. Holland and Zeeland shared the same legal literature, but Utrecht, Friesland and Gelderland built up their own legal literature. However, Holland was dominating the seven northern provinces of the Netherlands economically and also in legal matters.

Together with countries like France and Germany, the Netherlands also experienced influence from the Roman law even before the 12th Century, with an “early” reception from the 12th to the mid-15th Century and the “actual reception” from the end of the 15th up until the 18th Century. The reception phenomenon is not strange as the borrowing of ideas happens generally amongst human beings. The Roman law of the fifth century was a very sophisticated system of law and it is therefore no surprise that other legal systems borrowed a few rules here and there from it to incorporate in its native customary law system.

¹⁵ Christie (2006) 3-6.

¹⁶ Du Bois F (Ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, Le Roux R, Paleker M, Pope A, Van der Merwe CG and Visser D, *Wille's Principles of South African Law* (2007) (further referred to as Du Bois *et al*) 67-76; Edwards (1996) 22-25, 33-34, 50-52 and 56-58; Nagel *et al* (2006) 5; Van Jaarsveld en Oosthuizen (1988) 2-3; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1987) 81-289.

Two of the old writers are worth mentioning here. The first is Antonius Matthaeus (1601-1654). He is generally referred to as Matthaeus II. His most important works on private law are the *Paroemiae* and *De Auctionibus*. The latter is primarily a treatise on sales by judicial process, but is very broad in conception and gives many details on the law of sale in general as well as on letting and hiring. The second writer worth mentioning is Simon van Leeuwen (1626 – 1682). Van Leeuwen was the first ever writer to refer to the existing Dutch law as Roman-Dutch law. He used the description *Rooms-Hollandts Reght* for a subtitle of his work *Paratitula Juris Novissimi* which was published in 1652. Later, in 1664, his main work was given the title of *Het Roomsch Hollandsch Recht*.¹⁷

3.2 The Roman-Dutch concept of contract¹⁸

According to the old writers like Zypaeus, Gudelinus, Grotius, Groenewegen, Vinnius and Matthaeus, unlike the Roman law, the Roman-Dutch law treats every agreement made seriously and deliberately as a contract. This is most probably because of the big influence of the canon law which initially concerned governing the Church of the Christian faith. Because of their faith people of Germanic origin believed in the honouring of promises in general and therefore also the honouring of contractual promises.¹⁹

4 THE SOUTH AFRICAN LAW PERSPECTIVE

4.1 Roman-Dutch law at the Cape (1652 – 1795)

¹⁷ Du Bois F (Ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, Le Roux R, Paleker M, Pope A, Van der Merwe CG and Visser D, *Wille's Principles of South African Law* (2007) (further referred to as Du Bois *et al*) 67-76; Edwards (1996) 22-25, 33-34, 50-52 and 56-58; Nagel *et al* (2006) 5; Van Jaarsveld en Oosthuizen (1988) 2-3; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1987) 81-289.

¹⁸ See also Lötze *De Jure* (vol 2) 1991 217 on the historic overview of contracts of sale specifically.

¹⁹ Christie (2006) 6-8.

In Edwards'²⁰ opinion the force of custom is often not considered in any analysis of the standing which Holland's statutes, enacted after 1652, enjoyed at the Cape during the rule of the Company. Regular contact with the institutions of Holland was maintained at the Cape until the close of the eighteenth century and so a continuous influx of Holland's ideas must have had some influence still on the *mores* at the Cape. There was little change to the Roman-Dutch law at the Cape during this period due to the use of the *Kaapse Placaaten*. The only changes were brought on by the development of the primary source in Holland itself.²¹

4.2 The reception of English law at the Cape (1828 – 1910)

The English influence could be seen in the “time of essence”-rule and the rules relating to agreements in restraint of trade in the field of the law of contract as well as English legal terminology such as “malice”, and “duty of care” in the field of the law of delict. However, Roman-Dutch law was still adequate to meet the needs of the community as it was seen as a legal system that was not stagnant, but it was flexible and could change in order to take into account the changing circumstances of the time. The influence of English law on the South African common law proceeded until the first part of the twentieth century. The establishment of Afrikaans law faculties at the universities in Stellenbosch and Pretoria in the twentieth century caused the law to return to the Roman-Dutch law in a “pure” form which “gathered quite a storm” between the so-called “purists, pollutionists and pragmatists”.

From Union (1910) until the aftermath of the First Republic (1961), Roman-Dutch law was still prevailing. The Appellate Division came into operation in 1910. It was a well-

²⁰ Edwards (1996) 69.

²¹ Edwards (1996) 71 and 73-74; Van Jaarsveld en Oosthuizen (1988) 3-4; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1987) 420-444.

known fact that there were conflicts between the courts of the four former colonies with regards to questions of substantive law and there was thus a need to establish a uniform system of law throughout the country. A further problem was that the common law of South Africa was, at the time, the Roman-Dutch law as it had prevailed in the province of Holland during the era of the United Netherlands and that it did neither keep tract with the changes that have already taken place in Roman-Dutch common law nor taken into account that further changes are inevitable as the modern world keeps on changing. It is important that the law should be kept in line with changing circumstances in a community by either changing the old rules to keep tract with the changes or to introduce new rules in order to replace the old (now irrelevant) rules.²²

4.3 The South African concept of contract²³

In the early days in South Africa, there was a lot of power play between the judges of the four different colonies on whether Roman-Dutch law or English law should prevail. This was also true for the law of contract. Some courts (mostly that of the Transvaal and the Orange River Colony) would rely on the old Roman-Dutch writers like Voet, Grotius and Groenewegen in their interpretation of contracts while, for instance, in the Cape Colony and Natal there was a bigger influence from the English law. After the creation of the Appellate Division in 1910, it was for example decided by the court that the English doctrine of consideration does not form part of the law of contract of South Africa. This brought an end to a very long discrepancy between the decisions of the Cape Colony (De Villiers CJ) and that of the Transvaal

²² Edwards (1996) 80, 83, 87-93 and 95-98; Nagel *et al* 5; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (1987) 444-503.

²³ See Lötze *De Jure* (vol 2) 1991 217 on the historic overview of contracts of sale specifically.

(Kotze CJ). However, even today, there are still some English law influences in our common law without which our law of contract would have been very deficient.²⁴

²⁴ Christie (2006) 8-12.

CHAPTER 2

THE COMMON LAW AND THE LAW OF CONTRACT

1 OWNERSHIP

The early Roman law did not understand the concept of ownership in the same sense that we know it today. In the early Roman law the *paterfamilias* had ownership of all persons and things under his *patriapotestas*, but there was no actual private ownership and ownership resided in the *gens*. There were a few ways in which the early Romans could obtain ownership of a *res*, namely in an original or natural manner (a person obtained ownership without the intervention of a third party e.g. by way of prescription, *occupatio* and *accessio*, or in a derived manner (a person obtained ownership by way of transfer of the ownership from one person to another e.g. *traditio*).²⁵

Traditio, descended from the *ius gentium* (or *ius naturale* as it was also called), was the most usual form of transfer of ownership and was used for instance in contracts of sale to transfer the *res nec mancipi*.

2 LAW OF OBLIGATION

In the Roman law, an *obligatio* created a “legal tie” between two people in order for the one person (A) to have a certain right and the other person (B) to have a corresponding duty to provide the right to the first person (A).

²⁵ Thomas (1988) 48-49 and 51; Van Zyl DH, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 127 and 134-135.

Just like in our own law today, most legal obligations in the Roman law were either obligations *ex contractu* or obligations *ex delicto*, to which Gaius referred as *summa divisio*. According to Van Zyl:²⁶

“As *contractus* is beskou elke regmatige regshandeling op wilsooreenstemming gebaseer wat tot verbintenisregtelike regte en verpligtinge aanleiding gegee het en wat deur 'n aksie afgedwing kon word. Die *delictum* was weer 'n onregmatige daad (ook bekend as *maleficium*) wat ten koste van die een of ander persoon gepleeg is en wat aanleiding gegee het tot 'n verbintenis tussen sodanige persoon en die dader, die inhoud van welke verbintenis gerig was op skadevergoeding, genoegdoening of 'n boete (*poena*).”

Legal obligations are created where there is some form of conduct by humans. The human conducts are divided into juristic and non-juristic acts. Juristic acts are seen as those acts to which the law gives effect according to the intentions of the parties (for example in a contract of sale where one person undertakes to sell a thing for a certain price and the other person undertakes to buy the thing for that specific price). Non-juristic acts are those acts to which the law gives effect irrespective of what the intentions of the parties are (for example a delict where the one party (A) might not have had the intention to cause harm to the other party (B), but he (A) is liable to that party (B) because his (A) conduct resulted in harm to that party (B) in one way or the other).²⁷

²⁶ Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 250 par 2.

²⁷ Nagel *et al* (2006) 22-25; Thomas (1988) 90-94; Van Jaarveld en Oosthuizen (1988) 18-19; Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 247-250; Zimmermann R, *The Law of Obligations – Roman Foundations of the Civilian Tradition* (1990) 1-33 where the writer says on p 1 that: “Today the technical term ‘obligation’ is widely used to refer to a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance. The party ‘bound’ to make performance is called the debtor (debitor, from *debere*), whilst at the other end of the obligation we find the ‘creditor’, who has put his confidence in this specific debtor and relies (*credere*) on the debtor’s will and capacity to perform. As far as the Roman terminology is concerned, ‘obligatio’ could denote the *vinculum iuris* looked at from either end; it could refer to the creditor’s right as well as to the debtor’s duty.”

3 GENERAL BACKGROUND ON THE LAW OF CONTRACT²⁸

3.1 Introduction

What exactly is meant by the term “contract”? A contract can be defined as follows:

“n Kontrak is ’n ooreenkoms. Maar iedere ooreenkoms is nie in die wettige betekenis ’n kontrak nie. Dit kan alleen ’n kontrak wees as dit sekere eienskappe besit. Die eienskappe is:

- (1) Dit moet ’n ooreenkoms wees om iets te doen of om iets nie te doen nie (*physical possibility*);²⁹
- (2) Dit moet die bedoeling van die partye wees dat hulle deur hulle onderskeie beloftes gebind sal word (*consensus*);³⁰
- (3) Dit moet ’n ooreenkoms wees wat deur die wet van krag gemaak kan word, dit wil sê, dit moet vry van enige onwettigheid wees (*lawfulness*);³¹
- (4) Die partye moet oor die regsbevoegdheid beskik om kontrakte te kan sluit (*contractual capacity*);³² en
- (5) Indien die wet enige formaliteite vir die partikuliere kontraksoort voorskryf, dan moet dit nagekom word (*formalities*).³³

In short, a contract can therefore be defined as:

“an agreement which gives rise to a legal obligation.”³⁴

In the Roman law, contracts were divided into four categories, namely: *contractus re*, *contractus verbis*, *contractus litteris* and *contractus consensus*. For purposes of this dissertation *contractus consensus* is the most important. Both Gaius and Justinian recorded four subcategories of *contractus consensus*, namely *emptio venditio* (koopkontrak i.e. contract of sale), *locatio conductio* (huurkontrak i.e. lease), *societas*

²⁸ For general principles on the Law of Contract see Du Bois (2007) 733-887; Van der Merwe S, Van Huyssteen LF, Reinecke MFB and Lubbe GF, *Kontraktereg* (2008) (further referred to as Van der Merwe *et al*) 262-346; Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 251-252.

²⁹ See Van Jaarsveld en Oosthuizen (1988) 87-105.

³⁰ *Op cit* 24-59.

³¹ *Op cit* 87-105.

³² *Op cit* 60-86.

³³ Author unknown, *Die Afrikaanse Regsadviseur* (1959) (further referred to as Die Afrikaanse Regsadviseur) 424; Van Jaarsveld en Oosthuizen (1988) 106-112.

³⁴ Nagel *et al* (2006) 37 par 3.82.

(vennootskapskontrak i.e. partnership agreement) and *mandatum* (lasgewingskontrak i.e. mandate). In this dissertation the focus is on the contract of sale (*emptio venditio*). In all the *contractus consensus*, which are all dependent on the *bona fides*, mere agreement between the parties was enough for a contract to be established and there were no further requirements or formalities necessary for example delivery, formal words or that the contract had to be in writing like some of the other categories of contracts.³⁵

3.2 Essentialia, Naturalia and Incidentalia

The *essentialia* of a contract can be described as those minimum characteristics typical of a specific kind of contract and which characteristics distinguish it from all other kinds of contracts.³⁶ *Essentialia* are also the minimum requirements for the existence of the contract. *Naturalia* on the other hand are those terms and conditions that naturally or automatically and by operation of law forms part of the contract (for example the warranty against latent defects or eviction in contracts of sale). *Incidentalia* (accidentalia) are those additional terms and conditions which only forms part of a contract should the parties tacitly or expressly agree thereto as well as any express *incidentalia* that exclude, limit or change any of the *naturalia* of the contract.³⁷

3.3 Particular terms and conditions in contracts

³⁵ Nagel *et al* (2006) 36-39; Thomas (1988) 94; Van Jaarsveld en Oosthuizen (1988) 20-23; Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 285.

³⁶ For a broad discussion on the *essentialia* of the contract of sale see also Lötze *De Jure* (vol 2) 1991 from 222 par 3.

³⁷ Hutchison D (Ed), Pretorius C (Ed), Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C and Naudé T, *The Law of Contract in South Africa* (2009) (further referred to as Hutchison and Pretorius) 235-236; Nagel *et al* (2006) 39; Van der Merwe *et al* (2008) 302-305; Van Jaarsveld en Oosthuizen (1988) 22.

There is an unlimited pool of terms and conditions that can be found in contracts. However, there are a few specific terms and conditions that are specialised terms. One such term that is important for purposes of this dissertation is the warranty. A warranty is an undertaking by one party to the other party in the contract that a certain state of affairs exists or does not exist (for example the quality of a thing sold by A to B). In the case of a warranty it will be clear from the reading of the contract that the parties had the intention, either tacitly or expressly, that the undertaking would form part of the contractual rights and obligations and that non-compliance with the warranty would constitute a breach of contract.³⁸ Contractual warranties should, however, be distinguished from warranties *ex lege* (by operation of the law). With warranties *ex lege* it is not necessary for the parties to agree to the terms, but it would form part of the contract nonetheless (for example warranties against latent defects and eviction in contracts of sale).³⁹

Another important term is so-called exemption clauses/exception clauses/exclusion clauses (“*vrywaringsbedinge*”). These terms and conditions are used to exclude the liability as a result of misrepresentation, liability as a result of the *naturalia* of the contract as well as liability as a result of breach of the contract. One such exemption clause that is well-known is the *Voetstoots*-clause. This term, “*voetstoots*”, literally means that someone examined for example a motor vehicle by kicking the tyres with his foot. Exemption clauses have a very bad reputation as it is misused by parties in a stronger bargaining position to exploit parties in a weaker bargaining position.⁴⁰

4 THE *EMPTIO ET VENDITIO*

³⁸ See *Wright v Pandell* 1949 (2) SA 279 (K); *Schmidt v Dwyer* 1959 (3) SA 896 (K).

³⁹ Also see Nagel *et al* (2006) 104-105; Van der Merwe *et al* (2008) 316-317.

⁴⁰ Van der Merwe *et al* (2008) 318-322.

The Romans called a contract of sale an *emptio* (kontrak van koop i.e. to buy) *et venditio* (en verkoop i.e. and sell). It is thus clear that such a contract is reciprocal and both parties have clear rights and obligations in terms of the contract. In South Africa the law of sale is based on the common law and therefore the rules of the Roman law and the Roman-Dutch law still apply today in our country.⁴¹

The following definitions for the contract of sale are offered in Van Jaarsveld en Oosthuizen:⁴²

- 1) “Voet. ’n Koop is ’n *bona fide* kontrak, gebaseer op wilsooreenstemming waarkragtens dit ooreengekom word dat ’n saak vir ’n bepaalde prys verruil word (*Com ad Pandect* 18.1.1).
- 2) *MacKeurtan*: Purchase and sale (*emptio venditio*) is a mutual contract for the transfer of possession of a thing in exchange for a price (*Sale of Goods in South-Africa (1972) 4th edition* 2).
- 3) *De Wet en Yeats*: ’n Koopkontrak is ’n wederkerige ooreenkoms waarby een persoon, die verkoper, onderneem om aan ’n ander, die koper, ’n saak te lewer, en die ander, in ruil daarvoor, onderneem om aan die eersgenoemde ’n som geld te betaal (*Suid-Afrikaanse Kontraktereg en Handelsreg (1978) 4th edition* 278).
- 4) *Belcher*: *Emptio venditio* or purchase and sale is a contract whereby one person (the seller) promises to deliver a thing to another (the purchaser) and the latter in return promises to pay a price therefore (*Purchase and Sale in South Africa (1972) 4th edition* 2).
- 5) *Kerr*: When parties who have the requisite intention agree together that the one, called the seller, shall make something, called the thing sold, available to the other, called the buyer or purchaser, in return for the payment of the price, the contract is a sale (*The Law of Sale and Lease (1984) 3*).
- 6) Die volgende omskrywing word egter aan die hand gedoen: *’n Koopkontrak is in die algemeen ’n wederkerige ooreenkoms ingevolge waarvan die een party, die verkoper,*

⁴¹ Nagel *et al* (2006) 170; Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 285.

⁴² Van Jaarsveld en Oosthuizen (1988) 277.

onderneem om 'n saak asook al sy regte op die saak, aan 'n ander party, die koper, oor te dra en die koper onderneem om daarvoor, as teenprestasie, 'n prys in geld te betaal."⁴³

The *essentialia*⁴⁴ of a contract of sale are the following:

- 1) The intention of the parties must be for the one party (A) to sell something (*animus vendendi*) and the other party (B) to buy (*animus emendi*) it (the nature (*animus*) of the contract);⁴⁵
- 2) The parties must have agreed on the thing to be sold (*merx, res vendita*);⁴⁶ and
- 3) There must be a price (*pretium*)⁴⁷ agreed between the parties for the thing to be sold.⁴⁸

It is evident that the two parties involved (the seller (*venditor*) and the buyer/purchaser (*emptor*)) must have reached consensus about all three of the above in order for a contract to be a contract of sale.⁴⁹

⁴³ Also see Du Bois *et al* (2007) 889; Nagel *et al* (2006) 170-171; Van Jaarsveld en Oosthuizen (1988) 275-278; Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 286; *Union Government (Minister of Finance) v Van Soelen* 1916 AD 92 at 101; *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 at 400; Zimmermann (1990) 230-270.

⁴⁴ For a broad discussion on the *essentialia* of the contract of sale in specific see Lötze *De Jure* (vol 2) 1991 217 at par 3. For consensus on the *essentialia* of the contract see *McWilliams v First Consolidated Holdings (Pty) Ltd* (1982) 1 All SA 245 (A), (1982) 2 SA 1 (AD) where the court *a quo* held that "a positive agreement was reached on what may conveniently be referred to as the basic terms of the sale".

⁴⁵ For nature of the contract see *Vasco Dry Cleaners v Twycross* (1979) 1 All SA 321 (A), (1979) 1 SA 603 (AD) where it was established that the true intention of the parties was in fact not a contract of sale but rather that of a money-lending agreement; *Mountbatten Investments (Pty) Ltd v Mahomed* (1989) 1 All SA 94 (D), (1989) 1 SA 172 (D) which involved a trade-in transaction. Also see Kerr, *The Law of Sale and Lease* (2004) 3-6.

⁴⁶ See *Botha v Carapax Shadeports (Pty) Ltd* (1992) 3 All SA 768 (AD), (1992) 1 SA 202 (AD) where it was found that a restraint of trade clause in an employment agreement formed part of the goodwill of the business, which in turn formed part of the *merx* sold; *Phone-A-Copy Worldwide (Pty) Ltd v Orkin* (1986) 2 All SA 12 (A), (1986) 1 SA 729 (AD) where 12 flats (sectional title units) in a block of flats still to be erected were sold. See also Pienaar's criticism of this judgment 1986 THRHR 479. Also see Kerr (2004) 8-28.

⁴⁷ See *Patel v Adam* (1977) 3 All SA 31 (A), (1977) 2 SA 653 (AD) where the court held that not only must a price be described in such a manner that it can be legally determined, but also that the method in which payment is to be made must be determined or determinable; *Aris Enterprises (Finance) (Pty) Limited v Waterberg Koelkamers (Pty) Limited* (1977) 2 SA 425 (AD) where the court determined that the price was neither fixed nor determinable and therefore there was no contract of sale.

⁴⁸ Lötze DJ, Nagel CJ and Joubert EP, *Specific Contracts in Court* (2010) (further referred to as Lötze *et al*) 3-4 and 7-14. Also see Kerr (2004) 29-75.

⁴⁹ *Die Afrikaanse Regsadviseur* (1959) 565, 567; Du Bois *et al* (2007) 889-891, 895-897 and 901; Nagel *et al* (2006) 171-175; Thomas (1988) 95-96; Van Jaarsveld en Oosthuizen (1988) 280-281, 282-284 and 297-301; Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 286-287.

CHAPTER 3

THE COMMON LAW OBLIGATIONS OF THE SELLER

1 GENERAL⁵⁰

At the conclusion of a contract of sale between the seller and the purchaser/buyer, both parties have to fulfil certain contractual duties, the contents thereof being the *naturalia* of the contract. These contractual duties can be limited or changed by agreement between the parties (in the form of the *incidentalia* of the contract).

The duties of the purchaser/buyer are basically to accept delivery of the thing sold and to pay the purchase price to the seller.

The duties of the seller, however, are much more far-reaching than those of the purchaser/buyer and are also more problematic in executing. The duties of the seller can be summarised as follows:

- 1) Duty to take care of the thing sold and passing of risk;
- 2) Delivery of the thing sold (*Vacua Possessio*);
- 3) Warranty against eviction; and
- 4) Warranty against latent defects.⁵¹

For purposes of this dissertation we are only going to have a look at (i) the duty to take care of the thing sold and the passing of risk, (ii) the warranty against eviction and (iii) the warranty against latent defects.

⁵⁰ Also see Lötz *De Jure* (vol 1) 1992 143.

⁵¹ Du Bois *et al* (2007) 894; Kerr AJ (2004) 184; Van Jaarsveld en Oosthuizen (1988) 319-320.

2 RISK AND DUTY OF THE SELLER OF SAFE-KEEPING

2.1 Introduction

From the conclusion of the contract between the parties up until the time that the thing sold is handed over by the seller to the buyer, the seller has a duty to keep the thing sold safe. Should there be any loss of or damages caused to the thing sold, after the contract became *perfecta*, as a result of the intentional (*dolus*) or negligent (*culpa levis in abstracto*) conduct of the seller, the seller will be liable to the buyer for the loss of or damages caused to the thing sold.⁵² Negligent acts of the seller can be either gross negligence (*culpa lata*) or mere carelessness (*culpa levis*). The test for negligence will be that of a reasonable man.⁵³

2.2 Factors that influence the duty to take care

The duty to take care of the seller is influenced by the following factors:

1) *Mora debitoris* – either the buyer or the seller can be in *mora debitoris*. If the buyer omits to pay the purchase price, he is in *mora debitoris* and the seller will only be liable for loss of or damages caused to the thing sold if such was the result of intentional or gross negligent conduct by the seller. The seller on the other hand will be in *mora debitoris* should he fail to deliver the thing sold and he will be liable for any loss of or damages caused to the thing sold.

2) *Mora creditoris* – either the buyer or the seller can be in *mora creditoris*. Where the buyer fails to accept the thing sold when the seller delivers it to the buyer, he will be in *mora creditoris* and the seller will only be liable for loss of or damages caused to the thing sold due to his intentional or gross negligent conduct.⁵⁴ Where

⁵² Grotius 3.14.34; Voet 18.6.2; Also see *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957; *Frumer v Maitland* 1954 (3) SA 845 (A).

⁵³ Du Bois *et al* (2007) 895; Kerr (2004) 159; Nagel *et al* (2006) 184; Van Jaarsveld en Oosthuizen (1988) 319-320; Van Zyl, *Die Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 290.

⁵⁴ See *Wingerin v Ross* 1951 (2) SA 82 (K).

the seller fails to accept payment of the purchase price, he will be in *mora creditoris*. This will not have any influence on his duty to take care, unless he fails to deliver the thing sold in which instance he will be liable for loss of or damages caused to the thing sold as a result of his intentional or negligent conduct.

Where the thing sold is destroyed or damaged due to *vis maior* (and Act of God) or *casus fortuitous* (accidentally), the seller would not be liable due to the rule *periculum est emptoris* (the risk has passed to the buyer i.e. die risiko val die koper toe).⁵⁵

2.3 Passing of risk⁵⁶

According to the abovementioned paragraphs it would seem very simple to establish who carries the risk, the seller or the buyer. However, it is unfortunately not that simple at all. Firstly, it happens all the time that goods get sold by the seller to the buyer and the delivery of the goods does not happen simultaneously, but only afterwards. The question then arises as to whom has to carry the risk after the conclusion of the contract of sale up until the thing sold is actually delivered to the buyer? The general rule is that the owner carries the risk of the loss of or damages caused to his own goods (*res perit domino*) as mentioned above.⁵⁷ However, who is the “owner” of it if the thing was already sold but not yet delivered for instance?

⁵⁵ Du Bois *et al* (2007) 895; Kerr (2004) 160; Nagel *et al* (2006) 184; Van Jaarsveld en Oosthuizen (1988) 135-143; Van Zyl, *Die Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 290-291; also see *Pahad v Director of Food Supplies* 1949 (2) SA 710 (A); Zimmermann (1990) 280-281.

⁵⁶ *Die Afrikaanse Regsadviseur* (1959) 568-570; Du Bois *et al* (2007) 892-895; Nagel *et al* (2006) 184-185; Thomas (1988) 122; Van Jaarsveld en Oosthuizen (1988) 321-327; Van Zyl, *Die Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 290-291; Zimmermann (1990) 281-292.

⁵⁷ *Gengan v Pathur* 1977 (1) SA 826 (D) where the common law rule of *perfecta emptione periculum ad emptorem respiciet* (after completion of the sale the purchaser shall bear the risk) was excluded by a specific *incidental* that was included in the contract of sale; also see *Kistasamay v Pillay* 1979 (3) SA 1350 (N).

The result of the working of the doctrine of the passing of the risk is that any total loss (*periculum interitus*) of as well as diminishing value (*periculum deteriorationis*) of the thing sold will be borne by the buyer after the contract became *perfecta* as the passing of risk in our law differs from that of the English law in that the passing of the risk in the thing sold is not connected in any way to the passing of the actual ownership of the thing sold. This means that the buyer will still be liable to pay the purchase price despite the fact that the seller will not be liable to deliver the thing sold as it was destroyed.⁵⁸ However, any *commodum* (growth i.e. *aanwas*) will go to the buyer, e.g. where a pregnant cow was bought and the calf was borne before delivery and the cow died.

The rules regarding the passing of risk changed over time. Originally the rule read that *res perit domino* as said above as ownership of the *merx* did not pass to the buyer up until delivery thereof. The risk then rested on the seller (*periculum est venditoris*). The reason was most probably because the seller was responsible for the *custodia* of the thing sold. In that instance the seller was also responsible for loss of or damages caused to the *merx* through *casus fortuitus*, but not for loss or damages due to *vis maior*, in which instance the buyer was carrying the risk. In Justinian's law the seller was only responsible for loss and damages as a result of his *dolus* or *culpa levis in abstracto* and no longer for *casus fortuitus*.

This obligation of the seller of the safekeeping of the *merx* arose from the fact that the "passing of the risk" to the buyer normally happens as soon as a contract of sale becomes *perfecta* (the contract is completed i.e. *voltooid*). A contract of sale

⁵⁸ *Fine & Gluckman v Heyneke* 1915 TPD 125; *Montgomerie v Rand Produce Supply* 1918 WLD 170.

becomes *perfecta* as soon as consensus is reached between the seller and the buyer on the thing to be sold as well as the purchase price payable for the thing to be sold and there are no further terms and conditions (*pendente condicione*) applicable (e.g. a resolutive condition [i.e.ontbindende voorwaarde] or a suspensive condition [i.e.opskortende voorwaarde]). If there are any further terms and conditions, the contract will only become *perfecta* as soon as those terms and conditions are fulfilled.⁵⁹

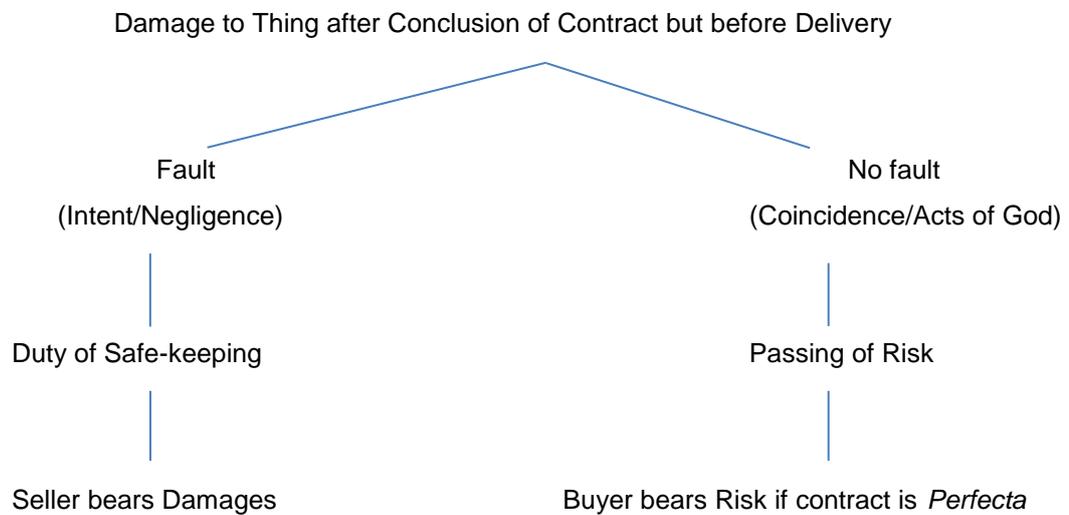
The parties are free to conclude contracts where they create their own terms and conditions and where they can exclude the obligation of safekeeping of the seller or where they extend the obligation of safekeeping up until after delivery of the thing sold to the buyer, as long as the terms and conditions are not illegal.

Another instance where the risk will not pass to the buyer after consensus was reached on the purchase price to be paid is where the *merx* is not fixed but generic (*emptio ad mensuram*) or a “sale by description”.⁶⁰ In this instance the risk will only pass as soon as the *merx* is individualised or identified (counted, weighed, or measured, e.g. 10kg of sugar or twenty head of cattle).

⁵⁹ See *Corondimas v Badat* 1946 AD 558; *Mulder v Van Eyk* 1984 (4) SA 204 (SOK).

⁶⁰ Voet 18.1.24; also see *Botha v Mazeka* 1981 (3) SA 191(A).

The following diagram is suggested by Nagel *et al*⁶¹ for the duty of safe-keeping and the passing of risk:



2.3.1 Passing of risk in sales by way of consignment⁶²

Generally the risk passes to the buyer after the contract of sale became *perfecta* as we can see from the abovementioned paragraphs. This has the effect that the buyer will also carry the risk during transit of the thing sold by ship or rail (and nowadays by aeroplane). However, it might sometimes happen that the thing sold is only individualised as soon it is loaded at the harbour or the station (or the airport). If the seller undertakes to deliver the thing sold at a certain specific place, the buyer will still carry the risk unless it is changed by way of *incidentalía* in the contract or a tacit agreement to this effect between the parties.⁶³

There are different types of sales by way of consignment. They are:⁶⁴

2.3.1.1 FOB – Free on Board

The seller undertakes to deliver the thing sold to the buyer for only the purchase price at a certain harbour. If it is the harbour where the thing sold is to be loaded on

⁶¹ (2006) 185.

⁶² *Die Afrikaanse Regsadviseur* (1959) 572-573; Van Jaarsveld en Oosthuizen (1988) 327-328.

⁶³ See *Thomas & Co v Whyte & Co* 1923 NPD 413; *American Cotton Products v Felt & Tweeds Ltd* 1953 (2) SA 756 (N).

⁶⁴ Also see Kerr (2004) 230-233

the ship, the seller should arrange for the thing sold to be shipped and the buyer is responsible for organising the ship and the chartering. However, if it is the harbour where the thing sold is to be off-loaded, the seller is also responsible for organising the ship and the chartering.⁶⁵ The risk passes as soon as the thing sold is shipped.

2.3.1.2 CIF – Cost, Insurance, Freight⁶⁶

In this instance the seller undertakes to ship the thing sold, to have it insured as per the normal terms and conditions for such as well as to pay for the freight up to the destination, all of which are included in the purchase price. He then sends the buyer the consignment note, the invoice and the insurance policy. The risk passes as soon as the thing sold is loaded onto the ship.⁶⁷

2.3.1.3 FOR – Free on Rail

The seller undertakes to load the thing sold at his costs onto a railway-carriage and also to pay for the consignment if it has to be delivered to the buyer's station. If it is FOR at the seller's station, the buyer is responsible for the payment of the consignment but the seller needs to organise the necessary railway-carriage. In both these instances the risk passes as soon as the thing sold is loaded onto the railway-carriage.⁶⁸

⁶⁵ See *Anderson & Coltman v Universal Trading Co* 1948 (1) SA 1277 (W); *Lendlease Finance v Corpor de Marcadeo Agricola* 1976 (4) SA 464 (A) from 494; *Chong Sun Wood Products PTE Ltd v K & T Trading Ltd and another* 2001 (2) SA 651 (D); *Murray & Co v Stephan Bros* 1917 AD 243 at 250; *Poort Sugar Planters (Pty) Ltd v Unfolozi Co-operative Sugar Planters Ltd* 1960 (3) SA 585 at 597.

⁶⁶ Also see *Du Bois et al* (2007) 892.

⁶⁷ *Frank Wright v Corticas BCM* 1948 (4) SA 456 (K); *Garavelli & Figli v Gollach & Gomperts* 1959 (1) SA 816 (W); *Lendlease Finance v Corpor se Marcadeo supra* from 491; *Savage & Lovemore Mining v International Shipping Co* 1987 (2) SA 149 (W); *chattanooga Tufters Supply Co v Chenille Corporation of South Africa (Pty) Ltd* 1974 (2) SA 10 (E); *Sharpe and Co v Nosawa and Co* 1917 2 KB 814.

⁶⁸ *Montgomerie v Rand Produce Supply Co supra* at 167; *Laing v SA Milling Co* 1921 AD 387; *M Levisseur & Co v Friedman* 1922 OPD 182; *Gibson v Arnold & Co (Pty) Ltd* 1949 (4) SA 541 (T); *Stanger Milling Co v Greenwood Webster & Co* 1926 NPD 279; *Sher v Frenkel & Co* 1927 TPD 375; *Natal Livestock Auctioneers Ltd v Herring and Herring* 1931 NLR 589 at 595; *Newmark Ltd v The Cereal Manufacturing Co Ltd* 1921 CPD 52; *Voigt Ltd v South African Railways* 1932 CPD 140.

3 WARRANTY AGAINST EVICTION⁶⁹

3.1 Introduction

In the early Roman law there was originally no protection or warranty for the buyer against a threat of eviction and the buyer simply suffered the loss unless there was fraud committed by the seller in that he acted purposefully. The Roman law endured a long history of change in this regard. By the time of Justinian's law there was a tacit warranty against eviction.

Due to the fact that the seller need not be the owner of the thing sold, the buyer does not automatically become the owner of the thing sold as a result of the conclusion of the contract of sale between the parties and there is no common law obligation on the seller to transfer ownership of the thing sold to the buyer.⁷⁰ According to Kerr,⁷¹ however, in the modern law the seller, if he is the owner, is obliged to transfer ownership. There is, however, a duty on the seller, even if he is not the owner, to provide the buyer with the peaceful/undisturbed possession (*vacua possessio*) of the thing sold and to warrant the buyer against eviction by any third party.⁷²

The warranty against eviction is a warranty *ex lege* and therefore it automatically forms part of any contract of sale. The parties may choose to exclude the warranty against eviction by way of a *pactum de eviction non praestanda* in the contract of sale.⁷³

⁶⁹ *Die Afrikaanse Regsadviseur* (1959) 574-575; Du Bois *et al* (2007) 896 and 901; Kerr (2004) 177-180 and 187-205; Nagel *et al* (2006) 191-193; Thomas (1988) 121-122; Van Jaarsveld en Oosthuizen (1988) 345-352; Van Zyl, *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 293-294; Zimmermann (1990) 293-304.

⁷⁰ *Kleynhans Bros v Wessels' Trustee* 1927 AD 271; *Shaw v Arami* 1913 WLD 105; *Ensor v Kader* 1960 (3) SA 453 (D); *Van der Westhuizen v Yskor Werknemers OBV* 1960 (4) SA 603 (T); *Boland Bank v Joseph* 1977 (2) SA 87 (D).

⁷¹ (2004) 177.

⁷² *Barclays Western Bank v Fourie* 1979 (4) SA 157(K); *Sweet v Ragereghara* 1978 (1) SA 131 (D); *Garden City Motors v Bank of Orange Free State* 1983 (2) SA 104 (N).

⁷³ *Kleynhans Bros v Wessels' Trustee supra* 290; *Credcor Bank v Merewent Service Station* 1978 (1) SA 584 (D&K).

The cause of the eviction (*causa evictionis*) must already have existed at the time before the contract of sale becoming *perfecta* as the buyer will carry the risk of any loss of or damages caused to the thing sold as soon as the contract becomes *perfecta*.⁷⁴

The following forms of eviction can be identified:

- (i) The true owner of the thing sold can claim his property from the buyer;⁷⁵
- (ii) A third party obtains possession of the property and the buyer cannot claim his property from the third party due to a defective title (*gebrekkige titel*);⁷⁶
- (iii) When fixed property is sold and the property is still subject to a lease agreement, the rule *huur gaat voor koop* will prevent the buyer from taking possession of the property sold up until the expiry of the lease agreement;⁷⁷
- (iv) The holder of a limited right (e.g. a servitude or a right of way) may prevent the buyer from having peaceful/undisturbed use and enjoyment of the thing sold.⁷⁸

3.2 Obligations of the buyer when there is a threat of possible eviction

When the buyer becomes aware of a possible threat of eviction by a third party against him for the thing sold, there are some rules that he needs to adhere to in order to protect his own rights when evicted. For example:

- (i) The buyer cannot merely hand over the thing sold to the third party if he is threatened with eviction and claim damages from the seller.⁷⁹ If the buyer can,

⁷⁴ *Roods' Trustees v Scott & De Villiers* 1910 TS 47; *Van Staden v Pretorius* 1965 (1) SA 852 (T).

⁷⁵ *Mdakane v Standard Bank of South Africa Ltd* 1999 (1) SA 127 (W).

⁷⁶ *Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty) Ltd* 1983 (1) SA 295 (AD); See also Lötze *et al* (2010) 47-48.

⁷⁷ *Thorpe v Donniger* 1930 TPD 839;

⁷⁸ *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A); *Southern Life Assoc v Segall* 1925 OPD 11; *Cowley v Hahn* 1987 (1) SA 440 (OK) and *Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty) Ltd supra* where in both instances the buyer bought a patent right.

however, show that the title of the seller was defective and that he would in any event have lost the thing sold to the third party, the buyer will succeed with his claim against the seller.⁸⁰

(ii) The buyer has to inform the seller of the threat of eviction against the thing sold by a third party in order to enable the seller to assist him in protecting his right in the thing sold or even for the seller to be able to file a defence against the claim of the third party.⁸¹ The notice provided by the buyer to the seller must be well in time for the seller to be able to prove his title of the thing sold.⁸²

(iii) As soon as the seller receives the notice from the buyer of the threat of eviction of the thing sold, the seller can: (a) obtain a cession of the rights of the buyer and intervene between the buyer and the third party, assist the buyer and provide him with the necessary proof of his title or (c) bring a joinder application to the relevant court of law to have himself joined as a party to the matter before the court.

(iv) If the buyer does not provide the seller with proper notice of the threat or the seller cannot assist the buyer in his defence, the buyer has an obligation to conduct a *virilis defensio* (kragtige verweer i.e. vigorous defence) against the eviction claim. In *York & Co v Jones NO*⁸³ the court found that a buyer has conducted a *virilis defensio* if he has appointed an attorney as well as counsel, the defence was brought properly, the facts were before court, etc. The test for a *virilis defensio* will be for that of a reasonable litigant.⁸⁴

⁷⁹ *Lammers & Lammers v Giovannoni* 1955 (3) SA 385 (A); *Dickinson Motors v Oberholzer* 1952 (1) SA 443 (A); *Westeel Engineering v Sidney Clow & Co* 1968 (3) SA 458 (T); *Moyo v Jani* 1985 (3) SA 362 (ZH); *Nuna v Meyer* 1905 SC 203; *Weber & Pretorius v Gavronsky Bros* 1920 AD 51; *Edward v Van Zyl* 1951 (2) SA 96-97 (R); *Bhagavan v Mavhundhla* 1954 (1) SA 350 (A).

⁸⁰ *Nuna v Meyer supra*; *Louis Botha Motors v James & Slabbert Motors* 1983 (3) SA 793 (A).

⁸¹ *Lammers & Lammers v Giovannoni supra*; also see *Lötz et al* (2010) 48-50; *De Bruyn v Centenary Finance Co* 1977 (3) SA 43 (T).

⁸² *York & Co v Jones NO* 1962 (1) SA 72 (SR); *Scott v Du Plessis* 1919 OPD 111.

⁸³ 1962 (1) SA 55 (SR).

⁸⁴ Also see *Moyo v Jani supra*; also see *Vrystaat Motors v Henry Blignaut (Edms) Bpk* 1996 1 All SA 249 from 255 to 260 where the Appellate Division held that where stolen motor vehicles were seized from the possession of the buyer by the police in terms of section 20 of the Criminal Procedure Act 51 of 1977, the buyer was in fact "evicted".

4 WARRANTIES⁸⁵ AGAINST LATENT DEFECTS⁸⁶

4.1 Introduction

Just like in the case of the warranty against eviction, the early Roman law did not make provision for a warranty against latent defects and there is a long history on the development in this regard. In short, at first the buyer only had a claim against the seller for latent defects if the seller knew about the latent defects and concealed it deliberately (*dolo malo*) and the buyer could institute the *actio empti* against the seller. Later on the parties could include *stipulations* by which the seller warranted that the thing sold was free from latent defects or that it had certain qualities. If this proved not to be true, the buyer could institute the *actio ex stipulate*, *stipulation duplae* or *stipulation habere licere* against the seller to claim for damages.

During the time of the Republic the *aediles curules* provided that where slaves (*sevi*) or draughts-animals (*iumenta i.e. trekdiere*) were sold, any illness (*morbus*) or deficiency (*vitium*), which included any disability of or a flaw in the character of the slave or animal must be expressly declared. If it was a slave, that was sold, it also had to be declared specifically by its master whether the slave was a vagrant (*erro i.e. rondloper*) or a fugitive (*fugitivus i.e. voortvlugtige*) or whether the slave was free from any further offence (*noxia solutus i.e. misdryf*) for which his owner could be held liable in some way. The buyer could insist that the seller provide him with a *stipulatio* to this effect and should the seller refuse to provide the *stipulatio* the buyer could institute the *actio redhibitoria* within two months from the conclusion of the contract

⁸⁵ Kerr (2004) on 219 criticises the use of the word “warranty” as he is of the opinion that the word “warranty” is misleading for two reasons: “(a) if it is thought to be helpful to consider that there is a provision in the contract, it is residual and not implied; and (b) the so-called ‘warranty’ does not involve, as warranties normally do, liability for consequential loss.” Kerr therefore suggests that it would be better to refer to it as “liabilities” and not “warranties”.

⁸⁶ *Die Afrikaanse Regsadviseur* (1959) 575-577; Du Bois *et al* (2007) 892 and 897; Kerr (2004) 211-215 and 219; Lötze *et al* (2010) 54-68; Nagel *et al* (2006) 193-198; Thomas (1988) 123-125; Van Jaarsveld en Oosthuizen (1988) 353-366; Van Zyl, *Die Geskiedenis en Beginsels van die Romeinse Privaatreg* (1988) 294-295; Zimmermann (1990) 305-337.

for *restitutio in integrum* or the *actio quanti minoris* within six months from the conclusion of the contract for a reduction in the purchase price. (This was also the case with draughts-animals.)

Later on the *actio redhibitoria* could be instituted within six months and the *actio quanti minoris* within one year from the date of the conclusion of the contract.

By the time of Justinian's law the *aedilician* actions were not only relevant for slaves and draughts-animals bought on the open market, but for all other things sold. Where the warranty against latent defects was excluded in the contract of sale, such a contract of sale was called a *venditio simplaria*.

Nagel *et al*⁸⁷ offers the following definition for a latent defect:

"A latent defect is a defect in the thing sold which is of such a nature that it renders it unfit for the purpose for which it was bought or for which it is normally used, and which defect was not known to the buyer at the time of conclusion of the contract, and could not be discovered by him upon a reasonable examination of the thing sold."⁸⁸

There is also a difference between latent defects and patent defects. A patent defect is a defect that can be noticed by any diligent person.⁸⁹ The test whether a defect is latent or patent will be whether a reasonable person would have been able to detect the defect after a normal examination of the thing to be sold.⁹⁰ It is not a requirement for the defect to be detectable by an expert or that an unusually thorough examination (*onnatuurlike of buitengewone deeglike ondersoek*) should have been

⁸⁷ (2006) 194.

⁸⁸ *Dibley v Furter* 1951 (4) SA 73 (C); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A); See Lötze *et al* (2010) 54-55 for a discussion of the *Holmdene*-case.

⁸⁹ *Von Mellenthin v MacDonald* 1969 (3) SA 476 (T).

⁹⁰ *Schwarzer v John Roderick's Motors* 1940 OPD 180; *Lakier v Hager* 1958 (4) SA 180 (T).

conducted on the thing sold.⁹¹ The fact that no examination was conducted by the buyer can also not change the nature of the latent defect in the thing to be sold.⁹² The defect must also be serious and effect the utility of the thing sold⁹³ and must already exist at the time of the conclusion of the contract.⁹⁴

Most latent defects originate with regards to animals,⁹⁵ household equipment and products,⁹⁶ agricultural products and equipment,⁹⁷ motor vehicles and mechanical apparatus,⁹⁸ as well as houses and parts thereof.⁹⁹ A concealed servitude over a fixed property can also be seen as a latent defect.¹⁰⁰

A warranty against latent defects can either be *ex lege* or *ex contractu*. This warranty stems from the common law, i.e. from the Roman law and the Dutch law.¹⁰¹

4.2 Ex lege warranties

⁹¹ *Knight v Hemming* 1959 (1) SA 288 (FC); *Willets & Sons v Kurtz* (1905) 19 EDC 125; *Corbett v Harris* 1914 CPD 535; *Schwarzer v John Roderick's Motors supra*.

⁹² *Zieve v Verster* 1918 CPD 296; *Schmidt v Dwyer* 1959 (3) SA 896 (K); *Ornelas v Andrews Cafè* 1980 (1) SA 378 (W).

⁹³ *Waller v Pienaar* 2004 (6) SA 303 (C); *Cohen & Klein v Duncan Grey & Co* 1936 CPD 490; *Dibley v Furter supra*; *Curtaincrafts v Wilson* 1969 (3) SA 223 (OK); in *De Vries v Wholesale Cars* 1986 (2) SA 22 (O) the court held that a buyer would only be able to succeed in his claim if the latent defect is of such a serious nature that he would not have proceeded to buy the thing to be sold if he knew about the defect beforehand.

⁹⁴ *Du Plessis v African Supply Co* 1910 EDL 496; *Heyne v Reynecke* 1946 NDP 713; *Seboko v Soll* 1949 (3) SA 337 (T) in which case it was held that the buyer has to prove that the latent defect existed at the time of the conclusion of the contract; *Cullen v Zuidema* 1951 (3) SA 817 (K) where it was held that the buyer should not have known about the latent defect was present in the thing sold; also see the *Schwarzer-* and *Corbett-case supra* in this regard.

⁹⁵ *Von Mellenthin v MacDonald supra*; *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A); *Muller v Hobbs* (1904) 21 SC 669 at 671 where there was scab in sheep; *Haviside v Jordan* (1903) 20 SC 149 where there was lung sickness in cattle; *Wilcken and Ackermann v Klomfass* 1904 TH 91 at 96 where there was heartwater in sheep.

⁹⁶ *Hackett- and Curtaincrafts-case supra*.

⁹⁷ *Du Plessis- and Kroonstad Westelike Boere Koöperasie-case supra*.

⁹⁸ *Schwarzer-case supra*; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Goldblatt v Sweeney* 1918 CPD 320 where there was a welded crankshaft found in a motor vehicle.

⁹⁹ *Crawley v Frank Pepper* 1970 (1) SA 29 (N); *Ranger v Wykerd* 1977 (2) SA 976 (A); *Ohlsson's Cape Breweries Ltd v Levison* 1905 TH 330 where there was a *cimex lectularius* in the dwelling-house.

¹⁰⁰ *Glaston House v Inag supra* where the court assumed that an undisclosed servitude (in this instance a statute in a building that was declared a national monument) constituted a latent defect. For as discussion of this matter see *Lötz et al* (2010) 59-60; also see *Trinder v Taylor* 1921 TPD 517; *Munnich v Botha* 1927 PH A34 which was criticised by Van Jaarsveld en Oosthuizen as the writers are of the opinion that concealed servitudes resort under eviction due to the fact that there is a defective title; They also criticised *Ornelas v Andrews Cafè supra* where the buyer could not obtain a permit to trade for the same reason.

¹⁰¹ *Hackett v G & G Radio & Refrigerator Corporation* 1949 (3) SA 664 (A); *Dibley v Furter supra*; *Kroonstad Westelike Boere Koöperatiewe Vereniging v Botha* 1964 (3) SA 561 (A); *Phame v Paizes* 1973 (3) SA 397 (A).

In any contract of sale there is by operation of law an implied warranty against latent defects, which warranty applies automatically, unless it was specifically excluded by the parties in the *incidentalia* of the contract by way of, for example, a “voetstoots” clause.

In any contract of sale there is thus an implied warranty that the thing sold does not have latent defects and that it would be fit for purpose and the parties need not come to such an agreement.¹⁰²

The usual remedy available to the buyer in instances like this is one of the *aedilician* actions, namely the *actio redhibitoria* (to claim restitution) or the *actio quanti minoris* (to claim a reduction in the purchase price). These two actions can, however, not be used by the buyer to claim compensation.

4.3 Ex contractu warranties

In a contract of sale, the parties can either expressly agree to certain terms and conditions or there can be tacitly implied terms and conditions, e.g. that the thing sold does not have latent defects and that it would be fit for the purpose for which the buyer is buying it.

It often happens that the tacit warranties are confused with *ex lege* warranties because *ex lege* warranties do not get expressly agreed to between the parties and *vice versa*. In order to distinguish between the two, the facts of each case, the evidence of the parties before the court as well as all the surrounding circumstances

¹⁰² See in this regard *Minister van Landbou-Tegniese Dienste v Scholtz supra* and *Crawley v Frank Pepper supra*.

must be considered and it must be deduced on a balance of probabilities that a tacit warranty was given by the seller for it to be enforced as such.¹⁰³

The seller can also warrant the presence of specific good qualities or the absence of bad qualities by way of incorporating such in the contract of sale.¹⁰⁴

The usual remedy available for the buyer to claim for *ex contractu* warranties is the *actio empti*. The buyer would also be able to use the *aedilician* actions, but it seems to be unwise as he will be able to claim for compensation as well with the *actio empti*, which cannot be claimed through the *aedilician* actions.

4.3.1 Misrepresentation

It is important to distinguish between contractual warranties and misrepresentation. A misrepresentation can be made fraudulently, negligently¹⁰⁵ or innocently. It is a declaration (*dicta*) or promise (*promissa*) that is made by the seller to the buyer which is untrue and can be unrelated to the contract. If, however, this declaration made by the seller to the buyer convinced the buyer to conclude the contract of sale, he will have the usual remedies against the seller.¹⁰⁶

4.3.2 Sales talk (“Puffing”)

It is also important to distinguish between contractual warranties and mere sales talk or “puffing”. Where a declaration is made by the seller purely to praise the thing to be

¹⁰³ *Minister van Landbou-Tegniese Dienste*-case *supra*; *Jaffe & Co v Bocchi* 1961 (4) SA 363 (T).

¹⁰⁴ *Naudé v Harrison* 1925 CPD 90; *Wright v Pandell* 1949 (2) SA 285 (K); *Small v Smith* 1954 (3) SA 436 (SWA).

¹⁰⁵ For negligent misrepresentation see the discussion of *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (AD) in *Lötzt et al* (2010) 66-68.

¹⁰⁶ See *Minister van Landbou-Tegniese Dienst v Scholtz* *supra*; *Phame v Paizes* *supra*; *Davidson v Bonafede* 1981 (2) SA 501 (K); *Gannet Manufacturing Co v Pastaflex* 1981 (3) SA 216 (K); *Waller v Pienaar* 2004 (6) SA 303 (C) for a discussion on this case see *Lötzt et al* (2010) 61-64.

sold or if the seller is merely expressing his own opinion about the thing to be sold, the buyer would have no remedy against the seller as it is neither a warranty nor a misrepresentation.¹⁰⁷

4.4 Actio empti

4.4.1 Grounds for institution

4.4.1.1 Warranty against latent defects

The seller can give the buyer either an express or a tacit warranty that there are no latent defects present in the thing sold. If it is discovered afterwards that in fact there is a latent defect in the thing sold which will influence the utility or not be fit for the purpose for which it was bought, the buyer can institute the *actio empti*.¹⁰⁸

4.4.1.2 Warranty for presence of special qualities

This is where a seller informs (makes a *dictum et prommissum* to) the buyer of certain special qualities or characteristics in the thing to be sold or that certain bad qualities are absent. It can also be where the buyer informs the seller that he wants to buy the thing to be sold for a specific purpose and afterwards it becomes clear that the thing sold is not fit for the purpose for which the buyer wanted it.¹⁰⁹

4.4.1.3 Seller conceals latent defects deliberately

The seller has an obligation to inform the buyer of any latent defects that he is aware of in the thing to be sold which may render the thing to be sold unfit for the purpose

¹⁰⁷ *Inhambane Oil Syndicate v Mears* 1906 SC 250; *Naudé v Harrison supra*; In *Corbett v Harris* 1914 CPD 535 it was stated that: "Simple puffing and mere commendation in describing the thing offered for sale are not actionable. In such a case the maxim *caveat emptor* applies and the purchaser will have no rest content with his bargain." The court will look at each individual case and take into consideration the circumstances and the exact words that were uttered to describe the thing sold in order to establish whether the seller gave an express warranty or merely praised the thing or gave his opinion about it. In the case of *Phame v Paizes supra* the court provided some guidelines to establish whether a declaration by a seller was mere "puffing".

¹⁰⁸ *Hackett v G & G Refrigeration Corp* 1949 (3) SA 690 (A); *Jaffe & Co v Bocchi supra*.

¹⁰⁹ See *Minister van Llandbou-Tegniese Dienste v Scholtz supra* in which case the buyer bought a bull from the seller in order to use it to breed. It later transpired that the bull was infertile and could not be used to breed with. The Appellate Division found that there was a tacit warranty; *Jaffe & Co v Bocchi supra*; *Naudé v Harrison supra*; *Marais v Commercial General Agency* 1922 TPD 440; *Evans & Plows v Willis & Co* 1923 CPD 496; *Kroomer v Hess & Co* 1919 AD 204.

that the buyer wants to use it for.¹¹⁰ If the seller knows about the latent defect and intentionally conceals it, he is guilty of fraudulent misrepresentation (opsetlike wanvoorstelling).¹¹¹ The seller *must have had the intention to mislead the buyer in order for the buyer to be able to institute the actio empti*.¹¹²

In this instance a *voetstoots* clause in the contract will also not protect the seller where he fraudulently misleads the buyer into buying the thing with the latent defects.¹¹³ However, in practice the buyer would seldom institute the *actio empti* and would rather institute a delictual claim based on fraudulent misrepresentation.¹¹⁴

4.4.1.4 Dealer

The question is whether a dealer who sells the thing to the buyer provides a tacit warranty of his own specialised knowledge regarding the thing sold and that it is fit for purpose and free from latent defects?¹¹⁵

¹¹⁰ *Glaston House v Inag supra*; *Crawley v Frank Pepper supra*; in *Von Mellenthin v MacDonald supra* it was found that the seller had no such obligation regarding the sale of a horse.

¹¹¹ *Van der Merwe v Meades* 1991 (2) SA 1 (A); *Cullen v Zuidema supra*; *Dibley v Furter supra*; *Speight v Glass* 1961 (1) SA 782 (N); *Glaston House v Inag supra*; *Ranger v Rykerd supra*.

¹¹² *Glaston House v Inag supra*; *Vivian v Woodburn* 1910 TPD 1285; *Cluley v Muller* 1924 TPD 720; *Hacket v G & G Refrigeration Corp supra*; Although there is no general duty on the seller to disclose, latent defects that fall within the knowledge of the seller should be disclosed. The test is whether the information to be disclosed fall outside the buyer's reasonable knowledge or could he have been reasonably required to obtain such knowledge, and does the advantage of such exclusive knowledge result in an unfair bargaining position for the seller. See Nagel *et al* (2006) 196 at par 14.67; *Waller v Pienaar supra*; *Cloete v Smithfield Hotel* 1955 (2) SA 662 (O). In *ABSA Bank Ltd v Fouché* 2003 (1) SA 176 (SCA) the Supreme Court of Appeal held that: "The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material...That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful...A party is expected to speak when the information he has to impart falls within his exclusive knowledge...and the information...is such that the right to have it communicated to him would be mutually recognised by honest men in the circumstances."

¹¹³ *Crawley v Frank Pepper supra*; *Glaston House v Inag supra*.

¹¹⁴ *Orban v Stead* 1978 (2) SA 717 (W); *Ranger v Wykerd* 1977 (2) SA 976 (A); *Truman v Leonard* 1994 (4) SA 371 (SE); *Waller v Pienaar supra*.

¹¹⁵ See *Kroonstad Westelike Boere Koöperatiewe Vereniging Bpk v Botha* 1964 (3) SA 561 (A) where Holmes J said the following: "In my opinion, the preponderant judicial view, and which this court should now approve, is that liability for consequential damage caused by latent defects attaches to a merchant seller, who was unaware of the defect where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold. Whether a seller falls within the category mentioned will be a question of fact and degree, to be decided from all circumstances of the case."; *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery* 1996 (2) SA 565 (A); *Sentrachem Bpk v Prinsloo* 1997 (2) SA 1 (A); *Kroon v JL Clark Cotton Co* 1983 (2) SA 197 (OK).

The fact that the seller is unaware of the latent defect will be no excuse.¹¹⁶ The seller will be liable to the buyer for consequential damages except if specifically excluded in the contract where:

- (i) he is a dealer;
- (ii) he professed in public that he has expert knowledge of the thing sold.¹¹⁷

4.4.1.5 Manufacturer

A seller, if he is also the manufacturer, will without a doubt be liable (including for consequential damages) for any latent defect in the thing sold except if there is an expressed agreement excluding his liability in the contract of sale.¹¹⁸

The seller who is also the manufacturer of the thing sold will be liable to the buyer even if he did not declare himself to be an expert. Negligence or ignorance of the defect will also not render the seller with a defence against liability. This is due to the *Pothier*-rule.¹¹⁹

4.4.1.6 Sale by sample

¹¹⁶ *Odendaal v Bethlehem Romery Bpk* 1954 (3) SA 370 (O).

¹¹⁷ *Gannet Manufacturing Co v Postaflex supra*; *Erasmus v Russell's Executors* 1904 TS 265; *Seggie v Phillips* 1915 CPD 292; *Marais v Commercial General Agency supra*; *Evans & Plows v Willis supra*; *Young's Provision Stores v Van Ryneveld* 1936 CPD 87; *Vlotman v Buysell* 1946 NP 412.

¹¹⁸ *Hall & Co v Kearns* 1893 SC 155; *Spiers Bros v Massey-Harris & Co* 1931 NP 382; *JK Jackson Ltd v Salisbury Family Health Studio* 1974 (2) SA 622 (RA).

¹¹⁹ *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd supra*; *Sentrachem BPK v Wenhold supra*; *Langeberg Voedsel Bpk v Sarculum Boerdery supra*; *Sentrachem Bpk v Prinsloo supra*; also see *Ciba-Ceigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) where the Supreme Court of Appeal found that the *Pothier*-rule is out-dated and unsuitable for modern circumstances, but offered no possible solution. Also see Lötze *et al* (2010) 55-57 for a discussion on the *Ciba-Ceigy*-case. Commentary: "It is submitted that the existing principles relating to patrimonial damages, the sum-formula approach, positive *interesse* and the limiting of liability should be applied properly in order to solve the problems regarding the liability of the merchant seller and manufacturer for consequential damages caused by latent defects. This approach will result in the scrapping of the so-called *Pothier* rule. Consequential damages are those damages that flow from direct damages according to the common-sense criterion and are limited by the foreseeability test. The prejudiced party must show that the party who is in breach did have knowledge of the specific circumstances and that the contract was entered into on the basis of that specific knowledge. The fact that the seller as merchant seller or manufacturer does have certain expertise or knowledge must be taken into account as a factor in determining the foreseeability of consequential damages in each individual case. On the contrary, a manufacturer, because of his intimate knowledge of the thing sold gained from the manufacturing process, is in an even better position than a merchant seller to foresee the specific consequences that may flow from latent defects. Therefore, it is easier to apply the foreseeability test to a manufacturer." *Button v Bickford Smith* 1910 WLD 52; *Bower v Sparks Young & Farmers Meat Industries* 1936 NP 1.

It happens all the time that the thing sold is out of stock, not readily available, too big or of too great a quantity, etc. and then it is not possible to show the buyer the actual thing to be sold, but rather a sample of the thing to be sold. This sample may be exhibited or presented as a warranty of the quality of the actual thing to be sold. When the sale is made by way of a sample the parties agree that the thing sold will correspond in quality with a specific specimen exhibited at the time of the conclusion of the contract of sale. When the sale is made by way of a description the parties agree that the thing sold follows the description of a particular kind or class of goods; or as possessing a particular quality; or fitness for a particular purpose; or as having a particular place of origin.¹²⁰

4.4.1.7 What can be claimed with the *actio empti*?

(a) Cancellation of the contracts of sale -

A buyer will be able to cancel the contract of sale where the nature of the latent defect is so serious that he would not have bought it if he knew about it and it cannot be expected of him to retain the thing sold.¹²¹

(b) Damages -

A buyer will be able to claim all his damages (*id quod interest*). This also includes the consequential damages suffered by the buyer.¹²²

4.5 *Aedilician actions*¹²³

¹²⁰ *Bouwer v Ferguson* 4 EDC 90; For a discussion of this case see Kerr (2004) 219-220; *Greenshields v Chisholm* 1884 SC 220; *Pringle v Ellis & Son* 1898 EDL 119; *Kinnear v Huxham* 1903 (13) CTR 421; *Willets & Son v Kurtz supra*; *Frenkel & Co v Johannesburg Municipality* 1909 TH 260; *SA Oil & Fat Industries v Park Rynie Whaling Co* 1916 AD 400; *Glicks & Co v Gerber* 1926 OPD 82; *Grossberg v Central Cabinet Works* 1955 (2) SA 246 (T).

¹²¹ *Minister van Landbou-Tegniese Dienste v Scholtz-case supra*.

¹²² In the *Holmdene Brickworks*-case at 687 the court held that: "The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party"; also see *Novick v Benjamin* 1972 (2) SA 860 (A); *Maennel v Garage Continental* 1910 AD 137; *The Louvre v Jaspan & Miller* 1922 TPD 242; *Versveld v SA Citrus Farm* 1930 AD 452; *Radiotronics v Scott Lindberg & Co* 1951 (1) SA 312 (K); *Odendaal v Bethlehem Romery supra*; *Jaffe & Co v Bocchi supra*; *Kroonstad Westelike Boere Kooop Vereniging supra*; *Crawley v Frank Pepper supra*; *Katzenellenbogen v Mullin* 1977 (4) SA 856 (A).

The *aedilician* actions are generally available to a buyer where there are latent defects in the thing sold and the seller did not expressly or tacitly warrant the absence of any latent defect or did not know about the existence of the latent defects in the thing sold and thus the *ex lege* warranty kicked in.¹²⁴

These actions can also be instituted where a seller gave an express or tacit warranty *ex contractu*, or concealed a latent defect in the thing sold, or warranted (gave as *dictum et promissum*¹²⁵ that) specific good qualities or characteristics in the thing sold that actually later transpired not to exist or that certain bad qualities or characteristics are not present in the thing sold.¹²⁶ It would, however, not be advisable for the buyer to institute these actions under the circumstances at hand and to rather make use of the *actio empti* because the buyer cannot claim his damages through the *aedilician* actions.

4.5.1 *Actio Redhibitoria*

The object of this action is to place both parties in the position they would have been in before the conclusion of the agreement (*restitutio in integrum*).¹²⁷ The buyer can claim back the purchase price from the seller.¹²⁸ This action may only be instituted where the restitution of the thing sold is justified. The test whether the restitution is justified is whether the thing sold is fit for purpose or not. The buyer will also be

¹²³ For a complete discussion of the *aedilician* actions also see Kerr (2004) 106-155.

¹²⁴ *Truman v Leonard supra* - for a discussion of this case see Lötze *et al* (2010) 57-58.

¹²⁵ See Van Jaarsveld en Oosthuizen (1988) 362 par 2.1(4): “n *Dictum et promissum* is ‘n materiële verklaring deur ‘n verkoper aan die koper tydens die ondehandeling gemaak wat betrekking het op die kwaliteit van die saak en meer behels as blote aanprysing of ophemeling van die saak.”

¹²⁶ In the *Phame v Paizes*-case *supra*, the court held that the *aedilician* actions are also available where: “...the seller made a *dictum et promissum* to the buyer upon the faith of which the buyer entered into the contract or agreed to the price in question; and it turned out to be unfounded”; also see *Gannet Manufacturing Co v Pastaflex supra*; *Viljoen v Steyn* 1976 (2) PH A 59 (K).

¹²⁷ *Muller v Steenkamp* 1937 TPD 248.

¹²⁸ *Radiotronics v Scott Lindberg & Co supra*.

entitled to claim interest on the purchase price.¹²⁹ There must also be restitution of the thing sold, meaning that the buyer has to return the thing sold to the seller.¹³⁰

This action can only be instituted once by the buyer.

There can, however, be no restitution of the thing sold if it was destroyed or where the buyer does not want to return the thing sold or where it is not possible for the buyer to return the thing sold due to the fact that he, for example, sold it to someone else, or where the buyer intentionally destroyed the thing sold.¹³¹

The following instances where restitution of the thing sold will not be possible are exclusions on the abovementioned rule:

- (i) Where the thing sold was destroyed as a result of the latent defect itself;¹³²
- (ii) Where the buyer had a statutory obligation to destroy the thing sold because of the latent defect;¹³³ and
- (iii) Where the thing sold, in general, was totally or partially destroyed due to no fault of the buyer.¹³⁴

Wear and tear as well as diminishing value as a result of the normal use of the thing sold should also not prevent the buyer from being able to return the thing sold. The buyer on his turn will have to make good all benefits he had from using or

¹²⁹ *Seggie v Phillips Bros supra*; *Kirsten v Niland* 1920 PD 87; *De Vries v Wholesale Cars* 1986 (2) SA 22 (O) for a discussion on this case see Lötze *et al* (2010) 60-61; *Janse van Rensburg v Grieve Trust* 2000 (1) SA 315 (C); *Dibley v Furter supra*. *Cloete v Smithfield Hotel supra*; In the case of *Weinberg v Aristo Egyptian Cigarette Co* 1905 TS 760 at 764 the court also held that the buyer is entitled to cancellation of the contract of sale where the defect is so serious: "that if the buyer had known of it he would not have bought".

¹³⁰ *SA Oil & Fat Industries v Park Rynie Whaling Co supra*.

¹³¹ *SA Oil & Fat Industries v Park Rynie Whaling Co supra*.

¹³² *Marks Ltd v Laughton* 1920 AD 12.

¹³³ *Dodd v Spitaleri* 1910 SC 196.

¹³⁴ *Wingerin v Ross* 1951 (2) SA 82 (K); *Conradie v Greyling Implemente Fabriek* 1955 (1) SA 433 (T).

possession of the thing sold¹³⁵ as well as any fruits that he received from it while in possession of the thing sold,¹³⁶ to the seller. The buyer will, however, be entitled to be compensated by the seller for any improvements that he made to the thing sold.¹³⁷

4.5.2 Actio Quanti Minoris

With this action the buyer is entitled to claim a *pro rata* reduction of the purchase price from the seller.¹³⁸ This action can be instituted more than once if more latent defects are detected at a later stage.¹³⁹ It can also be instituted in the alternative to the *actio empti* and the *actio redhibitoria*.¹⁴⁰

The question that now arises is exactly what amount of reduction can the buyer get when instituting this action? In the South African courts the amount will be calculated by determining the difference between the purchase price paid by the buyer to the seller and the true value of the thing with the latent defect at the time of the institution of the action.¹⁴¹ Obviously the buyer will not be able to claim reduction where the value of the thing sold exceeds the price that he paid for it.¹⁴²

4.5.3 When can the *aedilician* actions not be instituted?

4.5.3.1 Where defects arose after conclusion of the contract

¹³⁵ *Montagu Co-op Wines v Lewin* 1912 CPD 1153; D 21.1.1.1.

¹³⁶ *Mitchells Piano Saloons v Theunissen* 1919 TPD 392; *Kirsten v Niland supra*.

¹³⁷ *Seggie v Phillips Bros supra*.

¹³⁸ Dig 21.1.1.8; Voet 21.1.8.

¹³⁹ *Truman v Leonard supra*.

¹⁴⁰ *Clarke Bros & Brown v Truck & Car Co* 1952 (3) SA 479 (W); *Le Roux v Autovend supra*.

¹⁴¹ *SA Oil & Fat Industries v Park Rynie Whaling Co supra*; *Cugno v Nel* 1932 TPD 289; *Scheepers v Handley* 1960 (3) SA 54 (A); *Phame v Paizes supra*; *Labuschagné Broers v Spring Farm* 1976 (2) SA 828 (T); *Du Plessis v Semmelink* 1976 (2) SA 500 (T); *Gannet Manufacturing v Postaflex supra*.

¹⁴² *Grosvenor Motors v Visser* 1971 (3) SA 213 (OK).

As the claimant in the matter, the buyer has the burden to prove that the defect was present at the time of the conclusion of the contract. The fact that the defect presented itself soon after the conclusion of the contract might be one of the grounds to prove that the defect existed at the conclusion of the contract.¹⁴³

4.5.3.2 Where the defect is not a latent defect

Where a defect is patent and not latent, the buyer has no remedy.

4.5.3.3 “Voetstoots” sales

It is not unusual in our law for sellers to sell goods “voetstoots”. This means that the goods are sold “as is”, notwithstanding the fact that there might be any defects in the thing sold. This must be specifically included in the contract of sale as an express clause.¹⁴⁴

Where the sale was made “voetstoots” the buyer will not have any remedy against the seller if it only transpires later on that there is a latent defect in the thing sold.¹⁴⁵

However, if the seller is well aware of the defects in the thing sold at the time of the conclusion of the contract and he does not declare such but intentionally conceals it to mislead the buyer into buying it or where he made a misrepresentation to the buyer about the thing to be sold, he will not be protected against a claim from the buyer despite the fact that the thing was sold “voetstoots”.¹⁴⁶

¹⁴³ *Seboko v Soll* 1949 (3) SA 337 (T).

¹⁴⁴ *Schwarzer v John Roderick's Motors* 1940 OPD 176; *Greyling v Fick* 1969 (3) SA 580(T); *Boere Handelshuis v Pelsler* 1969 (3) SA 171 (O); *Ornelas v Andrews Cafè supra*; in this regard the court erred in the matter of *Pretorius v Van der Merwe* 1968 (2) SA 259 (N) in finding that the burden of proof was on the buyer to prove that there was no “voetstoots”-clause in the contract of sale. Also see *Stocks & Stocks v Daly & Sons* 1979 (3) SA 764 (A).

¹⁴⁵ *Mitchell Cotts Engineering v Epic Oil Mills* 1982 (2) SA 467 (W).

¹⁴⁶ *Van der Merwe v Meades* 1991 (2) SA 1 (A) – for a discussion of this case also see *Lötz et al* (2010) 58-59. For application of the “voetstoots”-clause to non-physical or invisible defects, see a discussion of *Odendaal v Ferraris* 2009 (4) SA 313 (SCA). Also see *Van der Merwe v Culhane* 1952 (3) SA 42 (T); *Trust Bank v Bekker* 1961 (3) SA 236 (T); *Crawley v Frank Pepper supra*; *Glaston House v Inag supra*; *Wells v SA Alumenite Co* 1927 AD 69; *Fitt v Louw* 1970 (3) SA 73 (W).

4.5.3.4 Where the latent defect was repaired

If the latent defect is detected before the conclusion of the contract and the seller repairs it, the buyer will have no claim against the seller.¹⁴⁷ If the defect is only detected later on, the buyer is not obliged to allow the seller to repair the defect.¹⁴⁸ However, if the seller is also the manufacturer, the buyer has to allow the seller a reasonable opportunity to repair the defect before he can institute any action against the seller.¹⁴⁹

4.5.3.5 Waiver

The buyer can waive his rights in the contract of sale. However, this will not be taken lightly by the courts and the relevant circumstances will be taken into account for example the manner in which the buyer wants to use the thing sold as well as the purchase price paid for the thing sold.¹⁵⁰

4.5.3.6 Prescription

Where the *aedilician* actions have already prescribed, the buyer will have no claim against the seller. In terms of the Prescription Act 68 of 1969 the period for prescription is three years¹⁵¹ from the date that the buyer becomes aware of the latent defects.

¹⁴⁷ *Townsend v Campbell* 1926 NLR 356.

¹⁴⁸ *Holz v Thurston* 1908 TS 162; *Reid v Springs Motor Metal Works* 1943 TPD 157.

¹⁴⁹ *Wessels v Kemp* 1921 OPD 58; *Shiels v Minister of Health* 1974 (3) SA 278 (R).

¹⁵⁰ *Laws v Rutherford* 1942 AD 21; *Van Schalkwyk v Griessel* 1948 (1) SA 460 (A); *Schwarzer v John Roderick's Motors supra*; *Small v Smith supra*; *Vorster Bros v Louw* 1910 TPD 1113; *Van Vuuren v Kloppers Diskontohuis* 1979 (1) SA 1053.

¹⁵¹ Under the Prescription Act 18 of 1943 the period was one year. See also Kerr (2004) 134 footnote 266-271 in this regard.

CHAPTER 4

THE INFLUENCE OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

1 GENERAL

An interim Constitution¹⁵² came into being just before the first democratic election in the Republic of South Africa in 1994. The interim Constitution was repealed by the Constitution of the Republic of South Africa, 1996. As the Constitution is now the supreme law in our country, it is obvious that no law can be in conflict with it and it is therefore important that we just have a quick look at the influence of the Constitution on our common law.¹⁵³

For purposes of this dissertation the following sections of the Constitution¹⁵⁴ should be noted:

- (i) Chapter 1(Founding Provisions) section 2;¹⁵⁵
- (ii) Chapter 2 (Bill of Rights) section 7;¹⁵⁶
- (iii) Chapter 2 (Bill of Rights) Section 8;¹⁵⁷

¹⁵² Act 200 of 1993.

¹⁵³ See Du Bois *et al* (2007) 35-45 and 92-99.

¹⁵⁴ The Constitution of the Republic of South Africa, 1996.

¹⁵⁵ **“Supremacy of Constitution** - 2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

¹⁵⁶ **“Rights** - 7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The Rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

¹⁵⁷ **“Application** - 8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural person or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

- (vi) Chapter 2 (Bill of rights) section 36;¹⁵⁸
- (v) Chapter 2 (Bill of Rights) section 39;¹⁵⁹
- (vi) Chapter 8 (Court and Administration of Justice) section 173;¹⁶⁰

In exercising their inherent powers enshrined by the Constitution, the courts always seek to keep the common law in line with their perceptions of the ever changing conditions and needs of the people as well as the developments and changes in the social values in the country. In order to do so, they are modifying, abolishing, extending and supplementing the common law principles from time to time.

The rights created in the Bill of Rights¹⁶¹ are not new to us as most of the rights can be traced back to the earliest historical sources of our common law and in specific with regards to the application thereof amongst private individuals, for example the enforcement of contractual terms.

(4) A Juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”

¹⁵⁸ **“Limitation of rights** - 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

¹⁵⁹ **“Interpretation of Bill of Rights** - 39. (1) When interpreting the Bill of Rights, a court, tribunal or forum

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

¹⁶⁰ **“Inherent power** - 173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

¹⁶¹ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

Sections 2 and 8(1) of the Constitution clearly states that it applies to the common law and subsections 8(3) and 39(2) provide expressly for the application and the development of the common law in line with the Bill of Rights. As Cameron JA has explained in *Fourie v Minister of Home Affairs*:¹⁶²

“Taken together, these provisions create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of rights. Doing so is not a choice. Where the common law is deficient, the courts are under a general obligation to develop it appropriately.”

Four situations in which this obligation takes effect can be distinguished:¹⁶³

- 1) The common law principle conflicts with the Bill of Rights;
- 2) The common law principle fails to adequately reflect the underlying values of the Constitution;
- 3) The application of a common law principle that is consistent with both the terms and the values of the Constitution calls for constitutional scrutiny; and
- 4) The common law principle may be in need of development for some or the other reason unconnected with the Constitution.

Where the court is obliged to develop the common law in the first three instances above, there are two stages to the inquiry that the court must undertake. According to Ackerman and Goldstone JJ¹⁶⁴ they are as follows:

“The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry

¹⁶² 2005 (3) SA 429 (SCA) at par 5.

¹⁶³ Du Bois *et al* (2007) 94. Also see *S v Thebus* 2003 (6) SA 505 at par 28 where Moseneke J said that: “It seems to me that the need to develop the common law under s 39 (2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the ‘objective normative value system’ found in the Constitution.”

¹⁶⁴ *Carmichele v Minister of Safety and Security* 2003 (2) SA 656 (CC).

requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.”

2 THE INFLUENCE ON THE LAW OF CONTRACT

2.1 Current problems in our law of contract

According to Hutchison and Pretorius¹⁶⁵ the most fundamental concepts in the modern law of contract are:

- 1) Consensus;
- 2) Reliance;
- 3) Freedom of contract – the idea that people are free to decide whether, with whom and on what terms to contract;
- 4) Sanctity of contract – the idea that contracts freely and seriously entered into must be honoured and, if necessary, enforced by the courts;
- 5) Good faith - ¹⁶⁶ the idea that parties to a contract should behave honestly and fairly in their dealings with one another; and
- 6) Privity of contract – the idea that a contract creates rights and duties only for the parties to the agreement, and not for third persons.

According to the writers the above are the cornerstones of contracts.

For purposes of this dissertation it is not necessary to go too deep into this aspect, but for the sake of background and completeness it is important to give just a short summary of the problems faced in our modern law of contract. Our modern law is far from perfect. Still one of the biggest problems of our time is unfair contracts or unfair

¹⁶⁵ (2009) 21.

¹⁶⁶ For a discussion of the influence of the common law and the Constitution on the role of good faith, equity and fairness, see Brand FDJ, “The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution” 2009 (176) *SALJ* 71.

clauses contained in contracts. In general principle courts will enforce contracts due to the maxim *pacta sunt servanda*. However, it is common knowledge that there are certain unfair contracts and/or certain unfair clauses contained in contracts and one would expect the courts not to allow such.

The *exceptio doli generalis* historically provided a remedy against the enforcement of unfair contracts or the enforcement of contracts in unfair circumstances, but it was never really a satisfactory instrument for the courts to use in modern times. In *Bank of Lisbon and South Africa Ltd v De Ornelas*¹⁶⁷ the Appellate Division decided to fully review the old and modern authorities on the *exceptio doli generalis* and finally concluded that it was not part of our law. According to Christie:¹⁶⁸

“The decision has been justly criticised for its positivist and over-scholarly method of historical reasoning and absence of an in-depth discussion of general policy considerations or the responsibility of a court to ensure justice, but it would be unrealistic to expect the Supreme Court of Appeal to have second thoughts and bring the *exceptio* back to life again.”

The Law Commission also looked at this problem and suggested that legislation would give the courts the necessary power to intervene when the enforcement of a contract would lead to unreasonableness, the contract to be unconscionable or oppressiveness and that legislation would also fill the gap that was left after the decision of the Appellate Division in the *Bank of Lisbon*-case.¹⁶⁹ In a report dated April 1998¹⁷⁰ the Law Commission proposed that the issues of unfair contracts making, unfair terms in contracts as well as the enforcement of unfair contract be

¹⁶⁷ 1988 (3) SA 580 (A).

¹⁶⁸ (2006) 12.

¹⁶⁹ *Idem*.

¹⁷⁰ South African Law Commission, Discussion Paper 65, Project 47 (1996).

covered in a comprehensive statute to be called “The Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts Terms Act.

In criticising the abovementioned report, Christie¹⁷¹ suggested that legislation like this is not feasible as it would open each and every contract to scrutiny by the courts and also that to protect the consumer it is necessary to look into the machinery rather than the law as the courts are in any event out of reach of most people on the street due to the high costs of litigation. He further suggests that inequality of bargaining power, duress and undue influence were still not properly addressed by the existing rules.¹⁷²

2.2 Effect of the Constitution

There is some uncertainty about the horizontal application (between private individuals as opposed to vertical application between the state and private individuals) of the Constitution. It seems that the general conclusion is that, from the wording of subsection 8(3), where the Constitution finds horizontal application, it does so through the common law rather than directly. This in effect means that, where a right that is protected by the Bill of Rights is compromised in a contract between private individuals, the answer to the problem should be sought in the common law and if the common law is unable to provide an answer, the Constitution obliges the court to develop the common law in order to provide for a suitable solution to the problem that is in line with the spirit, purport and objects of the Constitution.

¹⁷¹ (2006) 13.

¹⁷² For the complete discussion see Christie (2006) 12-18.

For example, in the case of *Barkhuizen v Napier*¹⁷³ the majority of the Constitutional Court judges expressed their doubts about the appropriateness of testing the constitutionality of contractual terms directly against provisions of the Bill of Rights. Ngcobo J held that any attempt to do so would encounter serious difficulties. If the contractual term limited a specific right that is enshrined in the Bill of Rights, the court would have to establish whether the relevant limitation is justifiable under section 36 of the Constitution or not. In terms of section 36 a right that is enshrined in the Bill of Rights may only be limited “in terms of a law of general application” and a contractual term is not such a law. In the same manner section 172(1)(a) of the Constitution stipulates that:

“172 (1) When deciding a constitutional matter within its power, a court –

- (a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”.

It is also evident that a contractual term is neither a law nor conduct in this sense. Because of all the above mentioned difficulties, the majority of the judges preferred the indirect application of the Constitution and decided that the proper approach would be to rather determine whether a contractual term is against public policy (*contra boni mores*) and to determine what exactly constitutes public policy in the modern world than to determine whether a contractual term is unconstitutional.¹⁷⁴ It is therefore evident that the Constitution may have an impact on a contract by rendering at least the relevant contractual term unenforceable.

The Constitution may also have an impact on a contract where the one party exercises a contractual power over the other party. In the case of *Bredenkamp v*

¹⁷³ 2007 (5) SA 323 (CC). Also see Hutchison and Pretorius (2009) 27 for a discussion of pars 57 and 58 of this case.

¹⁷⁴ Also see *den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D).

*Standard Bank of South Africa Ltd*¹⁷⁵ at paragraph 68 it was held by Jajbhay J that no unfair or unreasonable exercise of a contractual power will be permitted by the courts.¹⁷⁶

Hutchison and Pretorius¹⁷⁷ offer the following summary of the influence of the Constitution on the law of contract:

CONSTITUTION	COMMON LAW	CONTRACT
<ul style="list-style-type: none"> • Bill of Rights • Constitutional values 	<ul style="list-style-type: none"> • Rules and doctrines shaped by the Constitution • Especially through concepts like public policy, good faith and reasonableness 	<ul style="list-style-type: none"> • Contract provision(s) declared invalid • Court refuses to enforce contractual provision • Exercise of contractual power set aside • Party compelled to contract with another (?)

According to Christie¹⁷⁸ the common law has evolved quite a number of techniques to apply where there are issues around inequality of bargaining power, but not enough was done to ensure that unfair contracts would be unenforceable. The techniques included relaxation of the *caveat subscriptor*-rule, duress, undue influence and public policy considerations.

However, in terms of section 9(1) of the Bill of Rights in the Constitution:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

The above is also amplified by subsection 1(1) (ix) of the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁷⁹ which reads as follows:

¹⁷⁵ 2009 JDR 0300 (GSJ).
¹⁷⁶ See Hutchison *et al* (2009) 35-41; Du Bois *et al* (2007) 92-99.
¹⁷⁷ (2009) 39.
¹⁷⁸ (2006) 18-19.
¹⁷⁹ Act 4 of 2000.

“**equality**’ includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes”.

It is therefore evident that the Constitution has and will still in future have a serious effect on the law of contract in general as far as it is necessary to intervene in matters of inequality of bargaining power and the courts will have to develop the common law in this regard.¹⁸⁰

However, taking into consideration the difficulty the courts found (and still do) to decide on the horizontal application of the requirements of the Constitution 12 years after the coming into effect of the Constitution, it was evident that the Constitution on its own was not going to satisfy the needs of or provide for the necessary solution to the issues of, for example, unequal bargaining power in the conclusion of contracts between individual parties and therefore there was a definite need for legislation to fill this gap and thus the subsequent proclamation of the Consumer Protection Act.¹⁸¹

See Chapter 5 *infra*.

¹⁸⁰ Also see Brand FDJ, *supra*; Hawthorne L, “The principle of equality in the law of contract” 1995 (58) *THRHR* 157; Hawthorne L, “Closing the open norms in the law of contract” 2004 (67) *THRHR* 294; Hawthorne L, “The end of bona fides” 2003 *SA Merc LJ* 271; Lewis C, “fairness in South African Contract law” 2003 (120) *SALJ* 330; Naudé T, “Unfair contract terms legislation: the implications of why we need it for its formulation and application” 2006 *Stell LR* 361; Pretorius C, “Individualism, collectivism and the limits of good faith” 20006 (69) *THRHR* 294; Van Aswegen A, “The implications of a Bill of Rights for the law of contract and delict” 1995 *SAJHR* 50; *Brisley v Drotzky* 2002 (4) SA 1 (SCA); Van der Vyver JD, “The private sphere in constitutional litigation” 1994 (57) *THRHR* 378; .

¹⁸¹ Act 68 of 2008.

CHAPTER 5

THE INFLUENCE OF THE CONSUMER PROTECTION ACT 68 OF 2008

1 GENERAL¹⁸²

The following were preliminary remarks on the then Consumer Protection Bill:¹⁸³

“The law has protected consumers for centuries: Roman law provided warranties against latent defects in the sale of goods and slaves and even the *Magna Carta* required uniformity of measures of wine, corn and cloth. It has long been seen as the law’s business to protect the health and the economic interests of consumers...

By codifying the common law in relation to consumer rights, South Africa is following in the footsteps of most first-world countries...

Consumers are not aware of their rights and have limited redress when it comes to enforcing their rights...

The bill also authorises the consideration of appropriate foreign and international law, appropriate international conventions, declarations or protocols and any decision of a consumer court or arbitrator when interpreting the bill. This reminds one of section 39 of the [C]onstitution. This method of interpretation is likely to lead to a result different to the result expected when the traditional rules of interpretation are applied. In practical terms, it means that the legislation, in most if not all cases, will be interpreted to benefit the consumer and not the supplier of goods or services...

If concurrent application is not possible, ‘the provision that extends the greater protection to a consumer prevails over the alternative position’.”

And in conclusion Du Preez¹⁸⁴ stipulates that:

¹⁸² See also Lötze “Consumer Protection Act 68 of 2008 an Overview” (unpublished) 1-20.

¹⁸³ Du Preez M, “The Consumer Protection Bill: A few preliminary comments” 2009 *TSAR* 58.

¹⁸⁴ *Supra*.

“It is clear, however, that the bill appears to codify large areas of the common law and generally acceptable practices which are common place and prevalent in the South African market place. Common law evolves over a protracted period of time through common practice and court mechanisms and application, enforcement and resultant practices. Allowing this practice to be overlooked and replaced by a more rigid system will give rise to grave and serious consequences. There is a real danger that the proposed principles will not adequately cater for every business eventuality and that the uncertainty created through the removal of established common law principles will result in increased litigation and a lack of confidence in South Africa’s economy.”

The Consumer Protection Act¹⁸⁵ carries into effect some of the objects of the Constitution¹⁸⁶ in that it purports to protect consumers from exploitation and harm. Emphasis is also placed in the Act on ensuring that consumers are enabled to make informed choices through being provided by suppliers of goods and services with all the relevant and necessary information in plain language that they are able to understand and prohibiting suppliers of goods and services from misusing their position of greater bargaining power which provided them with an unfair advantage in the past. The Act also provides for alternative redress to consumers who were previously disadvantaged by the fact that they could not afford to take suppliers of goods and services to task because of the high costs of litigation.

The Act also requires the National Consumer Tribunal and courts to develop the common law in such a way that it enables the realisation and enjoyment of consumer rights. This means that the Act does not replace the common law, but it rather strengthens the rules that were already part of our common law. Section 2(10) of the Act leaves no doubt about this fact as it states expressly that no provision of the Act

¹⁸⁵ 68 of 2008.

¹⁸⁶ The Constitution of the Republic of South Africa, 1996.

must be interpreted so as to prevent a consumer from exercising any rights that the consumer already previously had under the common law.

The Consumer Protection Act starts off even before the pre-amble¹⁸⁷ to specifically indicate what the Act purports to accomplish. This is then further explained in the preamble of the Act.¹⁸⁸ The essence is that the purpose of this Act is to remove the power from the big players in the consumer market which allowed them in the past to bully the poor individual who could not afford, financially, to take on the big players by way of litigation no matter how strong his/her case was.

The following definitions in the Act find application for purposes of this dissertation:

- 1.) agreement;¹⁸⁹
- 2.) consideration;¹⁹⁰

¹⁸⁷ “To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, [...] and to provide for related incidental matters.”

¹⁸⁸ “Preamble - The people of South Africa recognise –
That apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality;
That it is necessary to develop and employ innovative means to –
(a) Fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers;
(b) Protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and
(c) To give effect to internationally recognised customer rights;
That recent and emerging technological changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services within South Africa; and
That it is desirable to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhanced performance.
For the reasons set out above, and to give effect to the international law obligations of the Republic, a law is to be enacted in order to –
• Promote and protect the economic interests of consumers;
• Improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs;
• Protect consumers from hazards to their well-being and safety;
• Develop effective means of redress for consumers;
• Promote and provide for consumer education, including education concerning the social and economic effects of consumer choices;
• Facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests; and
• Promote consumer participation in decision-making processes concerning the marketplace and the interests of consumers.”

¹⁸⁹ “‘agreement’ means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between them.”

¹⁹⁰ “‘consideration’ means anything of value given and accepted in exchange for goods or services, including –



- 3.) consumer;¹⁹¹
- 4.) consumer agreement;¹⁹²
- 5.) distributor;¹⁹³
- 6.) goods;¹⁹⁴
- 7.) importer;¹⁹⁵
- 8.) intermediary;¹⁹⁶
- 9.) producer;¹⁹⁷
- 10.) retailer;¹⁹⁸

-
- (a) Money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;
 - (b) Labour, barter or other goods or services;
 - (c) Loyalty credit or award, coupon or other right to assert a claim; or
 - (d) Any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer.”

¹⁹¹ “**consumer**”, in respect of any particular goods or services, means –

- (a) A person to whom those particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) A person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act by section 5(2) or in terms of section 5(3);
- (c) If the context so requires or permits, a user of those particular services, irrespective of whether that user, recipient or beneficiary was party to a transaction concerning the supply of those particular goods or services; and
- (d) A franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e).”

¹⁹² “**consumer agreement**” means an agreement between a supplier and a consumer other than a franchise agreement.”

¹⁹³ “**distributor**”, in relation to any particular goods, means a person who, in the ordinary course of business –

- (a) Is supplied with those goods by a producer, importer or other distributor; and
- (b) In turn, supplies those goods to either another distributor or to a retailer.”

¹⁹⁴ “**goods**” includes –

- (a) Anything marketed for human consumption;
- (b) Any tangible object not otherwise contemplated in paragraph (a), including any medium on which anything is or may be written or encoded;
- (c) Any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a license to use any such intangible product;
- (d) A legal interest in land or any other immovable property, other than an interest that falls within the definition of ‘service’ in this section; and
- (e) Gas, water and electricity.”

¹⁹⁵ “**importer**”, with respect to any particular goods, means a person who brings those goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business.”

¹⁹⁶ “**intermediary**” means a person who, in the ordinary course of business and for remuneration or gain, engages in the business of –

- (a) Representing another person with respect to the actual or potential supply of any goods or services;
- (b) Accepting possession of any goods or other property from a person for the purpose of offering the property for sale; or
- (c) Offering to sell to a consumer, soliciting offers for or selling to a consumer any goods or property that belongs to a third person, or service to be supplied by a third person,

but does not include a person whose activities as an intermediary are regulated in terms of any other national legislation.”

¹⁹⁷ “**producer**”, with respect to any particular goods, means a person who –

- (a) Grows, nurtures, harvest, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business; or
- (b) By applying a personal or business name, trade mark, trade description or other visual representation on or in relation to the goods, has created or established a reasonable expectation that the person is a person contemplated in paragraph (a).”

¹⁹⁸ “**retailer**”, with respect to any particular goods, means a person who, in the ordinary course of business, supplies those goods to a consumer.”

- 11.) supplier;¹⁹⁹
- 12.) supply;²⁰⁰
- 13.) supply chain;²⁰¹
- 14.) transaction;²⁰² and
- 15.) unconscionable.²⁰³

If one look at section 3, “Purpose and policy of Act”, it is clear that this Act sets out to protect consumers from exploitation in the marketplace, and to promote their social and economic welfare. The Act aims to, amongst other things, establish a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible, for the benefit of consumers generally; to promote fair business practices; and to protect consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and to protect consumers against deceptive, misleading, unfair or fraudulent conduct.²⁰⁴

¹⁹⁹ “**supplier**’ means a person who markets any goods or services.”

²⁰⁰ “**supply**’, when used as a verb –

(a) In relation to goods, includes sell, rent, exchange and hire in the ordinary course of business for consideration; or
...”

²⁰¹ “**supply chain**’, with respect to any particular goods or services, means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider.”

²⁰² “**transaction**’ means –

(a) In respect of a person acting in the ordinary course of business –

(i) And 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; or
(ii) the supply by that person of any goods to or at the direction of a consumer for consideration; or
(iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration; or

(b) an interaction contemplated in section 5(6), irrespective of whether it falls within paragraph (a).”

²⁰³ “**unconscionable**’, when used with reference to any conduct means –

(a) having a character contemplated in section 40; or

(b) otherwise unethical or improper to a degree that would shock the conscience of a reasonable person.”

²⁰⁴ For a broad overview on the Consumer Protection Act 68 of 2008, also see Hutchison and Pretorius (2009) 32-34 and 239; Van Eeden E, *A Guide to the Consumer Protection Act* (2009) 1-55; Melville NJ, *The Consumer Protection Act made easy* (2010) 1-34.

Section 5²⁰⁵ deals with the application of the Act which is very broad, as for example, it includes “every transaction occurring within the Republic” and even where transactions did not occur in the Republic, according to subsection (5) the goods will still be falling under the Act and will be dealt with in accordance with sections 60 and 61 of the Act.

According to Hutchison and Pretorius²⁰⁶, in order to achieve the objectives of the Act, a number of fundamental consumer rights²⁰⁷ are acknowledge in the Act.²⁰⁸

Kirby²⁰⁹ came to the conclusion that the introduction of consumer rights into the South African market caused quite a stir.

²⁰⁵ “**Application of Act** - (1) This Act applies to –
 (a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4);
 (b) the promotion of any goods and services, or of the supplier of any goods or services, within the Republic, unless –
 (i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
 (ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4);
 (c) goods or services that are supplied or performed in terms of a transaction to which this Act applies, irrespective of whether any of those goods or services are offered or supplied in conjunction with any other goods or services, or separate from any other goods or services; and
 (d) goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in subsection (5)...
 (6) If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61.”

²⁰⁶ (2009) 33 at par 1.

²⁰⁷ See also Jacobs W, Stoop PN, & Van Niekerk R. “Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 (13) *PER* 302.

²⁰⁸ “(i) The right to equal treatment in the marketplace (which affords protection against discriminatory marketing , for example);
 (ii) The right to privacy (which affords protection against direct marketing practices);
 (iii) The right to choose (which covers a host of ancillary rights, such as the right to select suppliers, to choose or examine goods and to return them, to a cooling-off period in certain circumstances, and to cancel advance bookings, reservations or orders);
 (iv) The right to disclosure and information (disclosure, for example, of the price of goods and services, and that goods are reconditioned, or are gr[e]ely market goods, with no misleading labelling or trade descriptions, and with all information in plain and understanding language);
 (v) The right to fair and responsible marketing (these provisions set general standards for marketing of goods and services, and regulate (among other things) bait marketing, negative option marketing, direct marketing, customer loyalty programmes and promotional competitions);
 (vi) The right to fair and honest dealing (which affords protection against unconscionable conduct such as fraud, duress, undue influence, misleading representations, pyramid schemes and over-selling or over-booking);
 (vii) The right to fair, just and reasonable terms and conditions [Also see Naudé T, “The consumer’s ‘right to fair, reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” 2009 (126) *SALJ* 505; Naudé T, “Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective” 2010 (127) *SALJ* 515; Harban T, “Letters of engagement and the Consumer Protection Act” 2011 *Risk Alert Bulletin* (November) 4]; and
 (viii) The right to fair value, good quality and safety (which extends the common-law protection of consumers significantly by introducing a strict no-fault regime of liability for harm caused by defective products) [Also see Bracher P, “Consumer Protection Act: Practical implications for suppliers of goods and services” 2011 (Vol 1) *The Corporate Report* 15].”

2 THE INFLUENCE ON THE LAW OF CONTRACT IN GENERAL²¹⁰

2.1 Why an Act to protect the interests of consumers?

Woker²¹¹ lists a few problems from the previous dispensation as reasons for introducing consumer legislation into the South African market. She also comes to the conclusion that²¹² amongst others, consumers are not equal in bargaining power and financial resources with their various suppliers and therefore it is necessary that they should be protected from exploitation.

Unfortunately it is a fact that we have a legend of imbalances, unfairness²¹³, and etcetera in our law of contract. One would want to believe that we have a system of freedom to contract, clear and certain rules and fairness, but such proved to be untrue. Often social and economic pressures leave people with little choice whether they want to enter into a contract or not; equality of bargaining power is the exception rather than the rule; market domination by large entities excludes

²⁰⁹ “There is much chatter and agitation about the formal introduction into South African law of a range of consumer rights. The introduction of these rights has an impact on suppliers as for every right there is a corresponding obligation and, more often than not, the obligation is imposed upon a supplier...The CPA is an exceptionally long piece of legislation and is, at times, particularly complicated. It endeavours to introduce an entire system of protection for consumer. Certain of the processes contemplated and created are, importantly, processes for the realisation of consumer rights in the resolution of consumer complaints, bearing in mind that both consumers and suppliers function in various sectors and parts of the economy.” See Kirby N, “Cracking the Code”, 2011 *Without Prejudice* (February).

²¹⁰ Also see Lötž “Consumer Protection Act 68 of 2008 and Overview” (unpublished) 20-48.

²¹¹ Woker T, “Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act” 2010 (31) *Obiter* 217. “Until recently it was probably incorrect to use the term “consumer law” in South Africa because there was no comprehensive and systematic body of law which was designed specifically to deal with consumer issues. Nevertheless consumer protection measures have existed for many years in certain industry specific legislation which deal with matters such as finance charges, weights and measures, food, trade descriptions on goods and false and misleading advertising...The purpose of [the Consumer Affairs (Unfair Business Practices) Act 71 of 1988] is to provide for the prohibition or control of unfair business practices but does not contain a list of practices that may be considered unfair. This is an enabling Act rather than a prescriptive one and the Act itself does not prohibit anything.”

²¹² Woker *Supra*. “Consumers must rely on the information which they receive from suppliers. Added to this is the problem that business and consumers tend to be in an unequal bargaining position, so consumers who confront businesses with problems find that they are simply ignored. Consumers do not have the financial resources to fight for their rights. Litigation is notoriously expensive and because of the relatively small sums involved, it does not make financial sense for consumers to take the matter to court. In an ideal world business would realize that consumers are their most important asset but the world is not ideal, so unfortunately public control is frequently the only way that consumers will be protected. There is a need for carefully structured checks, balances and safety nets to make the free market work in a way that considers both the interests of business and consumers, even though this may lead to increased costs and the economy may be less efficient. This is preferable to allowing the exploitation of consumers to go unchecked and is even more important now because, since 1994, the South African economy has opened up to international trade. A South African market without significant consumer protection measures, coupled with a proper regulatory framework, could become a dumping ground for unsafe and substandard products and South Africa’s vulnerable consumers will continue to be exploited with impunity.”

²¹³ See Naudé T *supra*.

competition and leave little room for consumers to choose whom to contract with; and the use of standard form contracts leave little to no room for negotiating reasonable contract terms.

Hutchison and Pretorius²¹⁴ opined that there are many developments in the traditional market place as we knew it which would also not leave the field of the law of contract unchanged. Human rights are emphasized and protected to a large extent in most western societies.

2.2 Impact of the influence of the Consumer Protection Act 68 of 2008²¹⁵

In general the biggest influence of the Act is with regards to fairness in contracts between the suppliers and the consumers. The relevant sections of the Act in this regard are *inter alia* sections 2, 14, 15, 16, 17, 19, 20, 22, 26, 39, 44, 46, 48, 49, 50, 51, 58 and 64.

In terms of the Act, when a matter is brought before the National Consumer Tribunal or a court, the common law must be developed as necessary to improve the realisation and enjoyment of consumer rights generally. The provisions of section 4(2)(a) are specifically addressed to the courts, and refer not to a mere power to develop the common law, but expressly call on the courts to develop the common law 'as necessary to improve the realisation and enjoyment of consumer rights

²¹⁴ (2009) 25. "Among the many developments responsible for this challenge to traditional contract theory may be mentioned:

- The ever-increasing use of standardised terms and forms for concluding contracts;
- The advent of the welfare state, with considerable government intervention in markets to alleviate poverty and some of the hardship caused by unbridled capitalism;
- The rise of the consumer protection movement as a political force in most western societies;
- The growing importance attached to human rights, as manifested in South Africa by the enactment of the Constitution; and
- A concomitant emphasis upon controlling the exercise of power and ensuring fairness in contractual relations."

²¹⁵ Also see Hawthorne L, "Contract law's choice architecture: The hidden role of default rules" 2009 *THRHR* 599.

generally, and in particular by persons contemplated in section 3(1)(b)'. The courts are thus now clearly mandated to develop the law with a view to the improved realisation and enjoyment of consumer rights generally.²¹⁶

In our common law, when a contract was validly entered into by parties, the contract is binding and enforceable in a court of law. A person who signed an agreement would be bound by the interpretation thereof as per the ordinary meaning and effect of the words which appear above his or her signature (*caveat subscriptor*). The courts refrained from intervening into contracts in the past even when a person signed a contract that was clearly to his or her disadvantage.²¹⁷ The Consumer Protection Act now aims at lessening the imbalance between the contracting parties.²¹⁸ Section 52(4) now enables the court to sever or alter any clause or part of a contract and a party may also be able to get out of a contract if, for example, it arose through direct marketing (section 16); a consumer did not have the opportunity to examine the goods before delivery thereof (section 20(2)); the goods are unsuitable for the purpose that the consumer intended it for (section 55(3)); or the transaction is an advanced booking, reservation or an order (section 17).

The parole evidence rule also entails that, once a contract has been committed to writing and signed by the parties, a court would not take any external evidence into consideration that is not part of the written agreement. This rule has also now been relaxed in that section 51(1) allows for a court to hear evidence from sources other

²¹⁶ Van Eeden (2009) 194; Sharrock RD, "Judicial control of unfair contract terms: The implications of Consumer Protection Act" 2010 (22) *SA Merc LJ* 295.

²¹⁷ See also Van Eeden (2009)168-169; *Afrox Healthcare v Strydom* 2002 (6) 21 (SCA); Letzler M, "The law of contract, the Consumer Protection Act and medical malpractice law" 2012 *De Rebus* (June) 22; *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) at 578.

²¹⁸ One such serious imbalance relates to standard term contracts. For a discussion see Eiselen GTS, "Die standaardbedingprobleem: Ekonomiese magsmisbruik, verbruikersvraagstuk of probleem in eie reg?" 1988 (21) *De Jure* 251 as well as Eiselen GTS, "Die standaardbedingprobleem: Ekonomiese magsmisbruik, verbruikersvraagstuk of probleem in eie reg? (vervolg)" 1989 (22) *De Jure* 44.

than the contract itself. Section 51(1) requires that a contract must not contain a clause stipulating that no representations or warranties were made by the supplier before the contract was entered into, if this is not true. The only way that a court would be able to establish whether this is true or not, is for the court to hear evidence outside the contract itself in this regard.²¹⁹

The aim of the Act is to protect the ordinary man in the street, the consumer, by for example providing that consumers' attention should specifically be drawn to certain categories of clauses in contracts which could be prejudicial to the consumer. Non-compliance with the Act may lead to contractual provisions being declared null and void in so far as it does not comply with the Act. Hutchison and Pretorius²²⁰ summarize the biggest impact of the Act on the law of contract in that terms and conditions impacting on consumers' rights to fair, just and reasonable terms and conditions will need a close look at and serious transformation.

²¹⁹ See Melville (2010) 26-27.

²²⁰ (2009) 34. "Of most interest, for present purposes, are those provisions of the Act dealing with the consumer's right to fair, just and reasonable terms and conditions (Chapter 2, Part G). Certain terms or conditions are prohibited outright, with the result that they are void to the extent of non-compliance (Section 51). These include:

- Terms aimed at defeating the purposes and policy of the Act, or misleading the consumer, or subjecting the consumer to fraudulent conduct;
 - Terms that purport to waive or deprive a consumer of rights under the Act, or to avoid a supplier's obligations under the Act;
 - A term that purports to limit or exclude the liability of a supplier (or those for whom he or she is responsible) for harm A term that falsely expresses an acknowledgement by the consumer that no warranties or misrepresentations were made in connection with the agreement;
- Where terms are not prohibited outright, they are subjected to a requirement of fairness and reasonableness. Thus, a supplier must not supply or offer to supply any goods or services, nor require a consumer to waive any rights, assume any obligations or waive any liability of the supplier, on terms that are unfair, unreasonable or unjust (Section 48(1)). A term is unfair, unreasonable or unjust if:
- It is excessively one-sided in favour of the supplier; or
 - It is so adverse to the consumer as to be inequitable; or
 - caused by gross negligence; and
 - It was induced by a supplier's false, misleading or deceptive misrepresentation; or
 - The existence, nature and effect of the term was not adequately drawn to the attention of the consumer in a clear and conspicuous manner before the transaction was entered into (Section 48(2) and section 49 for the notice to be given to the consumer)."

The writers²²¹ are also of the opinion that one consequence of these provisions is that liability for ordinary (but not gross) negligence may still be excluded by means of an appropriately worded exemption clause, provided the exclusion is fair and reasonable and that it is adequately drawn to the attention of the consumer before or at the time of entry into the transaction – which, by the way, brings us back to the relaxation of the parole evidence rule as the only way to establish the above will be to lead evidence in court outside of the contract itself.

Melville²²² summarizes the influence of the Act on contracts as follows:

“SUBJECT MATTER	SECTION(S)
Contractual capacity	
No agreements with persons lacking legal contractual capacity	39
Consumer’s right to assume supplier is entitled to sell goods	44
Pre-contractual requirements	
Right to information in plain and understandable language (to the extent that it applies to the contract)	22(1)(b)
Pre-authorisation of repair or maintenance service	15
Formalities	
Written consumer agreements	50(1)

²²¹ **“Does the Consumer Protection Act go too far in protecting consumer?”**
In many respects, the Consumer Protection Act merely restates protection that is already afforded by the common law (for example, in relation to liability for misrepresentation, duress and undue influence). In other respects, it goes very much further, affording South African consumers a level of protection that will make them the envy of consumers in most other parts of the world. Organised commerce is concerned about the introduction of strict (no-fault) liability for defective products, but this is now the norm in many developed societies. Undoubtedly, it will raise the cost of doing business and thereby will lead to some increase in prices, but this is probably a price worth paying for the greater protection afforded to consumers.

The test for the fairness of contractual terms is in some respects rather circular, being phrased in terms of inequity. This will allow courts a large measure of discretion in deciding whether or not to enforce the term against the consumer. Will this discretion give rise to the legal uncertainty and chaos so feared by the Supreme Court of appeal in *Brisley v Drotzky*? Will the level of uncertainty be any greater than that flowing from the decision of the Constitutional Court in *Barkhuizen v Napier*?

In light of the courts’ traditional reluctance to enforce exemption clauses, at least to their full extent, suppliers might have good grounds for fearing that in future such clauses will afford them little protection against liability for negligence. It may be in their own best interest simply to insure against liability, and to pass the costs of this insurance on to consumers.” (Hutchison and Pretorius (2009) 34-35 Pause for Reflection).

²²² (2010) 69-71. The Act refers to agreements, transactions and contracts. A transaction is broader than an agreement as it includes an agreement between two or more persons for the supply of any goods or services in exchange for consideration (payment or compensation), as well as the actual supply of the goods or the performance of any services. The Act defines agreement as ‘an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them’. The common law refers to a meeting of minds between two or more legally competent parties, about their respective duties and rights regarding performance. The term ‘contract’ is not defined in the Act but it is used in Section 48 in the sense of what was agreed between the parties.”

Any required notice, document or visual representation must be in the form prescribed	22(1)(a)
Sales records	26(2)
Signing or initialling in any recognised manner including an electronic signature	2(1)(3)
Terms of agreement	
Notice required for certain terms and conditions	49(1)
Unfair, unreasonable or unjust agreement terms	48
Prohibited transactions, agreements, terms or conditions	51(1)
Changes	
Changes, deferrals, and waivers and substitution of goods	46
Cancellation, expiry and renewal	
Consumer's right to cooling-off period after direct marketing	16
Consumer's right to return goods	20(2)
Consumer's right to cancel advance reservation, booking or order	17
Agreements with persons lacking legal capacity can be cancelled	39
Expiry and renewal of fixed-term agreements	14
Cancellation by supplier	14(2)
Written notice of the intention to close a service facility	64(3)

In our common law parties had the freedom to agree to the terms and conditions of the contract they entered into. However, since there were so many grave abuses arising from, amongst others, unequal bargaining power between suppliers of goods and services and their customers, the Act now limits the terms and conditions that can be included in contracts. The Act also requires that the attention of consumers intending to enter into a contract must be drawn specifically to certain terms and conditions in order to enable them to make informed decisions.²²³

Another important section is section 51 on prohibited transactions, agreements, terms or conditions. Any transaction or contract, provision, term or condition of a

²²³ See also Melville (2010) 69-76.

transaction or contract that contravenes section 51 is void to the extent that it contravenes the Act.²²⁴

The remainder of this chapter will focus on the impact of the Consumer Protection Act 68 of 2008 specifically on the seller's common law duties in terms of risk and duty to take care of the thing sold, warranty against eviction as well as warranty against latent defects.

3 THE INFLUENCE ON RISK AND THE SELLER'S DUTY TO TAKE CARE OF THE THING SOLD²²⁵

The following sections of the Act influences the seller's duty to take care of the thing sold and risk:

3.1 Consumer's rights with respect to delivery of goods or supply of service²²⁶

According to section 19(2)(c) "(2)Unless otherwise expressly provided or anticipated in an agreement, it is an implied condition of every transaction for the supply of goods or services that - ... (c) goods to be delivered remain at the supplier's risk until the consumer has accepted delivery of them, in accordance with this section."

This entails that the parties are able to expressly agree in their contract as to the party responsible for carrying the risk of the goods until it is properly delivered to the buyer in terms of the above subsection. If this issue is not expressly provided for in the contract, it is implied that the supplier will carry the risk until the goods are

²²⁴ See Van Eeden (2009) 167-195.

²²⁵ See Lötzt DJ, "The Law of Purchase and Sale" 2010 *Annual Survey of South African Law* 1102 at 1120.

²²⁶ See Lötzt DJ, Consumer Protection Act 68 of 2008 an overview (unpublished) 32; Melville (2010) 93-95; Van Eeden (2009) 215-216.

properly delivered. Proper delivery in this instance will be the acceptance of delivery of the goods in that the consumer expressly or implicitly communicated to a supplier that he or she has accepted the delivery of such goods, or if a consumer does anything in relation to the goods that is inconsistent with the supplier's ownership, or if a consumer keeps the goods for an unreasonable time period without communicating his or her intentions with respect to such goods to the supplier in terms of section 19(4) of the Act.

This position did not change the common law position but rather confirmed it.

3.2 Consumer's right to return goods²²⁷

According to section 20(1) "This section is in addition to and not in substitution for... (b) any other right in law between a supplier and consumer to return goods and receive a refund."

A consumer has the right to return goods to the supplier and receive a full refund if he or she did not have an opportunity to examine the goods (the consumer's right to examine goods as per section 18(2)) before the delivery thereof and the consumer is not satisfied that the goods are of a type and quality that the parties agreed upon. Where the consumer bought such goods purely based on a description and/or sample, the consumer will have to show that the goods delivered did not correspond in all material respects with what an ordinary alert consumer would have been entitled to expect, based on the description or on a reasonable examination of the sample.

²²⁷ Melville (2010) 23; Strachan D, "Returns policies and the CPA" 2012 *Orde Nuus/Society News* (Augustus) 21; Van Eden (2009) 229-235.

Certain goods under the Act are called “special order”-goods, which mean that the consumer expressly or implicitly required or expected the supplier to procure, create or alter the goods specifically to the consumer’s requirements. Such goods can be returned to the supplier if they do not reasonably meet the material specifications of the consumer’s special order in terms of section 19(5).

Should a supplier deliver a mixture of goods (some as per the agreement and some of a different description or quality) the consumer has the right to refuse delivery of all or part of the goods in terms of section 19(8). This will not render the buyer in *mora creditoris* as per the common law.

If the supplier delivers a larger quantity of goods (section 19(7)) than the agreed quantity as per the contract of sale, the consumer may either reject all of the delivered goods or accept and pay for the agreed quantity at the agreed purchase price and return the rest.

In terms of section 55(3) a consumer may return goods intended to satisfy a particular purpose communicated to the supplier within ten business days of the delivery thereof to the consumer if the goods have been found not to be suitable for the particular purpose that the consumer bought it for.

In all these circumstances the goods are returned at the supplier’s risk and expense.²²⁸

²²⁸ Melville (2010) 84-86; Van Eeden (2009) 232-233 at 11.16.3 and 234-235 at 11.16.5.

This position brought about serious changes in the common law position of consumers as they can now, under the Act, for example insist on receiving a refund of the purchase price when goods are returned and the supplier can no longer force the consumer to accept a replacement product or to accept a “credit note” in order to buy something else from the same supplier. The bargaining position of the consumer is much stronger after the coming into effect of the Consumer Protection Act.

3.3 Supplier obliged to draw potential risks of an unusual character or that the consumer could not reasonably be expected to be aware of or that could result in serious injury or death to the attention of the consumer

Section 58(1), Suppliers must warn the consumer of facts that might involve a risk to the consumer or a weakening of his or her legal position. The supplier must specifically draw the fact, nature and potential effect of that specific risk to the attention of the consumer in a form and manner that meets the standards as set out in section 49. Section 49(1) provides that any contractual limitation of risk or liability of the supplier or an assumption of the risk and/or liability by the consumer must be brought to the attention of the consumer (in a manner contemplated in sections 49(3) to (5)). This implies that the supplier is to ensure that the consumer had adequate time to receive the section 49(1) notice and comprehend the risk (section 49(5)) and that the consumer adequately understands the risk. The consumer must also acknowledge that he took note of the risk by for example signing or initialling next to that specific clause.²²⁹

²²⁹ See also Van Eeden (2009) 179 and 251-252.

Any such term must be in plain language²³⁰ (section 22), and drawn to the attention of the consumer in a conspicuous (eye-catching) manner and form that is likely to attract the attention of an ordinary alert consumer. This means exactly the opposite of the previous regime of “small print” and can be done by way of bolding or underlining the text, using colours, headings and arrows or putting the clause where it will immediately be seen for example in the beginning of the contract. The consumer must be made aware of this clause before signing the contract.

The Act also prohibits a supplier to negotiate, enter into or administer a transaction or a contract for the supply of any goods in a manner that is unfair, unreasonable or unjust. Therefore clauses for the purpose of waiving of rights and protections provided for by law and exemption clauses that absolve the supplier from liability for losses that it might otherwise be liable for has now been curtailed and certain of these terms and conditions are no longer permitted in our law.²³¹

Also important here are the provisions of section 61 of the Act,²³² Liability for damage caused by goods.²³³

²³⁰ See also Gouws M, “A Consumer’s Right to Disclosure and Information: Comments on the Plain Language Provisions of the Consumer Protection Act” 2010 (22) *SA Merc LJ* 79.

²³¹ Sections 41, 48(1)(c), 49(1) and 51(1). The Act also specifically prohibits clauses where consumers falsely express an acknowledgement that (i) before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier; and (ii) the consumer has received goods or services, or a document that is required to be delivered to the consumer. Also see Melville (2010) 81.

²³² See also Melville (2010) 24-26 where he discusses the drastic change brought about by the Consumer Protection Act towards product liability in the South African law; Van Eeden (2009) 237-252; *Wagener v Pharmacare Ltd supra*.

²³³ “(1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of –

- (a) Supplying any unsafe goods;
 - (b) A product failure, defect or hazard in any goods; or
 - (c) Inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,
- irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.
- (2) A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section.
- (3) If, in a particular case, more than one person is liable in terms of this section, their liability is joint and several.
- (4) Liability of a particular person in terms of this section does not arise if –
- (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;

This is the section of the Act that potentially has the most drastic effect on future business dealings. The design, manufacture and distribution of products are activities that are central to the wealth and welfare of society, but they may also be attended by, or result in death, disease or injury for a wide range of parties. Where there is a contractual nexus between the victim and the seller, the victim may theoretically have a contractual claim for damages against the supplier with whom the contract was concluded. Prior to the introduction of the Consumer Protection Act product liability was not a priority and suppliers and manufacturers enjoyed virtual immunity from liability for product defect claims. The Act now changed this situation so that any one of or all the suppliers in the supply chain can be jointly and severally responsible to make good the damages suffered by a consumer.²³⁴ The Pothier-rule is therefore now confirmed by the Consumer protection Act.

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- (b) the alleged unsafe product characteristics, failure, defect or hazard –
 - (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or
 - (ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case subparagraph (i) does not apply;
 - (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or
 - (d) the claim for damages is brought more than three years after the –
 - (i) death or injury of a person contemplated in subsection (5)(a);
 - (ii) earliest time at which a person had knowledge of the material facts about an illness contemplated in subsection (5)(b);
 - (iii) earliest time at which a person with an interest in any property had knowledge of the material facts about the loss or damage to that property contemplated in subsection (5)(c); or
 - (iv) the latest date on which a person suffered any economic loss contemplated in subsection (5)(d).
 - (5) Harm for which a person may be held liable in terms of this section includes –
 - (a) the death of, or injury to, any natural person;
 - (b) an illness of any natural person;
 - (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
 - (d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).
 - (6) Nothing in this section limits the authority of a court to-
 - (a) assess whether any harm has been proven and adequately mitigated;
 - (b) determine the extent and monetary value of any damages, including economic loss, or
 - (c) apportion liability among persons who are found to be jointly and severally liable."

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Melville (2010) 98-100; Van Eeden (2009) 237-252; Maphosa J, "Manufacturers and suppliers beware" 2009 *Without Prejudice* (June) 36; Van Vuuren N, "Contractual autonomy and consumer rights" 2009 *Without Prejudice* (September) 38; Neethling J, "Strikte aanspreeklikheid vir defekte produkte" 2011 *TSAR* 808; Botha MM, "Does the Consumer Protection Act 68 of 2008 provide for strict product liability? – A comparative analysis" 2011 *THRHR* 305 where mention is made of the words of Innes CJ in *Cape Town Municipality v Paine* 1923 AD 207 which express fundamental principles that should be applicable to everyone involved in the retail chain: "every man has the right not to be injured in his person or property by the negligence of another – and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established and it only remains to ascertain whether it has been discharged." Hawkey K, "The Consumer Protection Act in the medical setting" 2012 *De Rebus* (August) 11; Lötze DJ, Consumer Protection Act 68 of 2008 an overview (unpublished) 33-36.

4 THE INFLUENCE ON THE SELLER'S WARRANTY AGAINST EVICTION

4.1 Introduction

By the warranty against eviction, the seller essentially promises that if the purchaser is threatened with dispossession of the goods by a third party claiming to have a better legal title to the goods, the seller will compensate the purchaser. In terms of the common law, the seller can also undertake expressly, or would be deemed to have undertaken, unless these obligations have been specifically disclaimed, that the purchaser would enjoy 'quiet possession' of the goods and that the goods would not be subject to any charge or encumbrance ('burden'), unless disclosed to the purchaser before concluding the contract.²³⁵

However, under the common law the parties were permitted to exclude, for example, the obligation of the seller to make the purchaser the owner of the goods.²³⁶

4.2 Consumer's right to assume that the supplier is entitled to sell the goods

Section 44²³⁷ of the Act deals with the consumer's right to assume, and it is an implied provision of every transaction or agreement, that the supplier not only has

²³⁵ Van Eeden (2009) 220 at par 11.12.

²³⁶ See section 19 with regards to the consumer's right to delivery.

²³⁷ "(1) Subject to subsection (2), every consumer has a right to assume, and it is an implied provision of every transaction or agreement, that –

- (a) In the case of a supply of goods, the supplier has the legal right, or the authority of the legal owner, to supply those goods;
- (b) In the case of an agreement to supply goods, the supplier will have a legal right, or the authority of the legal owner, to –
 - (i) Sell the goods at the time the title to those goods is to pass to the consumer; or
 - (ii) Lease the goods at the time the lessee is to take possession of the leased goods;
- (c) as between the supplier and the consumer, the supplier is fully liable for any charge or encumbrance pertaining to the goods in favour of any third party unless –
 - (i) such a charge or encumbrance is disclosed in writing to the consumer before the transaction or agreement is concluded; or
 - (ii) the supplier and the consumer have colluded to defraud the third party; and

the legal right to supply the goods, but also has the legal right or alternatively the necessary authority of the legal owner to supply the goods.

Section 44 therefore secures the consumer's right to title against the supplier, quiet possession as well as the disclosure of any charges or encumbrances.²³⁸

4.3 Eviction

A consumer, when entering into a contract of sale with a supplier of goods, has the right to assume, and is it in fact an implied term of every transaction or contract, that the supplier of the goods has the legal right and authority to supply, sell or provide ownership of those goods (section 44(1)(a) and (b)). It is also warranted by the supplier of the goods that the buyer (consumer) will have and enjoy undisturbed (quiet) possession of the goods (section 44(1)(d)).

Section 51(i)(i) of the Act prohibits clauses authorising any person acting on behalf of the supplier to enter any premises for the purposes of taking possession of goods to which the contract relates.

It is therefore evident that the Consumer Protection Act changed the common law position in this regard quite extensively. Under the common law the buyer could be evicted by the true owner without much ado and then the buyer ended up with the burden to institute action for his or her loss against the seller. Under the Consumer

(d) the supplier guarantees that the consumer is to have and enjoy quiet possession of the goods, subject to any charge or encumbrance disclosed as contemplated in paragraph (c)(i).

(2) If, as a result of any transaction or agreement in which goods are supplied to a consumer, a right or claim of a third party pertaining to those goods is infringed or compromised the supplier is liable to the third party to the extent of the infringement or compromise of that person's rights pertaining to those goods, except to the extent of a charge or encumbrance disclosed as contemplated in subsection (1)(c)(i)."

²³⁸ See Lötz DJ, Consumer Protection Act 68 of 2008 an overview (unpublished) 32; Melville (2010) 116; Van Eeden (2009) 221-223.

Protection Act the buyer now enjoys protection as the seller is liable towards the true owner and the removal of the goods under such an agreement is also specifically prohibited by the Act.

5 THE INFLUENCE ON THE SELLER'S WARRANTY AGAINST DEFECTS

5.1 Introduction

In terms of the Consumer Protection Act:

'Defect' in goods, which is any material imperfection in the manufacture of goods or components that renders the goods less acceptable, including any characteristic of the goods or components that caused it to be less useful, practicable or safe, in circumstances that persons, generally, would be reasonably entitled to expect (subsection 53(1)(a)(i) and 53(1)(a)(ii)). The test in this regard is what a 'person generally would reasonably be entitled to expect', which in practice will entail the so-called abortive 'legitimate expectation' approach; and

'Failure' means the inability of goods to perform in the intended manner or effect (section 53(1)(b)).²³⁹

5.2 Disclosure of reconditioned or grey market goods

Section 25(1), Suppliers are required to warn consumers, with a conspicuous notice, that branded goods have been reconditioned²⁴⁰ or that they have been imported without the approval or license of the registered owner of the trade mark, as the case

²³⁹ Lötz (unpublished) *supra* 33-34; Melville (2010) 98-100; Van Eeden (2009) 246.

²⁴⁰ Also see section 57 of the Act (Warranty on repaired goods); Melville (2010) 106; Van Eeden (2009) 226.

may be.²⁴¹ See also Section 41(3)(b)(iii). These types of goods are commonly referred to as “grey” market goods.²⁴²

5.3 Quality of goods²⁴³

Implied warranty of quality –sections 55 and 56 of the Act introduce minimum levels of quality-related undertakings in respect of consumer sale transactions on the part of retailers.

In terms of section 55 all goods must be reasonably “fit for purpose” (section 55(2)(a). this means that consumers have the right to receive goods that are reasonably suitable for the purpose for which they are usually intended. If the consumer has indicated a specific purpose for which he or she needs the goods to the supplier, the goods must also be reasonably suitable for that specific purpose (section 55(3)).

The goods must be of a good quality, in good working condition and free of defects and be capable of being used for a reasonable period of time (section 55(2)(c)), depending upon the relevant circumstances (section 55(2)(b)). A defect in goods is any material imperfection in the manufacture of the goods or components that renders the goods less acceptable than persons generally would be reasonably entitled to expect in the circumstances (section 53(1)(a)(i)) or any characteristic of the goods or components that renders them less useful, practicable or safe than

²⁴¹ Van Eeden (2009) 206 at 11.3.1.

²⁴² Van Eeden *supra* 206 at 11.3.2.

²⁴³ See also Lötzt (unpublished) *supra* 36-38; Melville (2010) 100-106; Melville (2010) 100-106; Van Eeden *supra* 223-226; Lötzt DJ, “The law of purchase and sale” 2010 *Annual Survey of South African Law* 1102 at 1119; Charter C, “*Caveat Vendor*: consumer refunds under the CPA” 2011 *Without Prejudice* (April) 20; Meiring I, “Warranties and what they mean” 2011 *Without Prejudice* (May) 14; Otto JM, “Verborge gebreke, voetstootsverkope, die Consumer Protection Act en die National Credit Act” 2011 *THRHR* 525; Naudé T, “The Consumer’s Right to Safe Good Quality Goods and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer Protection Act 68 of 2008” 2011 (23) *SA Merc LJ* 336; Strachan D, *supra*; Hawkey K, *supra*.

persons generally would be reasonably entitled to expect in the circumstances (section 53(1)(a)(ii)).

In interpreting section 55(4) it makes no difference whether goods have latent or patent defects or whether it could have been detected by a consumer before taking delivery of such goods. The consumer will be able to claim against any of the entities in the supply chain, including the producer, importer, distributor or retailer of the goods.

Melville²⁴⁴ is of the opinion that, because of the serious consequences for non-compliance with section 55, suppliers need to ensure that their staff members who deal with the consumers are indeed knowledgeable about the goods that they sell or that it is made clear to the consumers that a senior member of staff should be approached for advice on the suitability of the goods for the purposes for which they want to buy it. In terms of section 48(2)(c) a contractual provision is unfair if the consumer, to his disadvantage, relied on a false, misleading or deceptive representation made by the supplier as contemplated in section 41, or on a statement of opinion provided by or on behalf of the supplier.²⁴⁵

Suppliers will most likely have to take out extra insurance to ensure them against these risks and will also need to see to it that, in turn, their own contracts with their producers, distributors or importers are drafted in such a manner that they will be able to recover their losses.

²⁴⁴ (2010) 104 at par 1.
²⁴⁵ Also see Van Eeden (2009) 187-188.

If the goods entail any risk of an unusual character or can result in serious injury or death, the supplier is obliged to specifically draw the fact, nature and potential effect of that risk to the attention of the consumer. The consumer must indicate (for example by attaching his or her signature to the clause in the contract) that he or she agrees to that provision and that he or she has been made specifically aware of the risk and accepts the provision.²⁴⁶

In the common there might be a contractual term (either expressly or tacitly) about the quality of the goods or their suitability for an intended use that warrants that the goods are free of defects. The problem, from a consumer's point of view, is that the parties to the contract can expressly exclude the operation of the implied warranty in their contract. One way to do that would be to include the 'voetstoots' clause²⁴⁷ in the contract that effectively releases the seller from liability for any defect, be it patent (obvious on inspection) or latent (hidden). In the common law where a "voetstoots" clause is included in the contract the seller would only be liable if he knew about the defect and did not disclose it to the buyer.²⁴⁸

Under the Act, in addition to any warranty implied by the common law or expressed explicitly in the contract by the supplier, all contracts involving the supply of goods are now taken as having an implied term that the goods are fit for purpose, are of good quality, are durable and comply with the statutory standards as set by the Standards Act.²⁴⁹

²⁴⁶ See Melville (2010) 91-108.

²⁴⁷ See Schulze H, "The Law reports" 2009 *De Rebus* (March) 27 at 30 on Contract Law – voetstoots; *Odendaal v Ferraris* (2008) 4 All SA 529 (SCA).

²⁴⁸ See Hutchison and Pretorius (2009) 235; Morrissey C and Coetzee A, "Does this mean *voetsek voetstoots*?" 2010 *Without Prejudice* (May) 12.

²⁴⁹ 8 of 2008.

Important to take note of is the fact that section 55(2)(b) does not apply to a transaction if the consumer has been expressly informed that particular goods were offered in a specific condition (section 55(6)(a)) and he expressly agreed to accept the goods in that condition, or knowingly acted in a manner consistent with accepting the goods in that condition (section 55(6)(b)). The provisions of sections 55(2)(b) and 55(6) must be read together with the provisions of sections 48(1)(a)(i), 29(b)(iii) and 41(3)(f). Should the supplier and consumer want to enter into a transaction in terms of which goods are to be supplied that are not of 'good quality, in good working order' or are or may be defective (for instance goods typically referred to in common parlance as 'voetstoots' goods) the condition of the goods should be described with sufficient particularity and descriptiveness to render it clear that the condition in which the goods is offered is such that the consumer understands that the goods may be defective and accepts the risk.²⁵⁰

In terms of section 56(1) any transaction or agreement is subject to an implied warranty by a producer, importer, distributor and retailer to the effect that any supplied goods comply with the quality requirements and standards contemplated in section 55. Section 56(4) "The implied warranty imposed by Subsection (1), and the right to return goods set out in Subsection (2), are each in addition to (a) any other implied warranty or condition imposed by the common law..."

²⁵⁰ Van Eeden *supra* 225 at par 11.13.2.

CHAPTER 6

CONCLUSION

1 GENERAL

It is evident that the Consumer Protection Act 68 of 2008 is bound to make some waves in our law of contract. As John Giles²⁵¹ puts it:

“What the Labour Relations Act did for employees, the Consumer Protection Act will do for consumers.”

Giles criticised the way in which vendors “sign-up customers fast” and the issues arising as a result thereof in practice. Under the Act this will not be allowed at all.

Emma Donovan²⁵² also point out that the sections of the Act are in addition to any other right in law between a supplier and a consumer to return goods and receive a refund and that it does not purport to replace any existing rights.

Edward Makwana²⁵³ quoted Robby Coelho who presented at a seminar hosted by SAICA in that penalties for non-compliance can be severe; the Act impacts on all business; the large influence of the Act on contracts and agreements due to its impact on exclusions and limitations of liability, disclaimers, warranty clauses, indemnities, etc.; and the impact of strict liability on the whole supply chain. Also of importance is the power of the National Consumer Tribunal and courts to declare parts of or even whole agreements null and void.

²⁵¹ “The Consumer Protection Act – a heads up” April 2009 www.michalsons.com; and November 2009.

²⁵² “Consumer Protection Act Series #10 – Right to return goods” January 2010 www.getclosure.co.za.

²⁵³ “South African Institute of Chartered Accountants (SAICA) press Office Feature: Consumer Protection Act not taken seriously” August 2010 www.itinews.co.za.

2 INFLUENCE ON THE COMMON LAW OBLIGATIONS OF THE SELLER

By now it is clear that there is definitely an influence by the Consumer Protection Act 68 of 2008 on the common law in general, but also in specific, in regards to this dissertation, on the common law obligations of the seller *vis-à-vis* (1) risk and duty to take care of the thing sold, (2) warranty against eviction and (3) warranty against latent defects.

The influence on each one of the above obligations will now shortly be discussed separately.

2.1 Risk and the seller's duty to take care of the thing sold

The right of disclosure of information to the consumer in plain language and visually clear in a format that is eye-catching so that it can be noticed and understood by the consumer, is one of the most significant changes. No more "small print" to mislead consumers will be allowed.

Also, another drastic change is that, should there be any provision in any agreement that limits the supplier's risk or liability (disclaimers), that requires the consumer to accept the risk or liability (standard form contracts) or that imposes an obligation on the consumer to indemnify the supplier, or if the consumer acknowledges any fact, then there are plain language notice consequences. The nature and effect of the provisions must be drawn to the attention of the consumer in a conspicuous manner that the consumer ought to notice, in plain language and before the contract is

concluded. The consumer must also be afforded the opportunity to appreciate the notice.

Any disclaimer in a notice or contract needs to be boldly highlighted and carefully explained so that the consumer knows what the effect of the disclaimer is. If there are hazards or risks of an unusual nature or which could lead to serious injury or death, the supplier has an obligation to ensure that the consumer is actually aware of what he or she has agreed to. This also extends the common law in that it now introduces strict liability into our law which entails that the consumer would be able to act against any supplier in the whole supply chain, which was not possible under our common law *aedilitian* actions. This also confirms the Pothier-rule.

There are also a number of provisions in the Act entitling consumers to return goods and to claim a refund and not being able to be forced by a supplier to accept a replacement or credit in the place of a refund.

If goods are not delivered on time or the wrong goods are delivered (even partly wrong) the consumer may refuse to accept delivery and ask the supplier to take the goods back. If the supplier then does not take the goods back in a certain time, they are known as unsolicited goods and may end up being forfeited to the consumer. The delivered goods remain at the supplier's risk and it is the supplier's responsibility (and at his cost) to get the goods back and to refund the purchaser any amount paid.

A consumer may also return goods within ten business days and receive a full refund if the consumer did not have the chance to examine the goods at the time of

the sale (for example bought the goods off a catalogue), or if the consumer rejects the goods because the goods do not comply with the description of the goods sold or if the goods prove to be unsuitable for a purpose that was communicated to the supplier at the time of sale.

2.2 Warranty against eviction

The CPA is very clear on the issues of the consumer's right to assume that the supplier is entitled to sell the goods and it also leaves no uncertainties that a supplier or any person on behalf of a supplier is prohibited from entering the premises of a consumer for purposes of taking possession of goods to which the contract relates.

The only thing that one might argue that is not clear from the Act is if the supplier is in fact in terms of the Act obliged to transfer the actual ownership in the thing sold to the consumer. This remains to be seen from future case law.

2.3 Warranty against latent defects

A supplier will not be able to contract out of the responsibility to supply goods that are free from defect. Whether the defects are apparent or hidden (patent or latent), the supplier is responsible for the defects unless they are specifically drawn to the attention of the consumer and the consumer accepts the goods in that condition. This mean effectively that it is not necessarily the end of the voetstoots clause, but that suppliers will have to ensure that the consumer indicated clearly that he or she accepts the goods with the defects and all.

Where goods are supplied other than at an auction, the consumer has the right to receive goods that are suitable for their general purpose, of good quality, in good working order, free of defects (under the CPA there is no distinction between latent and patent defect; manufacturing defects and defect which render the goods less useful, practicable or safe than is generally expected), usable and durable for a reasonable period of time, and comply with the required standards as per legislation such as the Standards Act.

If a consumer indicated a specific purpose for which he wants to use the goods to the supplier, the goods must be fit for that specific purpose.

Goods which do not comply with the requirements relating to good quality, the absence of defects, and durability may be returned to the supplier within six months of delivery without the risk or penalty to the consumer. The protected consumer, who will not be bound by the usual voetstoots clause, can return the goods if any material defect or inadequate usability is found. The supplier bears any loss in value and has to accept the goods with the normal wear-and-tear that may have taken place in the interim.

The only requirement for the consumer is that he or she has to be able to return the goods intact. The consumer chooses whether the goods must be repaired or replaced, or whether the purchase price must be refunded. If the goods are repaired and the repairs do not last three months or a further defect appears within the next three months, the right of return recurs.

At first glance this might not seem to be such a serious problem, but this can be detrimental in sales of immovable property where it involves formalities like the obligation to register at the Deeds Office.

Much said about the Consumer Protection Act is still but mere speculation as there is no case law as yet to research in order to be able to form an informed opinion. However, the “dooms-day-prophets” despite, I am of the opinion that there is definitely a need for the Act and that, in time, it will be beneficial to our economy as opposed to the opinions of many of the writers of the articles cited here, that it will in the end be detrimental to our economy. The world-wide drive is in any event to protect consumers against unscrupulous business practices and we are only following suit. The biggest challenge that I foresee is with regards to precedent as the National Consumer Tribunal will be able to set precedent in cases before it, but it is unclear how these cases will be reported. This will surely be problematic to any lawyer who needs to properly advise his or her client as to the application of the Act in the client’s specific circumstances.

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