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The statutory reintroduction of a defence similar to the *exceptio doli generalis*?

by

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ABSTRACT

This dissertation considers the impact of the Consumer Protection Act 68 of 2008 (hereafter 'CPA') on contractual claims, and specifically whether the *exceptio doli generalis* is being reintroduced in the South African legal system.

This dissertation illustrates that although the CPA improves the position of the consumer in many ways, the legislature should have drafted some provisions more carefully which could have resulted in clarifying some vital issues. Many terms and principles introduced by the CPA are foreign to the South African legal system. Although practice and precedent will eventually provide solutions to many of the practical difficulties currently experienced, it will take time and money to do so. It is therefore submitted that some areas should be reconsidered for amendment by the legislature in order to allow this significant piece of legislation to operate optimally.

Ultimately, two sets of conclusions can be drawn in this dissertation. Firstly, the general conclusions relating to whether the defence of the *exceptio doli generalis* has been reintroduced in the South African legal system by the CPA and, secondly, whether the *exceptio doli generalis* is in line with our constitutional values and in line with the current rules for the interpretation of contracts.

Although the Courts have abolished the defence of *exceptio doli generalis*, it seems as if the CPA has reintroduced this defence.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION

1.1 Background information

In South Africa, as in the rest of the world there has been a shift towards the increased protection of consumers. The high levels of poverty, illiteracy and social and economic inequality necessitate this.[1] Many believe that the Consumer Protection Act 68 of 2008,[2] that was assented to on 24 April 2009,[3] will promote a fair, accessible and sustainable marketplace for consumer products and services and will improve the relationship between consumers and businesses.[4]

The CPA can be classified as legislation aimed primarily at protecting consumers. This includes protecting consumers against the unconscionable conduct of suppliers and service providers.[5] The main aim of the Act is to level the playing field in the marketplace between consumers and suppliers, and the purpose of the CPA is to regulate both market practices and contracts.[6] The CPA will unquestionably have a material impact on the common law principles regulating the law of contracts in South Africa.[7] The fundamental consumer rights that are protected by the CPA are the right to equality in the consumer market,[8] privacy,[9] choice,[10] disclosure and information,[11] fair and responsible marketing,[12] fair and honest dealing,[13] fair, just

[1] Preamble of the Consumer Protection Act 68 of 2008.
[2] Hereinafter the "CPA".
[3] Published in GG32186/29-4-2009; and which became fully operational on 1 April 2010.
[4] Esser I M "Stakeholder protection: The position of consumers" 2009 (72) *THRHR* 407; Stadler S "The Consumer Protection Act - a short introduction" *De Rebus*, April 2010.
[5] The CPA s40.
[6] Preamble of the CPA and s3.
[7] Stadler S "The Consumer Protection Act – a short introduction" *De Rebus* April 2010 at 43 for an introduction of the framework of the CPA.
[8] S8 to s10.
[9] S11 to s12.
[10] S 13 to s 21.
[11] S 22 to s 28.
[12] S 29 to s 39.
[13] S 40 to s 47.

and reasonable terms and conditions,[14] fair value, good quality and safety[15] and the supplier's accountability to consumers.[16]

1.2 Problem statement and research objective

In terms of the common law 'good faith'[17] is not a specific requirement for the conclusion or existence of a valid and enforceable contract, regardless of the fact that litigants have in the past tried to introduce general concepts in order to ensure the fair operation of a particular contract. The Roman law afforded one such remedy, namely the *exceptio doli generalis.* In terms of this *exceptio* or exception a defendant could raise the defence that the plaintiff did not act in good faith.[18]

Initially the South African courts seemed prepared to recognise that this remedy, as an instrument of equity, had been accepted into our law by way of Roman-Dutch law.[19] The *exceptio doli generalis* was, however, held not to be a valid defence in *Bank of Lisbon and South Africa Ltd v De Ornelas.*[20] For many years the courts abided by this decision. Van der Merwe[21] correctly points out that the courts did not identify any other remedy that might fulfill the same function as *exceptio doli generalis* as an instrument of introducing more equitable principles and thereby ensuring the fair operation of a contract.

The Constitutional Court, however, was called upon in the case of *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd*[22] in 2008 to develop our common law, by reintroducing the defence of reasonableness and fairness as a defence in the law of

[14] S 48 to s 52.
[15] S 53 to s 61.
[16] S 62 to s 67.
[17] Writer's own emphasis.
[18] http://en.wiktionary.org/wiki/exception_doli generalis (last accessed on 26 October 2011); see *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A).
[19] *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); *Arprint Ltd v Gerber Gold Schmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A).
[20] 1988 (3) SA 580 (A). See also *Eerste Nasionale Bank v Saayman NO* 1997 (4) SA 302 (A); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[21] Van der Merwe (2007) 318.
[22] 2008 (4) SA 16 (CC).

contract, on the basis that this remedy was in line with constitutional values.[23] This would in effect have revived a defense similar in nature and context to the previously abolished *exceptio doli generalis*. The Constitutional Court declined to entertain this application.[24]

The CPA contains elaborate provisions relating to the "fairness" of a consumer contract and its contents, as well as to the conduct of the suppliers and service providers.[25] The question that comes to light is whether the legislature is reintroducing a defense similar to the *exceptio doli generalis* into our law with the CPA, after our courts have clearly been unwilling to recognise good faith as a general basis for intervening in contractual relationships. The research objective of this dissertation is thus to investigate whether the *exceptio doli generalis* has been reintroduced by statute as a defence in the South African law of contract.

1.3 Delineation and limitations

This dissertation will examine the fundamental consumer rights, which will have an effect on the general law of contract.[26] The specific requirements for franchise agreements and auctions will not be discussed.

The impact of the CPA on the law of delict falls outside the ambit of the research objective of this dissertation, and consequently the sections of the CPA dealing with the fundamental consumer rights, which might transform the law of delict, will not be discussed.[27]

Enforcement of the CPA and recourse through alternative dispute resolution also falls outside the ambit of this dissertation. The powers of the court to ensure fair and just conduct, terms and conditions will be considered and discussed only where relevant.[28]

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[23] At 19D to G.
[24] At 19G.
[25] See *inter alia* ss 2, 14, 15, 16, 17, 20, 22, 26, 39, 44, 46, 48, 49, 50, 51, 58 and 64.
[26] Part A to G of Chap 2.
[27] Part H of Chap 2.
[28] S 52.

Business names and industry codes of conduct will also not be discussed and do not fall within the ambit of the research objective.

It is to be noted that this dissertation reflects relevant developments in this area of the law as at 24 November 2011.

1.4 Significance of the study

This study provides a comprehensive analysis of the *exceptio doli generalis*, and whether the CPA attempts to establish a general defense, similar to the *exceptio doli generalis*, in the South African legal system that could offer consumers a general remedy or right of recourse.

1.5 Structure of dissertation

The dissertation is structured in four parts to meet its objective. Chapters 2 and 3 contain the general introduction and orientation to establish a firm basis for determining the application of the CPA in our contract law system. It furthermore provides an overview of the *exceptio doli generalis* as a defence in contractual claims. Chapter 4 deals with specific principles contained in the CPA and critically analyses whether the effect of the Act is to reintroduce the *exceptio doli generalis* as a defence in the law of contract. Chapter 4 also examines whether the *exceptio doli generalis* is in line with our constitutional values, with specific reference to the right to equal bargaining powers and freedom of contract. This chapter also contains the general conclusion and recommendations.

1.6 Key references, terms and definitions

For the purpose of this dissertation it is important to note that the Renaming of High Courts Act[29] provides for the renaming of the High Courts of the Republic. Although

[29] 30 of 2008.

this Act finally became fully operative on 31 March 2011,[30] this dissertation refers to High Court divisions as they appear in the relevant law reports or as referred to in a specific piece of legislation.

It is necessary for the sake of clarity to define the following terminology that will be used throughout this dissertation in accordance with the definitions provided in the CPA:[31]

'agreement' means an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them.

'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 a 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).

'consumer agreement' means an agreement between a supplier and a consumer other than a franchise agreement.

'market', when used as a noun, means any visual representation, name signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or contained for goods of other sign capable of being represented graphically, or any combination of those things, but does not include a trade mark.

[30] GG 31948 of 23 February 2009.
[31] Extracted from s1 of the CPA.

'market', when used as a verb, means to promote or supply any goods or services.

'National Credit Act' means the National Credit Act, 2005 (Act 34 of 2005).

'prohibited conduct' means an act or omission in contravention of this Act.

'transaction' means

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

(i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration; 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).

'unconscionable', when used with reference to any conduct, means

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

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

CHAPTER 2: AN OVERVIEW OF THE *EXCEPTIO DOLI GENERALIS* AS A DEFENCE IN CONTRACTUAL CLAIMS

2.1 Introduction

In terms of the common law 'good faith'[32] is not a specific requirement for a valid and enforceable contract, regardless of the fact that litigants have tried in the past to introduce general concepts in order to ensure fair operation of a particular contract.[33] Van der Merwe[34] pointed out that the Roman law afforded one such remedy, namely the e*xceptio doli generalis.* In terms of this *exceptio* or *exception* a defendant can raise a general defence that the plaintiff has not acted in good faith.[35]

The existence of the *exceptio doli generalis* has surrounded our law with uncertainty and has been the subject for discussion in many cases, as will be discussed in this chapter. It is therefore necessary to investigate the origin and development and scope of application of the *exceptio doli generalis*.

2.2 Bona fides and the *exceptio doli generalis* in Roman and Roman-Dutch law

In the case of *Bank of Lisbon and South Africa Ltd v De Ornelas and another*[36] Joubert JA thoroughly investigated the origin, development, scope and applicability of the *exceptio doli generalis*. It can be summarised as follows.

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[32] Writer's own emphasis.
[33] See as examples: *Bank of Lisbon and South Africa v De Ornelas & Others* 1988 (3) SA 580 (A); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at para 27; *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); *Arprint Ltd v Gerber Gold Schmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A); *Eerste Nasionale Bank v Saayman NO* 1997 (4) SA 302 (A).
[34] Van der Merwe *et al* 316 to 317.
[35] http://en.wiktionary.org/wiki/exception_doli generalis (last accessed on 26 October 2011.); *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A).
[36] 1988 (3) SA 580 at 592 to 605.

In the Roman law the *ius civile* as an *ius strictum* liability for fraud was unknown. The liability on the ground of fraud could also not be resisted under the *negotia stricti iuris.* These shortcomings of the *ius civile* were ameliorated and remedied by the praetorian law. In 66 BC Gallus Aquilius provided in his *edictum praetoris* for two praetorian remedies, the *action doli* and the *exceptio doli mali.* They are usually referred to as the *action doli* and the *exceptio doli.* The *exceptio doli,* since its inception in the Roman law, became the most important exception to be pleaded by a defendant in defence to a claim based on a *negotium stricti iuris.* Joubert JA pointed out that the *exceptio doli generalis* was a plea, which, without specifying the factual basis of the defence, enabled the defendant to rely on facts upon proof of which the plaintiff's claim would be ousted. An example is where a lessor would be founded to act in bad faith should he suggest to the lessee that they should adopt a method of paying the rent , other than the amount as contained in the written contract, in order to suit his convenience. And then for the lessor to later say that he is cancelling the contract because the lessee did not pay the rent as according to the written contract.[37]

Botha, in his unpublished doctoral thesis correctly accepted that the *exceptio doli generalis* was not founded on equity but on *mala fides, which* was in conflict with *bona fides* in an objective sense.[38]

The *exceptio doli generalis* ceased to function as a praetorian procedural remedy in post-classical Roman law, because the law showed signs of a tendency to develop in the direction of requiring all contracts to be regulated by *bona fides.*[39] In concluding his investigation of Roman law in the judgment passed in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*, Joubert JA emphasised the importance of the fact that the disappearance of the formulary procedure also

[37] This hypothetical statement reflects the counter-argument that was made by the respondent in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 52.
[38] Botha AD Die *exceptio doli generalis* in die Suid-Afrikaanse Reg (1981) LLD Thesis University of the OFS.
[39] Cod 4.10.4: "*Bonam fidem in contractibus considerari aequum est*"

entailed the termination of the use of the *formula* of the *exceptio doli* as a technical term of pleading.[40]

Joubert JA continued to establish whether the *exceptio doli generalis* formed part of our common law by considering the position of the Roman-Dutch law.[41] The Roman law of Justinian, as codified in the *Corpus Juris Civilis*, was received in the Netherlands during the 15th century.[42] The court held that although it does not seem as if all Roman legal principles were received, the important principle that all lawful agreements were binding as consensual contracts was in fact received.[43] Joubert JA found that the *exceptio doli generalis* did not form part of the Roman-Dutch law as a living legal system.[44] It was concluded that the time has arrived, once and for all, to bury the e*xceptio doli generalis* as a superfluous, non-operational anachronism.[45]

In the matter of *Bredenkamp & Others v Standard Bank of South Africa Ltd*[46] the Supreme Court of Appeal confirmed the majority judgment in *Bank of Lisbon and South Africa Ltd case*[47] which had found that the *exceptio* had never been part of our law as it was never part of our Roman Dutch common law. The court held that the *exceptio doli generalis* was merely part of the Roman law of procedure and never a substantive rule, and was used to alleviate the strictness of contracts that were not based on *bona fides*.[48] The court pointed out that all contracts in our law are considered to be *bona fide*, and consequently the *exceptio* had no purpose in modern law.[49] The learned Judge commented that in German law, the *exceptio* was simply a convenient label for a number of rules, yet it had no specific content.[50]

[40] *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* supra at 597H.
[41] *Supra* at 601D to 605H.
[42] *Supra* at 601D to 605H.
[43] *Conradie v Rossouw* 1919 AD 279 at 309.
[44] *Ibid* at 605F to I; this conclusion is confirmed by the significant silence of the authoritative Dutch jurists and by the absence of judicial recognition of the e*xceptio doli generalis* by the Hof van Holland and WesttoFriesland and the Hooge Raad.
[45] *Ibid* at 607A.
[46] 2010 (4) SA 468 (SCA).
[47] *Supra.*
[48] *Ibid* at 478 F to G.
[49] *Ibid* 478G to 479A.
[50] *Ibid* at 479D.

2.3 History and abolishment of the defence of *exceptio doli generalis* in the South African law

The principle of reasonableness and fairness (consequently the foundation of the *exceptio doli generalis)* versus the principle of freedom of contract and the sanctity of contracts became the subject matter in numerous court cases over the past couple of years.

Initially the South African courts seemed prepared to accept that the remedy of *exceptio doli generalis,* as an instrument of equity, had been accepted into our law by way of Roman-Dutch law.[51] In certain cases the court had assumed, without deciding, that the *exceptio doli* did exist as a viable independent defence in our law.[52]

As stated above, the Appellate Division in the *Bank of Lisbon and South Africa case*[53] held that the *exceptio doli generalis,* as a technical remedy founded in equity, does not form part of the South African law.[54]-

In this case, De Ornelas Fishing Company had provided securities, consisting of a suretyship and a special mortgage of immovable property, to the Bank of Lisbon as security for the contractual obligations under an overdraft facility.[55] The relevant security agreements provided that the securities also covered obligations from 'whatsoever cause or causes arising'.[56]

[51] *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); *Arprint Ltd v Gerber Gold Schmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A).
[52] *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) at 607F toG; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 27G toH; *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 (2) SA 281 (C) at 293 G to H; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T) at 437F to 438C; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd 1977 (2) SA 425 (A) at 431G to 432; Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W) at 156A to 157B*; Otto v Heymans* 1971 (4) SA 148 (T).
[53] *Supra*.
[54] 2010 (4) SA 468 (SCA) at 479D.
[55] *Ibid* 607E.
[56] Ibid 609A.

The De Ornelas Fishing Company canceled the overdraft facility after the bank refused to increase it.[57] The entire debt under the overdraft was discharged and consequently the company wanted to cancel the security agreements accessory to the overdraft.[58] The Bank refused to accept cancellation of the security on the basis that the securities also secured obligations of the Fishing Company due to the bank in terms of a transaction, which was entirely independent from the overdraft facility. It was due in terms of a contract for the forward purchase of dollars.[59] De Ornelas Fishing Company raised the *exceptio doli generalis* as a defence in an attempt to escape the security agreements.

The court examined whether the *exceptio doli generalis* existed and survived the reception of Roman law into Roman-Dutch law and of Roman-Dutch law into the South African law. The court held that as the *exceptio doli generalis* never formed part of the Roman-Dutch law,[60] the *exceptio* could not have been received into the South African law.

Three years after the Appellate Division ruling in the *Bank of Lisbon*[61] case, the Appellate Division made a ruling in the case of *Van der Merwe v Meades,*[62] which was directly opposed to judgment in the *The Bank of Lisbon*[63] case. In the latter the court concluded that the non-reception of the *exceptio doli generalis* held 'equally for the *replicatio doli generalis*'.[64] In the *Van der Merwe* [65] case the appellant entered into an agreement of sale with Meades in terms of which he sold a house to Meades. The deed of sale contained a voetstoots clause. After transfer had taken place, Meades claimed damages from Van der Merwe for the cost of the repair of a latent defect. Van der Merwe pleaded that he was unaware of the latent defect at the time of the sale, and relied on the voetstoots clause to avoid liability.[66]

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[57] Ibid 607I.
[58] Ibid 607J to 608A.
[59] Ibid 608A to B, E.
[60] *Bank of Lisbont-case supra* at 605H.
[61] *Supra*.
[62] 1991 (2) SA 1 (A).
[63] *Supra*.
[64] *Ibid* at 608F to G.
[65] *Supra*.
[66] *Ibid* 2F to 3A.

The court discussed the position in terms of the Roman law, which can be summarised as follows. The seller of a merx with a latent defect could rely on a voetstoots clause, yet the buyer could reply by using the *replicatio doli* in that he had to prove that the seller knew about the latent defects at the time of the sale, and willfully withheld the fact of their existence from the buyer to mislead him. Consequently, if the seller succeeded with the *replicatio doli* the seller could no longer rely on the voetstoots clause.[67]

The court considered the Roman-Dutch reception of this position and found that this position was received unchanged into the South African law.[68] Consequently the court concluded that r*eplicatio doli* did form part of the South African law of contract.[69] Kerr holds the view that the *Van der Merwe v Meades*[70] case is correct and that the decision in the *Bank of Lisbon*[71] case is incorrect in respect of the post-classical Roman law and the Roman Dutch law.[72] I do not agree with Kerr's view. I hold the view that the position as set out in the *Bank of Lisbon and South Africa*[73] case is correct. This has subsequently been investigated thoroughly and confirmed by the Supreme Court of Appeal in the case of *Bredenkamp v Standard Bank.*[74]

Thus, if the *replicatio doli* survived the reception from the Roman-Dutch law, then the only conclusion that can follow is that the *exceptio doli generalis* must have also survived the reception, as they are two sides of the same coin.[75] It appears that the court in *Van der Merwe v Meades,*[76] perhaps unintentionally, revived the *exceptio doli generalis*. One should note that the *Van der Merwe*[77] case does not refer to the *Bank of Lisbon* case whatsoever.

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[67] *Ibid* 4H to 5A.
[68] *Ibid* 8B to H.
[69] Kerr AJ "The law of sale and lease" (3rd Ed) Lexis Nexis Durban (2004) 370 and 479; Kerr AJ "The *Replicatio Doli* Re-affirmed. The *Exceptio Doli* available in our law" (1991) 108 *SALJ* 583.
[70] *Supra*.
[71] *Supra*.
[72] Kerr (2004) 479.
[73] *Supra*.
[74] *Supra*.
[75] Kerr (2004) 479.
[76] *Supra*.
[77] *Supra*.

As Kerr points out, the decision of the *Van der Merwe* case should be followed according to the exposition of the consequences of the *stare decisis* principle.[78] But it appears that the decision of *Van der Merwe case* was not followed in later judgments. In the majority judgment in *Brisley v Drotsky*[79] the Supreme Court of Appeal criticized the minority judgment of Olivier, JA in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*[80] as discussed below, for attempting to breathe new life into the *exceptio doli generalis. The* majority was of the opinion that the *exceptio doli generalis* does not deserve reconsideration.[81] This position was subsequently confirmed by the decision in *Afrox Healthcare v Strydom,*[82] that good faith, reasonableness, fairness and justice are abstract considerations subjacent to our law of contract, which may shape and transform rules of law, but that they are not independent bases for the non-enforcement of contracts.[83]

In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*[84] Olivier JA delivered a separate, concurring minority judgment. Olivier JA held that the appeal had to fail due to the fact that the contract had been concluded against the principles of *bona fides*.[85] *Bona fides* were described by Olivier JA as 'eenvoudig om gemeenskapsopvattings ten aansien van behoorlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik.'[86] Olivier JA felt justified in applying the principles of public policy and summed up his argument as follows:[87]

> 'Ek hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrond op openbare beleid, steeds in ons kontraktereg 'n belangrike rol speel en moet speel, soos in enige regstelsel wat gevoelig is vir die opvattinge van die gemeenskap, wat die uiteindelike skepper en gebruiker is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoorlikheid.'

[78] Kerr (2004) 479.
[79] 2002 (4) SA 1 (SCA) at 29C to D.
[80] 1997 (4) SA 302 (HHA).
[81] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 14A to B.
[82] 2002 (6) SA 21 (SCA).
[83] *Ibid* 40H to 41A.
[84] *Supra*.
[85] *Ibid* 318I.
[86] *Ibid* 319B. Broadly translated that to comply with the moral sense of the community on what is proper, reasonable and just in the law of contract. (Writer's own translation).
[87] *Ibid* 326G.

In the *Brisley case* the appellant attempted to raise the *bona fides* argument as a defence that the entrenchment clause of the rental agreement should not be enforced.[88] As authority for this view, the appellant relied on the minority judgment of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk case.*[89] The court, however, criticized the viewpoint of Olivier JA and remarked that his viewpoint must be considered with caution.

The Constitutional Court, as our highest court, was recently called upon in the case of *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd*[90] to develop our common law, by reintroducing the defence of reasonableness and fairness as a defence in the law of contract on the basis that this remedy was in line with constitutional values. The Constitutional Court declined to entertain this application.[91]

In this case the court had to consider an application for leave to appeal in accordance with Constitutional Court rule 19(6)(b).[92] In terms of a written lease agreement the Applicant leased premises from Gold Reef City Theme Park (Pty) Ltd. The Applicant fell into arrears with the rental. Gold Reef City Theme Park (Pty) Ltd subsequently cancelled the lease and applied to the Johannesburg High Court for an ejectment order and for payment of damages.[93] The applicant opposed the application on the basis that the lessor had verbally agreed to grant an indulgence and to allow them time to make proposals for settling the rental arrears. It was submitted that Gold Reef City Theme Park (Pty) Ltd had waived its rights to cancel the lease agreement. This was denied by the defendant, by relying on a non-variation clause and on another clause in the lease agreement, which provided that any indulgence granted did not preclude either party from enforcing any of its rights.[94] The High Court, per Msimeki AJ, agreed that the defendant company was entitled to rely on both clauses and granted the relief sought.

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[88] *Ibid* 12G to 19B/C.
[89] *Ibid* page 318.
[90] 2008 (4) SA 16 (CC).
[91] *Ibid* at 19D to G.
[92] *Ibid* 18B to C.
[93] *Ibid* 18C to D.
[94] *Ibid* 18E to F.

The Applicant applied to the Supreme Court of Appeal for leave to appeal the judgment of the High Court. In the application for leave to appeal the applicant, for the first time, seeked to have the *exceptio doli generalis* reintroduced as a defence, by contending that this equitable remedy is in line with constitutional values.[95] The applicant submitted that it was unconscionable for The Gold Reef City Theme Park (Pty) Ltd to rely on the aforesaid clauses due to the alleged verbal agreement reached between the parties.[96]

The Supreme Court of Appeal was not prepared to entertain the application as it found that it was undesirable to sit as a court of first and last instance.[97] It pointed out that although the High Court and the Supreme Court of Appeal have a vital role to play in respect of the development of the common law of contract, the court was not prepared to entertain this application. [98] The application for leave to appeal was consequently dismissed.[99]

In the recent case of *Bredenkamp & Others v Standard Bank of South Africa Ltd*[100] the Supreme Court of Appeal had to consider *inter alia* whether or not it was constitutional for a banker to close a client's account.[101] The appeal was based on principles laid down by the Constitutional Court in *Barkhuizen v Napier.*[102] It was argued that the benchmark for the constitutional validity of a term of a contract is fairness, and that even where a contract is fair and valid, its enforcement must also be fair in order to survive constitutional analysis. It was further argued, with the case of *Barkhuizen v Napier* as authority, that fairness is a core value of the Bill of Rights and that it is therefore a broad requirement of our law in general.[103]

The court held that the aforesaid interpretation of the judgment delivered in *Barkhuizen v Napier* was incorrect, and remarked with relief that 'for once we were

[95] *Ibid* 18E to F.
[96] *Ibid* 18F to H.
[97] *Ibid* 19C to E.
[98] *Ibid* 19D.
[99] *Ibid* 19G.
[100] See fn 179.
[101] *Ibid* 472A to B.
[102] 2007 (5) SA 323 (CC).
[103] *Ibid* 477C to D.

not referred to any foreign constitutional jurisprudence with such far-reaching consequences, presumably because there is none'.[104]

Although the court pointed out that the appellants did not seek to rely on a revival of the *exceptio doli generalis*,[105] the court found it necessary to say something more about the *exceptio.* The *obiter* footnote contained in the case of *Crown Restaurant*,[106] read together with *Barkhuizen v Napier*[107] has created the impression that the Constitutional Court revived the *exceptio doli generalis.*[108] The court in the *Bredenkamp* case felt compelled to confirm the *exceptio doli generalis* had been laid to rest by the Appellate Division[109] in the *Bank of Lisbon and South Africa case*.[110]

The court pointed out that our common law does not recognize agreements that are contrary to public policy and commented that our courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground.[111] Determining whether or not an agreement was contrary to public policy requires a balancing of competing values.[112] That contractual promises should be kept is only one of the values.[113] The question of whether a clause in a contract was contrary to public policy depends on whether it was contrary to the values of constitutional democracy.[114]

It emphasised that the *Barkhuizen* case[115] confirmed that a contractual term which limited a constitutional right, was not merely and necessarily contrary to public policy. It would, however, be against public policy if it was unreasonable and unfair.[116]

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[104] *Ibid* 477G.
[105] *Ibid* 478D.
[106] *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 (4) SA 16, 2007 (5) BCLR 453. (CC) fn 1.
[107] *Supra*.
[108] *Ibid* 478D to F.
[109] *Ibid* 478E to 479G.
[110] *Supra*.
[111] *Ibid* 480D to E.
[112] See also older cases that confirm this principle: *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) ; *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); *National Chemsearch (SA) Pty Ltd v Borrowman and Another* 1979 (3) SA 1092 (T) at 1100H-1101B; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at para 8; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at page 893H – 894B; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 57.
[113] *Ibid* 480E.
[114] *Ibid* 481I to 482A.
[115] Fn 244 *Supra*.

Harms DP also refused to accept that the *Barkhuizen*[117] judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable even if no public policy consideration found in the Constitution or elsewhere is implicated. The court concluded that fairness is not a freestanding requirement for the exercise of a contractual right.[118]

It is clear from the judgments that it is not for a court to assess whether or not a *bona fide* business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved.[119] Consequently the appeal was dismissed.[120]

It was not only the courts that considered the principle of bona fides and unjust contract terms, the South African Law Commission[121] also considered the question whether the courts should be able to grant relief in circumstances where contract terms are unjust or unconscionable by setting it aside or modifying its terms. The Law Commission identified two concerns in their report:

a That any tampering with the binding force or sanctity of contracts will destroy legal and commercial certainty;

b That the consequences of giving such a power to the courts will be counter-productive as far as the weak, uneducated and the economically disadvantaged are concerned, since nobody will be prepared to conclude contracts with them.[122]

Despite of the aforesaid concerns the Law Commission recommended and found in favour of legislation introducing the doctrine of unconscionability and the review

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[116] *Ibid* 482C to D.
[117] Fn 244.
[118] *Ibid* 483E to G and 483H.
[119] *Ibid* 487D.
[120] *Ibid* 487E.
[121] South African Law Commission Discussion paper 65, Project 47 "Unreasonable stipulations in contracts and the rectification of contracts" (1996). See par 3.3.1 of this dissertation.
[122] *Ibid* par 1 on iv.

power of courts. The Law Commission recommended the publication of an Unfair Contractual Terms Bill, which sets out stipulations similar to those contained in the CPA.[123]

The Law Commission, upon pointing out that the *exceptio doli generalis* was buried in *Bank of Lisbon and South Africa case,*[124] commented that:

> 'Yet one could have hoped that a doctrine of relief against unconscionable claims could be founded on this *exceptio*.' [125]

The Commission stated that 'only legislative intervention can now correct' the implications of the *Bank of Lisbon* case.[126] It seems from the aforesaid remarks that the Law Commission had the reintroduction of the *exceptio doli generalis* in mind when they made a recommendation.

2.4 Conclusion

As established by the aforesaid case law, it is clear that our courts are not prepared to acknowledge or reconsider the defence of *exceptio doli generalis.* Van der Merwe[127] correctly points out that the courts also do not identify any other remedy that might fulfill the same function as *exceptio doli generalis* as an instrument of introducing more equitable principles and thereby ensuring the fair operation of a contract.

Our courts do not readily accept any limitation of or deviation from freedom of contract, and have over time moved away from any defence regulating fair, just and reasonable contract terms.[128] As illustrated below, the court held that there needs to be strict adherence to the terms of a contract and that the *exceptio doli generalis*

[123] *Ibid* 29 to 38.
[124] *Supra*.
[125] South African Law Commission Discussion paper par 1.9 at 9.
[126] South African Law Commission Discussion paper par 1.10 on 10.
[127] Van der Merwe (2007) 318.
[128] *Bank of Lisbon case supra.*

could not be used to deal with unfairness.[129] In the case of *Sasfin (Pty) Ltd v Beukes*[130] the court held that a court could only refuse to enforce contracts that were against public policy.

The current position was clearly summarized by the court in the matter of *Bredenkamp v Standard Bank*[131] in that the *exceptio doli generalis* has not been revived, but that our courts are prepared to accept that contracts that are *prima facie* unconstitutional are unenforceable. Furthermore that *prima facie* 'innocent' contracts that limit or eliminate a constitutional value, should also not be enforced where the limitation is unjustifiable or unfair and unreasonable.

As illustrated in the next chapter the CPA contains elaborate provisions relating to the 'fairness' of a contract and 'unconscionable' conduct and contractual terms.[132] The question that comes to light is whether the legislature is reintroducing the *exceptio doli generalis* as a defence in our law by ways of statute with the enactment of the CPA, after our courts have clearly been unwilling to recognise good faith as a general basis for intervening in contracts. This question will be examined in the next two chapters.

[129] *Ibid* 605.
[130] 1989 (1) SA 1 (A) pars 7 to 9.
[131] *Ibid* at 483A to D.
[132] See *inter alia* ss 2, 14, 15, 16, 17, 20, 22, 26, 39, 44, 46, 48, 49, 50, 51, 58 and 64.

CHAPTER 3: APPLICATION AND OVERVIEW OF THE CONSUMER PROTECTION ACT

3.1 Introduction

The CPA was assented to on 24 April 2009 and commenced in stages. The sections governing the establishment of the National Consumer Commission became effective on 29 April 2010. The remainder of the Act became effective on 31 March 2011.[133]

The CPA aims to promote a fair, accessible and sustainable marketplace for consumer products and services. It establishes national norms and standards relating to consumer protection, provide for improved standards of consumer information, prohibit certain unfair marketing and business practices, and promote responsible consumer behavior, consistent legislative and enforcement framework for consumer transactions and agreements.[134] The relevant chapters of the Act include Chapter 2 that deals with the fundamental consumer rights, and Chapter 5 that deals with consumer protection institutions.[135] The latter will be discussed briefly regarding the right of recourse available to a consumer where he suffers victim to unfairness.

The fundamental consumer rights that are protected by the CPA and that are relevant to the topic of this dissertation are the right to equality in the consumer market,[136] choice,[137] fair and responsible marketing,[138] fair and honest dealing,[139]

[133] GN 917 in GG 33581 of 23 September 2010.
[134] Preamble of the CPA.
[135] S 83 to s 98.
[136] S 8 to s 10.
[137] S 13 to s 21.
[138] S 29 to s 39.
[139] S 40 to s 47.

fair, just and reasonable terms and conditions,[140] fair value, good quality and safety[141] and the supplier's accountability to consumers.[142]

The discussion now focuses on an investigation of the general provisions regulating the application of the CPA incorporating the fundamental consumer right to fair, just and reasonable terms and conditions and the remedies in the event of infringing this aforesaid fundamental consumer right.[143]

3.2 The purpose interpretation and application of the CPA

3.2.1 The purpose and interpretation of the CPA

The CPA must be interpreted in a manner that gives effect to the purposes set out in section 3 of the Act.[144] The Act furthermore provides that no provisions of the Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.[145] Applicable foreign law, international law, conventions, declarations or protocols may be considered when interpreting the Act.[146] The Act provides that any decision of a consumer court may also be considered when interpreting the Act. Jacobs, Stoop and Van Niekerk[147] correctly point out that precedents may be created if a consumer court, ombud or arbitrator interprets the Act.

The purpose and objectives of the CPA and the ways in which the Act attempts to achieve these purposes, are set out in section 3 of the Act. The CPA specifically prescribes the responsibilities of the National Consumer Commission[148] to ensure

[140] S 48 to s 52.
[141] S 53 to s 61.
[142] S 62 to s 67.
[143] See in general Melville NJ "The Consumer Protection Act made easy" (2010) chap 1 to 4; Van Eeden E "A Guide to the Consumer Protection Act" (2009) chaps 1 to 5.
[144] S 2.
[145] S 2(10).
[146] S 2(2).
[147] Jacobs W, Stoop P & Van Niekerk R "Fundamental Consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis" 2010 (13) 3 *PER* 302.
[148] The National Consumer Commission is established in terms of S 85(1).

that the purposes of the Act are realised.[149] The Commission must take reasonable and practical measures to promote the purposes of the Act and to protect the interests of all consumers. The Commission must monitor and an annual report regarding prescribed consumer matters must be sent to the Minister.[150]

It remains to be seen whether the CPA will achieve its purpose as successfully as the National Credit Act[151] has done.

3.2.2 The scope and application of the CPA

The CPA enjoys a wide field of application. Section 5 regulates the general application of the CPA and provides that the CPA applies to every transaction occurring within the Republic for the supply of goods or services or the promotion of goods and services or of the supplier of any goods or services, unless it is exempted from the application of the Act.[152] The CPA does not apply to the following transactions where goods or services are supplied or promoted to the State;[153] or where the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, is more than or equal to the threshold value determined by the Minister in terms of section 6[154] or where the persons have been exempted by the Minister in terms of sections 5(3) and 5(4).[155] Credit agreements under the National Credit Act are also excluded, yet not the goods or services that are the subject of the credit agreement,[156] services to be supplied under an employment contract,[157] collective bargaining agreements in terms of the Labour Relations Act[158]

[149] S 3(2).
[150] S 3(2)(b) and (c).
[151] 34 of 2005.
[152] S 5(1)(a) to (d). It is uncertain what the meaning of "occurring within the Republic" is; the National Credit Act 34 of 2005 applies to transactions "having effect within South Africa".
[153] S 5(2)(a). Jacobs, Stoop and Van Niekerk (2010) 309 point out that the Act does not contain a definition of 'State' and that it is not clear whether companies and other entities, of which the State is a shareholder or member are included in the definition.
[154] S 5(2)(b). The monetary threshold of R 2 000 000.00 was determined by the Minister of Trade and Industry as published in GN 294 of GG 34181 of April 2011.
[155] S 5(2)(c).
[156] S 5(2)(d).
[157] S 5(2)(e).
[158] Act 66 of 1995.

and the Constitution;[159] and a collective agreement in terms of section 213 of the Labour Relations Act.[160]

The CPA also applies to goods that are supplied in terms of a transaction that is exempt from the application of the Act to the extent provided for in subsection (5) regarding strict product liability.[161] Finally, advice or intermediary banking or related financial service, as regulated by the Financial Advisory and Intermediary Services Act 37 of 2002 or the Long-term Insurance Act 52 of 1998 or Short-term Insurance Act 53 of 1998, is excluded.[162] These services will however, fall within the scope of the Act where this industry does not align its statutes with the CPA within 18 months from date of commencement of the Act.[163]

3.3 Fundamental consumer rights: The right to fair, just and reasonable terms and conditions

3.3.1 Introduction

The South African contract law is based on the principles of 'freedom of contract' and '*pacta sunt servanda',* which ensures that the law will enforce an agreement where parties were in an equal bargaining position.[164] As correctly pointed out by Jacobs, Stoop and Van Niekerk,[165] these absolute principles were revised by the common law, which will not enforce a contract if it is contrary to public policy.[166]

[159] S 23 of the Constitution. S 5(2)(f).
[160] S 5(2)(g).
[161] Which states: "5(5) 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."
[162] Definition of 'service' in section 1 of the CPA.
[163] Schedule 2 s 10.
[164] *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk V Strydom* 2002 (6) SA 21 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375; See also Christie RH "The Law of Contract in South Africa" (2006) 14.
[165] Jacobs W, Stoop PN & Van Niekerk R (2010) 353.
[166] Christie 14. A restraint of trade as discussed in *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A) serves as an example. See also the minority judgement of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 612; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) paras 7 to 9; the most recent example is *Barkhuizen v Napier* 2007 (5) 323 (CC) para 36.

In the *Bank of Lisbon and South Africa case*[167] the court held that there had to be strict adherence to the terms of a contract and that the principle of *exceptio doli generalis*[168] did not form part of the South African law and that it could not be used to deal with unfairness. The minority in this judgment held however that freedom of contract and the principles of *pacta sunt servanda* were not absolute, and that the *exceptio doli generalis* formed a substantive defence against contractual unfairness.[169] In the case of *Sasfin (Pty) Ltd v Beukes*,[170] it was held that the court has the power to refuse to enforce a contract that was against public policy or contrary to good morals.

In some cases the question of the legality of a restrain of trade clause in a contract was examined even before the Constitution of the Republic of South Africa,[171] specifically whether it is against public policy. In the matter of *Ackermann-Göggingen Aktiengesellschaft v Marshing*[172] the court found that the most important factors to be considered when the public interest is determined are the nature of the restricted activity, the geographical area in which the restriction is intended to operate, the period of the restriction, and the particular interests which stand to be protected by the restriction. In the matter of *Magna Alloys and Research (SA) (PTY) Ltd v Ellis*[173] the Court held that a restraint of trade contract is not *prima facie* invalid or unenforceable. The restraint of trade is valid and binding, unless proven that it is contrary to public policy and consequently unenforceable. Every case should be considered on its own facts and circumstances. The party who alleges that he is not bound by a restrictive condition, to which he agreed, bears the *onus* of proving that the enforcement of the condition would be contrary to public policy.

After the Constitution[174] came into effect it was identified that two values come into conflict when the legality of a restraint of trade is in issue, namely freedom of

[167] *Supra*.
[168] See chap 2 of this dissertation for an in depth discussion of this defence.
[169] *Ibid* 612.
[170] *Ibid* pars 7 to 9.
[171] Act 28 of 1996.
[172] 1973 (4) SA 62 (C).
[173] 1984 (4) SA 874 (A).
[174] *Supra*.

contract and freedom of trade.[175]

Nienaber JA identified four questions in the matter of *Basson v Chilwan and Others*[176] that should be asked when considering the reasonableness of a restraint. The first question is if the one party have an interest that deserves protection after termination of the agreement, secondly, if so, is that interest threatened by the other party, in that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive and is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? A fifth question has been identified in the case of *Reddy v Siemens Telecommunications (Pty) Ltd*[177] which states that it should be decided whether the restraint goes further than necessary to protect the interest.

In the *Reddy case*[178] the Court held that a restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restrain is not in the public interest.

During 1996 the Law Commission, in its report,[179] reinvestigated the question of whether the courts should be able to grant relief in the circumstances where a contract or some of its terms are unjust or unconscionable, by either setting aside the contract or modifying its terms. The Law Commission identified a need to enable the courts to intervene where individuals voluntarily enter into contracts with one another, in the expectation that the contracts will satisfy their needs and aspirations, only to find that the contracts in whole or in part are unjust or unconscionable.[180] – . The Law Commission indentified that the only way to protect consumers against unconscionable contracts or clauses was to provide in consumer legislation for

[175] See *Barkhuizen* case *supra*.
[176] 1993 (3) SA 742 (AD).
[177] 2007 (2) SA 486 (SCA).
[178] *Supra*.
[179] South African Law Commission Discussion paper 65 Project 47 (1996) "Unreasonable stipulations in contracts and the rectification of contracts" ISBN: 0-621-17503-X.
[180] See fn 75 South African Law Commission Discussion paper 7.

appropriate mechanisms.[181] It proposed in its report the enactment of general unfair contract legislation against unfairness, unreasonableness and unconscionability in all the contractual phases.[182] In 2004 the Department of Trade and Industry, in its Draft Green paper,[183] proposed that general provisions regarding unfair contracts had to be inserted into consumer protection law.[184] The aim was to enact law to provide what the rights and responsibilities of the parties were, promote the use of plain language in consumer contracts, and provide examples of unfair contract terms through guidelines that build on international precedents.[185]

In the *Barkhuizen case*[186] the court finally confirmed that where a court needs to consider whether the terms of a contract are contrary to public policy, the principles of reasonableness and fairness must be considered. The court held that two questions should be considered when determining the fairness of a contract, the first is to consider whether the clause itself is unreasonable and secondly, if it is found that the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the clause.

Part G of Chapter 2 of the CPA makes provision for and seeks to protect a consumer's right to fair, reasonable and just terms and conditions.[187] The introduction of these sections of the CPA introduces the first structured comprehensive legislative mechanism in the history of the South African law that is dedicated to dealing with unfairness in contracts and unconscionable conduct.[188] These provisions contained in the CPA is welcomed due to the fact that our legal system should find a way of dealing with the problem of unfair contract terms, due to the fact that many businesses use pre-formulated and standardised contract terms and will adopt a 'take-it-or-leave-it' stance. [189]

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[181] See fn 70. South African Law Commission Discussion paper 10.
[182] Where the contract came into existence, when executed and when enforced. See in this regard Jacobs W, Stoop PN & Van Niekerk R (2010) 354.
[183] GN 1957 in GG 26774 of 9 September 2004 pars 30 to 31.
[184] GN 1957 in GG 26774 of 9 September 2004 pars 30 to 31.
[185] As pointed out by Jacobs W, Stoop PN & Van Niekerk R (2010) 354.
[186] *Ibid* para 36.
[187] S 48 to s 52.
[188] See generally Van Eeden E "A Guide to the Consumer Protection Act" (2009) Chap 10.
[189] As reiterated by Sharrock in his recent article: Sharrock RD "Judicial control of unfair contract terms: The implications of Consumer Protection Act" (2010) 22 *SA Merc LJ* 295. .

The following part of this chapter examines and evaluates the sections of the CPA that provide for the judicial control of unfair terms in consumer contracts. The main focus is on the substantive unfairness or consumer contracts, although the procedural unfairness will be discussed briefly.[190]

3.3.2 Unfair, unreasonable or unjust contract terms

Section 48 of the CPA stipulates that a supplier must not supply, offer to supply or enter into an agreement to supply goods or services at a price or on terms that are unfair, unreasonable or unjust.[191] A supplier is also not allowed to market any goods or services, or negotiate, or enter into or administer a transaction or an agreement for the supply of any goods or services, in a *manner*[192] that is unfair, unreasonable or unjust.[193] It further provides that a supplier must not require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such term as a condition of entering into a transaction.[194] From this section it becomes clear that not only the content of the contract, but also the conduct by which the contract is negotiated and concluded has to be fair, reasonable and just.

As the words used are general and open-ended, the Act attempts to clarify them by providing the following description: 'A transaction or agreement, a term or condition, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust (a) if it is excessively one-sided in favour of any person other than a

[190] 'Substantive unfairness' is unfairness in the contractual provisions themselves, the fundamental inquiry being whether the provisions are unreasonably favourable or adverse to one party. 'Procedural unfairness' is unfairness in the process by which the contract is formed. It is caused by, *inter alia*, misrepresentation, duress, improper marketing practices and a refusal to bargain over contract terms. See RA Lord "Williston on Contracts" (1990) volume 8 at sec 18.10; Sharrock RD (2010) 297 fn 15.
[191] S 48(1)(a). One could ask whether the abolished *laesio enormis* doctrine is being revived again in respect of price. And if so, it seems as if the basic principles of our contract law are changed by the CPA. See Van der Merwe SW *et al* "Contract: General Principles" 3rd ed (2007) 132 for a discussion of the *laesio enormis* doctrine.
[192] Writer's own emphasis.
[193] S 48(1)(b).
[194] S 48(1)(c).

consumer;[195] (b) if the term of the transaction or agreement are so adverse to the consumer as to be inequitable;[196] (c) if the consumer relied to his detriment on a false, misleading or deceptive representation[197] or a statement of opinion provided by or on behalf of a supplier;[198] (d) if the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1)[199] and the term, condition or notice is unfair, unreasonable, unjust or unconscionable or the fact, nature and effect of the term, condition or notice was not drawn to the attention of the consumer in a manner that satisfies the applicable requirements of section 49.'[200]

Several factors will need to be considered by the court in order to decide whether an agreement or transaction will be unfair, unreasonable or unjust.[201] The court must also consider the principles, purposes and provisions of the CPA and take into account the following subjective and objective factors:[202]

'(a) the fair value of the goods or services in question;

(b) the nature of the parties to that transaction or agreement;

(c) the parties' relationship to each other;

(d) the parties' relative capacity, education, experience, sophistication and bargaining position;

(e) those circumstances of the transaction or agreement that existed or were reasonable foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether the CPA was in force at that time;

(f) the conduct of the supplier and consumer;

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[195] S 48(2)(a).
[196] S 48(2)(b).
[197] S 41.
[198] S 48(2)(c).
[199] This includes any notice to consumers or provision of a consumer agreement that purports to limit the risk or liability of the supplier or any other person; constitute an assumption of risk or liability by the consumer; impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or be an acknowledgement of any fact by the consumer.
[200] S 48(2)(d). One could ask whether the *Parol Evidence* Rule and the *Caveat Subscriptor* Rule has been abolished or amended. These are the basic principles of our law of contract and further indicate that the CPA amends our law of contract as we know it drastically, not only in respect of the *exceptio doli generalis*..
[201] S 52(2). These same factors apply to S 40 and S 41.
[202] S 52(1) and S 52(2).

(g) whether there was any negotiations between the supplier and the consumer, and if so, the extent of that negotiation;[203]

(h) whether a consumer was required to do anything that was not reasonably necessary for the legitimate interest of the supplier;

(i) the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22;[204]

(j) whether the consumer knew or ought reasonably to have known of the existence of a provision of the agreement that is alleged to have been unfair, unreasonable or unjust when having regard to custom of trade and previous dealings between the parties;

(k) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and

(l) in the event where goods were supplied, whether the goods were manufactured, processed or adapted to the special order of the consumer.'[205]

From this extensive definition it becomes clear that additional open-ended terms, such as the term 'inequitable'[206] have been introduced to describe the initial open-ended terminology used. The effect is that a very wide and general meaning ascribes to the terms 'fair, just and reasonable'. The remedies available to a consumer where a court determines that a transaction or agreement is unconscionable, unjust, unreasonable or unfair will be discussed later in this chapter.

The CPA sets new procedural and substantive formalities for the negotiation and entering into an agreement or transaction. These requirements are considered in detail below.

[203] What the effect of this stipulation is on the *Parol Evidence* Rule and the Law of Evidence is a question that will only be answered by future litigation.
[204] S 22 in respect of the right of a consumer to information in plain and understandable language.
[205] S 52(2)(a) to (j).
[206] See subpar 2.3.2.

3.3.3 Procedural unfairness

The CPA imposes requirements regarding information, terms and transparency of contract terms on suppliers. The Act also requires that certain categories of consumer agreements must be in writing.[207]

The procedural requirements as prescribed in the CPA is a further attempt to ensure that the consumer does not agree to unconscionable terms and if they do agree to restrictive terms, they are informed and understands the contents of the agreement. It can potentially serve as a protective measure for suppliers to indicate that no unconscionable conduct has taken place as substantiation that the contract is *bona fide*.

In terms of the principles of South African contract law, no general requirements exist that contracts must be in writing. Specific legislation[208] may in some cases prescribe that a contract must be in writing, or the parties themselves may agree that a contract must be in writing to be valid and binding. If a consumer agreement is in writing, as required by the CPA or voluntarily, the contract is valid irrespective of whether or not the consumer signs the agreement. The supplier must, however, provide the consumer with a free copy or free electronic access to a copy,[209] of the terms and conditions of that agreement.[210] The provisions of section 50(2)(a) and (b) will apply to a particular agreement or understanding between two or more parties, provided that it can be inferred from the context, surrounding circumstances and conduct of the parties, determined on a balance of probabilities,[211] that such arrangement purports to establish a legal relationship between them.[212]

[207] S 50(1).
[208] S 2(1) of the Alienation of Land Act 68 of 1981 serves as an example.
[209] This can be prejudicial towards vulnerable consumers who do not have access to computers. The purpose of the CPA to attempt to prevent unconscionable terms or conduct and to ensure that consumers are informed, will potentially not be reached due to the fact that the consumer who does not have access to a computer will not be able to view the terms and conditions.
[210] S 50(2).
[211] S 117.
[212] Van Eeden E (2009) 175.

The copy of the terms and conditions of the agreement must satisfy the requirements of section 22 and it must set out an itemized breakdown of the consumer's financial obligations under such agreement.[213] Section 22 provides that the notice should be in the form prescribed in terms of the Act or any other legislation for that notice, document or visual representation, or and in the event that no such form is prescribed, it must be in plain language. A notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation.[214] Such understanding should be possible without undue effort on the part of that consumer, having regard to *inter alia* the context; form and style; vocabulary and illustrations etc.[215]

With the aforesaid provisions in the CPA it seems as if non-compliance with the provisions to use plain, understandable language can lead to the same effect as the general defence of the *exceptio doli generalis,* which is based on the *bona fides* and reasonableness of the supplier or seller. The CPA takes the principles and test of *bona fides* further than our courts use to. In terms of the aforesaid provisions one should not consider the reasonableness of the terms objectively. It seems to be a subjective test where one should not only consider the terms of the contract, but also the circumstances of the specific consumer and his literacy skills.

The CPA places a further obligation on the supplier to ensure that the contract is fair and reasonable towards the consumer. By stating that any provisions of a consumer agreement that purports to limit the risk or liability of the supplier or any other person; constitute an assumption of risk or liability by the consumer; impose an obligation on the consumer to indemnify the supplier or any other person for any cause or be an acknowledgement of any fact by the consumer must be drawn to the attention of the consumer.[216]

[213] S 50(2)(i) to (ii).
[214] S 22(2).
[215] S 22(2)(a) to (d).
[216] S 49(1).

In terms of section 49(2) the consumer must also receive notice of any activity or facility that is subject to risk of an unusual character or nature; the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or that could result in serious injury or death.[217] The supplier of such an activity or facility must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards as set out in sections 49(3) to (5).

The provision, condition or notice must be in writing and in plain language as described in section 22.[218] The fact, nature and effect of the provision or notice must be drawn to the attention of the consumer in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances, and before the earlier of the time at which the consumer enters into the transaction or agreement; begins to engage in the activity; or enters or gains access to the facility; or is required or expected to offer consideration for the transaction or agreement.[219] The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice.[220]

It seems as if the main purpose of the aforesaid requirements contained in the CPA is to ensure that consumers are well aware of terms and conditions that can limit their rights. It is currently unclear what the effect and consequences would be should a supplier not comply with the aforesaid sections in the act, but it seems as if the consumer will not be obliged to comply with terms and conditions not pointed out to them and those terms and conduct can be found not to be *bona fide*, reasonable and just. I am of the view that this will make the general defence of *exceptio doli generalis* available to the consumer.

[217] S 58(1) and S 49(2).
[218] S 49(3).
[219] S 49(4)(a) to (b).
[220] S 49(5).

Further obligations to furnish consumers with information relate to the identification of the supplier;[221] disclosure of price;[222] disclosure of product labeling and trade descriptions;[223] disclosure of reconditioned or grey market goods;[224] disclosure by intermediaries;[225] identification of deliverers and installers;[226] catalogue marketing;[227] provision of competition rules in relation to promotional competitions;[228] alternative work schemes,[229] and auctions.[230]

The above principles are not totally foreign in the South African contract law. In the case of *Mercurius Motors v Lopez*[231] the Supreme Court of Appeal held that a clause that undermines the essence of the contract and a hidden clause should be clearly and pertinently brought to the attention of a client who signs a standard contract.[232]

In ticket cases the courts follow a similar approach as the aforesaid principles contained in the CPA. The courts follow the principle to enquire whether a party has accepted certain terms in a contract by asking the following:[233] Did the person, when receiving the ticket, know that there was printing on it?; If so, it needs to be ascertained whether the person who received the ticket know that the printing or writing contained provisions of the contract in question; if both of these questions have been answered in the affirmative, the provisions are part of the contract.[234] If one of the aforesaid questions are answered in the negative, a third question needs

[221] S 79.
[222] S 23.
[223] S 24.
[224] S 25.
[225] S 27.
[226] S 28.
[227] S 33.
[228] S 36.
[229] S 37.
[230] S 45.
[231] 2008 (3) SA 572 (SCA) par 33.
[232] See also *Bok Clothing Manufacturers (Pty) Ltd and another v Lady Land (Pty) Ltd* 1982 (2) SA 565 (C) where it is confirmed that special notice must be given of an unusual provision contained in a signed document.
[233] *Central South African Railways v McLaren* 1903 TS 727, and *Central South African Railways v James* 1908 TS 221, adopting *Parker v The South Eastern Railway Co* (1877) LT 2 CP 416, and *Richardson, Spence & Co v Rowntree* 1894 AC 217 (HL); *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643D-F*; Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd and another* 1977 (2) SA 709 (W) at 713H-714A; *Van Deventer v Louw* 1980 (4) SA 105 (O) at 110E-H; *Yeats v Hoofwegmotors* 1990 (4) SA 289 (NC) at 294J-295I; *Payne v Minister of Transport* 1995 (4) SA 153 (C) at 159G-160C; *Durban's Water Wonderland (Pty) Ltd v Botha and another* 1999 (1) SA 892 (SCA) at 991D-992D*; Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers* 2001 (3) SA 110 (NC) 118A-120H.
[234] *Parker v The South Eastern Railway Co* (1877) LR 2 CP 416 at 423; *King's Car Hire* case above; *Durban 's Water Wonderland* case above at 991D-F.

to be asked, one need to ascertain whether the person giving the ticket did what was reasonably sufficient to give the consumer notice of the conditions. If the answer to this question is yes, the provisions are part of the contract between the parties.[235]

The principles contained in the CPA are not foreign principles, even though the defence of *exceptio doli generalis* has been abolished. In the *Parker* case[236] Bramwell LJ confirmed that as in the case of signed documents, special notice of an unusual provision must be given to the consumer. In Bok *Clothing Manufacturers (Pty) Ltd and another v Lady Land (Pty) Ltd*[237] King AJ said that the nature of the document is relevant to the steps required of a party in order to bring the contractual provisions to the other party's attention. The court held that the provisions in question were not part of the contract,[238] due to the fact that the clauses relied on by the applicant introduce a substantial reduction of the respondent's previous rights. The parties were in an existing business relationship for a long time. Due to the fact that the parties had been doing business together previously, these new onerous conditions should have been drawn to the director of the respondent company's attention.

In the Parker-case the court considered whether illiterate persons who do not understand the language in which a provision is printed, are bound to the provisions.[239] The court held that it depends whether a trade usage can be established.

This last mentioned principle seems to be changed by the CPA. The CPA specifically provides that a supplier must consider the literacy skills of the consumer when pointing out terms and conditions to a consumer. Consequently I will submit that the general defence of the *exceptio doli generalis* will be available in these circumstances, even where a trade usage has been established.

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[235] *Durban's Water Wonderland* case above at 991F-992D; *Central South African Railways v McClaren* 1903 TS 727.
[236] *Supra* at 428.
[237] *Ibid* at 569E-570D.
[238] 570E-F.
[239] See page 422.

3.3.4 Substantive unfairness

The provisions relating to the consumer's right to fair, just and reasonable terms and conditions as contained in section 48 has been discussed in the aforesaid paragraphs.[240]

Section 51 of the Act contains further substantive requirements in order to ensure that the consumer agreement or transaction is not unfair. This section is aimed at specific contractual provisions that can be referred to as a 'black list of terms'.[241] A supplier must not make a transaction or agreement subject to any term or condition that have the purpose of defeating the purpose of the Act, misleading or deceiving a consumer, or terms that subject the consumer to fraudulent conduct.[242]

A term or an agreement may also not directly or indirectly purport to waive or deprive consumers of their rights as set out as fundamental rights in terms of Chapter 2 of the CPA, avoid a supplier's duty in terms of the Act, or authorize the supplier to do anything that is unlawful in terms of the Act or fail to do something that is required in terms of the Act.[243]

In terms of section 51(1)(c) a supplier is prohibited from using any term of condition that limit or exempt a supplier from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier.[244] It also prohibits the use of terms or conditions that constitute an assumption of risk or liability by the consumer for these damages. An agreement or term may not impose an obligation on a consumer to pay for damage to goods displayed by a supplier.[245]

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[240] See par 2.3.2.
[241] Naudè T "The use of black and grey lists in unfair contract terms legislation in comparative perspective" (2007) *SALJ* (124) 128.
[242] S 51(1)(a). It is void *ab initio.*
[243] S 51(1)(b).
[244] In *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) par 35, the court remarked that liability for gross medical negligence could possibly be excluded; however, this is now prohibited by the CPA.
[245] Unless the loss results from a consumer's gross negligence, malicious behaviour or criminal conduct. See S 18(1).

Section 51 has other prohibitions, such as agreements or transactions where any term or condition results from an offer prohibited by section 31;[246] requiring consumers to enter into supplementary contracts;[247] purporting to cede or set off a consumer's right to claim against the Guardian Fund;[248] falsely expressing an acknowledgement by a consumer that no representations or warranties were made before an agreement was made, or that a consumer has received goods, services or a required document;[249] terms that require a consumer to forfeit money to a supplier should the consumer exercise his rights in terms of the CPA or to which the supplier is not entitled to;[250] expressing an authorization for the supplier or someone on his behalf to enter any premises for the purpose of taking possession of goods, undertaking to sing in advance documents relating to enforcement, or a consent to a predetermined value of costs relating to enforcement of the agreement;[251] expressing an agreement by the consumer to deposit a bank card or identity document or provide a pin code or number to be used to access an account.[252]

A supplier may also not directly or indirectly require a consumer to enter into a supplementary agreement or sign any document that contains provisions in terms of section 51(1).[253]

Any agreement or transaction is void to the extent that it contravenes this section.[254]

If it were to be determined by a court that a transaction or agreement had been affected by unconscionable conduct[255] the court may make a declaration to that affect and may make any order it considers just and reasonable in the circumstances.[256]

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[246] S 51(1)(d).
[247] S 51(1)(e).
[248] S 51(1)(f).
[249] S 51(1)(g).
[250] S 51(1)(h).
[251] S 51(1)(i).
[252] S 51(1)(j).
[253] S 51(2)(a).
[254] S 51(3).
[255] S 40.
[256] S 52(1) and (3).

In terms of section 40 of the CPA a supplier are not permitted to use physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct in connection with the supply, marketing, negotiations, payment or recovery of goods, against a consumer.

The aforesaid provision is not affecting our existing law of contract. Our law has always protected persons by the rules relating to justifiable mistake, duress, undue influence and fraudulent, negligent and innocent misrepresentations. Section 40(2) though, introduced a new term and principle of 'unconscionable conduct'. In terms of section 40(2) it is unconscionable[257] for a supplier to knowingly take advantage of the fact that a consumer was substantially unable to protect his own interests due to physical or mental disability, illiteracy, ignorance,[258] inability to understand the language of an agreement or any similar factor. In terms of section 48(2) the meaning of 'unfair, unreasonable or unjust' is when a term is excessively[259] one-sided in favour of a person other than the consumer; when terms are so adverse to the consumer as to be inequitable;[260] when the consumer agreed in reliance upon a false, misleading or deceptive representation or when a consumer agreed to the transaction subject to conditions that he should have been notified of and was not.

Use of the general wording in section 40(2) re-introduce the remedy of *exceptio doli generalis* which is available to a person who can show that implementation of the contract would be unconscionable or inequitable, even though should one go according to the letter of a contract, would be liable.

The aforesaid principles change the South African common law principles. As previously explained, the court has found in the *Bank of Lisbon and South Africa case* that the *exceptio doli generalis* should be laid to rest. The learned judge held that equity could not override a clear rule of law. It was held that the overriding principle is that contracts must be performed according to their terms.

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[257] In S 1 'unconscionable' is defined as: '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.'
[258] The question arises how ignorant is ignorant enough.
[259] What is the meaning of excessively and how excessive should it be?
[260] The courts will need to interpret and decide when a term is 'inequitable'.

I am sure that for those hoping that our courts would develop a defence which provides relief in cases of unconscionability, the aforesaid judgment was a great disappointment. Due to the legislative intervention of the CPA this principle in our law has been changed for good. Courts are now able to test terms in standard contracts against the criteria of vague terms such as 'good faith', 'fairness' and 'unconscionability'.

It can be foreseen though that the vague and general wording of section 40(2) will create some difficulty. Courts will probably differ as regards the application and interpretation of such vague terms. In the past our courts held without any uncertainty that general considerations of equity and fairness cannot provide an umbrella defence as the *exceptio doli generalis.*[261] . It seems as we are moving back to uncertainty due to the CPA.

3.4 Remedies in the event of unfair and unconscionable conduct, terms and conditions

Where in the past the *exceptio* was a defense against a contractual liability claim - also a *replicatio doli*-, and the CPA now also allows parties to approach the court for an order to find that a contract is unfair, unjust or unconscionable, in other words, introduce an *actio doli generalis*.

3.4.1 Persons entitled to approach the Court

Any of the following persons are permitted in terms of section 4(1) to approach a court,[262] alleging that a consumer's rights in terms of the CPA have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:

a a person acting on his own behalf;

[261] *Bank of Lisbon v De Ornelas supra; Sasfin v Beukes supra*; *Eerste Nasionale Bank v Saayman supra*; *Brisley v Drotsky supra and Barkhuizen v Napier supra*.
[262] The persons listed in this section may also approach the National Consumer Tribunal and the National Consumer Commission. The National Consumer tribunal is established in terms of section 26 of the National Credit Act and the National Consumer Commission is established in terms of section 85(1) of the CPA.

b an authorize person acting on behalf of another person who cannot act in his own name;

c a person acting as a member of, or in the interest of, a group or class of affected persons;[263]

d a person acting in the public interest, with leave of the Tribunal or court, as the case may be;[264] and

e an association acting in the interest of its members.[265]

3.4.2 Powers of the Court

In terms of the definitions contained in section 1 of the Act 'court' does not include a consumer court. A 'consumer court' is defined as a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation. Consequently the orders discussed in the following paragraphs of which the courts have the power to make, can only be made by a normal court of law and not by a consumer tribunal. In terms of section 100(1), the Consumer Commission may issue a compliance notice to any person who engaged in conduct prohibited by the CPA. Should a person fail to comply with the notice issued by the Consumer Commission, the Commission may refer the matter to the National Prosecuting Authority for prosecution,[266] or apply to the Tribunal for the imposition of a fine.[267]

A court has the powers to deal with provisions that are unfair[268] and unconscionable[269] and also provisions that are prohibited by the Act.[270] The CPA

[263] This section gives individual consumers the right to pursue 'class actions' against suppliers.
[264] This section allows for public interest actions, consequently action by individuals who act on behalf of the public at large, who have no direct interest in the relief sought.
[265] This section gives consumer organisations *locus standi* to bring actions against suppliers.
[266] S 110(2).
[267] S 100(6).
[268] S 52(3).
[269] S 40.

further empowers the court to order a supplier to alter or cease any conduct that is in contravention with the Act[271] and to award damages against a supplier for collective injury to all of a class of consumers.[272]

In any proceedings where a court needs to adjudicate upon whether a term or condition of an agreement or transaction is in contravention with section 40, 41 or 48 the court must consider the fair value of the goods or services; the nature of the parties to the transaction or agreement, their relationship, education, experience, sophistication and bargaining position; the circumstances of the transaction or agreement that existed or were foreseeable at the time that the conduct occurred;[273] the conduct of the supplier and the consumer; whether there was any negotiations between the supplier and the consumer and the extent of that negotiations; whether consumer was required to do anything that was not reasonably necessary for the legitimate interest of the supplier; extent to which any documents satisfied the requirements of section 22; whether the consumer knew or ought to have known of the existence of any provision that is alleged to have been unfair, unreasonable or unjust taking in consideration the custom of trade and any previous dealing between the parties; the amount and circumstances under which the consumer could have acquired similar goods or services from a different supplier; and whether the goods were manufactured, processed or adapted to the special order of the consumer.[274]
In the event of a court finding that a transaction or agreement was in whole or partly unconscionable, unjust, unreasonable or unfair the court has the powers to:

a declare the transaction or agreement to be unconscionable, unjust, unfair or unreasonable;[275] and

b make any order the court considers just and reasonable, which includes, but are not limited to restore money or property to the consumer;[276] to compensate the consumer for losses or expenses relating to the transaction

[270] S 52(4).
[271] S 76(1)(a).
[272] S 76(1)(c).
[273] Irrespective of whether the CPA was in force at that time.
[274] S 52(2)(a) to (j).
[275] S 52(3)(a).
[276] Thus declare contract void *ab initio.*

or agreement or the proceedings of the court; and requiring the supplier to cease or alter any practice, form or document to avoid a repetition of the supplier's conduct.[277]

If a person alleges during court proceedings that an agreement, term or condition or a notice to which a transaction or agreement is purportedly subject, is void in terms of the CPA or failed to satisfy any requirement as set out in section 49, the court may sever any part of the relevant agreement, provision or notice, or alter it to the extent required to render it lawful, if it is reasonable considering circumstances as a whole; or the court may declare the entire agreement, provision or notice void as from the date that it purportedly took effect.[278]

In the case of a provision or notice that fails to satisfy any provision of section 49 the court may sever the provision or notice from the agreement, or declare it to have no force or effect with respect to the transaction; and make any further order the court deems just and reasonable.[279]

3.5 Conclusion

The purpose of the CPA is to protect and develop the social and economic welfare of consumers, in particular, vulnerable consumers.[280] The CPA prescribes measures that deal with unfair, unreasonable or unjust contract terms. One of the purposes of the CPA is also to protect consumers against unconscionable, unfair, unreasonable, unjust or improper practices.[281]

If one look at the stipulations of section 48[282] of the CPA it is clear that the enforcement and recognition of the principles of freedom of contract and *pacta servanda sunt* is subject to the condition that the term of a contract must be fair,

[277] S 52(3)(b)(i) to (iii).
[278] S 52(4)(a)(i).
[279] S 52(4)(a)(ii) and s 52(4)(b).
[280] See s 3(1) of the CPA on the ways in which these purposes are to be achieved.
[281] S 3(1)(d) of the CPA. See Chap 2 of this dissertation.
[282] See chap 2 of this dissertation for full discussion.

reasonable and the consumer's attention had to be drawn to a term as set out in section 49(1) of the CPA.

Considering the application and remedies as contained in the CPA it is illustrated that the Act is written in favour of the consumer. Various provisions, as identified in this chapter, seem to amend the common law position. The view can be held that the CPA does reintroduce the defence, or a defence similar to the *exceptio doli generalis,* although it has been abolished by our courts as it was not considered as part of the Roman-Dutch Law.[283]

The following chapter will specifically focus on the question whether the abolished *exceptio doli generalis* is being reintroduced by the provisions of the CPA.

[283] See chap 3 above.

CHAPTER 4: GENERAL CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

This dissertation investigated whether the CPA reintroduces the abolished defence of *exceptio doli generalis*. It also identified problem areas in which it seems as if the CPA changes certain aspect of our law of contract.

Since the CPA must operate within an existing legal system and within the ambit of the existing law of contract, it was important for purposes of this study to provide a broad background on the CPA and its influence on our existing contract law, especially in respect of a general open-ended defence such as the *exceptio doli generalis.*

This dissertation illustrates that the CPA is drafted in favour of the consumer. It further illustrates that various provisions of the CPA amend the common law in order to attempt to strengthen the position of the consumer.

This chapter draws together two sets of conclusions. Firstly, there is a general conclusion relating to whether the *exceptio doli generalis* has been reintroduced by the CPA. Secondly, there are those conclusions that relate specifically to the areas that should be reconsidered by the legislature in order to allow the CPA to function optimally in our existing legal system in respect of the law of contract.

4.2 Summary of findings

Our courts do not readily accept any limitation of or deviation from freedom of contract, and have over time moved away from any defence regulating fair, just and

reasonable contract terms.[284] As illustrated below, the court held that there needs to be strict adherence to the terms of a contract and that the *exceptio doli generalis* could not be used to deal with unfairness.[285] In the case of *Sasfin (Pty) Ltd v Beukes*[286] the court held that a court could only refuse to enforce contracts that were against public policy. This was confirmed by the case of *Bredenkamp & Others v Standard Bank of South Africa Ltd*[287] where the court pointed out that our common law does not recognize agreements that are contrary to public policy and commented that our courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground.[288] The court qualified this statement by pointing out that the question of whether a clause in a contract was contrary to public policy depends on whether it was contrary to the values of constitutional democracy.[289]

The purpose of the CPA is set out in section 3, which is to protect and develop the social and economic welfare of consumers, in particular, vulnerable consumers.[290] Part G of Chapter 2 of the CPA prescribes measures that deal with unfair, unreasonable or unjust contract terms. One of the purposes of the CPA is also to protect consumers against unconscionable, unfair, unreasonable, unjust or improper practices.[291]

Part G of Chapter 2 of the CPA contains measures dealing with unfair, unreasonable or unjust contract terms in order to protect consumers against unconscionable, unfair, unreasonable, unjust or improper practices.[292] If one look at the stipulations of section 48[293] of the CPA it is clear that the enforcement and recognition of the principles of freedom of contract and *pacta servanda sunt* is subject to the condition that the term of a contract must be fair, reasonable and the consumer's attention had to be drawn to a term as set out in section 49(1) of the CPA. The view can be held

[284] *Bank of Lisbon and South Africa case supra*.
[285] *Ibid* 605.
[286] *Ibid* pars 7 – 9.
[287] *Supra*.
[288] *Ibid* at 480D to E.
[289] *Ibid* 481I to 482A.
[290] See s3(1) of the CPA on the ways in which these purposes are to be achieved.
[291] S3 (1)(d) of the CPA. See Chap 2 of this dissertation.
[292] S3 (1)(d). See chap 2 of this dissertation for full discussion.
[293] See chap 2 of this dissertation for full discussion.

that the CPA does reintroduce the defence, or a defence similar to the *exceptio doli generalis,* although it has been abolished by our courts as it was not considered as part of the Roman-Dutch Law.[294]

As previously discussed, the South African Law Commission[295] considered the question whether the courts should be able to grant relief in circumstances where contract terms are unjust or unconscionable by setting it aside or modifying its terms Despite of having some concerns[296] the Law Commission recommended and found in favour of legislation introducing the doctrine of unconscionability and the review power of courts. The Law Commission recommended the publication of an Unfair Contractual Terms Bill, which sets out stipulations similar to those contained in the CPA.[297]

The Law Commission, upon pointing out that the *exceptio doli generalis* was buried in *Bank of Lisbon and South Africa (Ltd) v De Ornelas and Another,*[298] commented that:

> 'Yet one could have hoped that a doctrine of relief against unconscionable claims could be founded on this *exceptio*.' [299]

The Commission stated that 'only legislative intervention can now correct' the implications of the *Bank of Lisbon* case.[300] It seems from the aforesaid remarks that the Law Commission had the reintroduction of the *exceptio doli generalis* in mind when they made a recommendation.

The court has found in the *Bank of Lisbon and South Africa case* that the overriding principle is that contracts must be performed according to their terms.

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[294] See chap 3 above.
[295] South African Law Commission Discussion paper 65, Project 47 "Unreasonable stipulations in contracts and the rectification of contracts" (1996). See par 2.3.1 of this dissertation.
[296] *Ibid* par 1 on iv.
[297] *Ibid* 29 to 38.
[298] *Supra*.
[299] South African Law Commission Discussion paper par 1.9 at 9.
[300] South African Law Commission Discussion paper par 1.10 on 10.

Due to the legislative intervention of the CPA this principle in our law has been changed for good. Courts are now able to test terms in standard contracts against the criteria of vague terms such as 'good faith', 'fairness' and 'unconscionability'.

As pointed out in the previous chapter, it can be foreseen that the vague and general wording of section 40(2) will create some difficulty and that courts will probably differ as regards the application and interpretation of such vague terms.

The reintroduction of a defence such as the *exceptio doli generalis*, and the inclusion of section 48 of the CPA which refers to 'unconscionable' terms, can lead to a situation whereby a litigant can avoid the consequences of established legal principles such as sanctity of contract, freedom of contract and the parol evidence rule. The court, correctly in my view, found in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*[301] that our law does not recognize the principle where courts oversee contractual transactions between parties who freely and voluntarily contract with each other on certain terms nor does our courts have the jurisdiction to ameliorate the lot of a contracting party. Part G of the CPA can lead to this very consequence.

The CPA, as it currently stands, will promote litigation in that the defence of *exceptio doli generalis* or at least one similar to the *exceptio doli*, as reintroduced by the CPA, tends to be an open-ended means of challenging the plain meaning of the words and the intention of the contracting parties. The legislature is creating uncertainty, promoting litigation and inhibits trade and commerce. Parties to a contract will not know, when concluding a contract, whether or not the court under the flagship of 'fairness', 'reasonableness' and 'unconscionability' will rewrite the contract. Although, the purpose of the CPA as set out in section 3, which is to protect and develop the social and economic welfare of consumers, in particular vulnerable consumers.[302] I am of the view that the CPA creates loopholes for opportunistic, well-educated businessmen, who will be afforded the opportunity to enter into a contract voluntarily and freely, from which they can just walk away and not be bound

[301] *Ibid* 582H to J.
[302] See S 3(1) of the CPA on the ways in which these purposes are to be achieved.

to, under the flag of 'unconscionable' term and condition. The final decision as to whether a party is bound or not to a contract will at the end of the day lie in the discretion of the court. No legal certainty will consequently exist between the contracting parties.

As correctly pointed out by the court in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another,*[303] our law of contract recognises numerous defences, such as estoppel, misrepresentation, fraud, duress and rectification, which are available to a litigant. One may question whether the extended factors and very broad power of review, as set out in the CPA, are really necessary in view of the fact that the consumers might be sufficiently protected by the rules relating to justifiable mistake, duress, undue influence and misrepresentation. The CPA, as it currently stands creates an untenable situation due to the fact that it is contrary to the objective approach in contracts[304] and it offends the sanctity of contracts and the constitutional right of freedom of contract.

Public policy is a sufficient criteria in the South African legal system to achieve the result of consumer protection and equal bargaining position for supplier and consumer. Brand JA found that 'In these cases it was held by this Court that, although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contracts. *South African Forestry Co Ltd v York Timbers Ltd,*[305] by referring to *Brisley v Drotsky*[306] and *Afrox Healthcare v Strydom,* sums the position up concisely as follows:

> 'Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty.

[303] *Ibid* at 582H to J.
[304] As correctly noted by the court in *Bank of Lisbon and South Africa case supra*.
[305] 2005 (3) SA 323 (SCA) at 27.
[306] *Supra*.

> After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder. In addition, it was held in *Brisley* and *Afrox Healthcare* that – within the protective limit of public policy that the courts have carefully developed, and consequent judicial control of contractual performance and enforcement – constitutional values such as dignity, equality and freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint.' [307]

The whole argument boils down to the protection and interest of the consumer versus the constitutional rights of freedom of contract of both parties to a contract, and all-important sanctity of contracts. A fair balance is required in order to protect vulnerable consumers and to maintain the sanctity of contracts where parties can enter into contracts freely and freely agree to the terms thereof. I will submit that the consumer currently enjoys more protection than what is required and in contravention of the constitutional right of freedom of contract. As correctly pointed out in *Brisley v Drotsky*[308] our Constitution[309] and public policy must be linked to get contractual fairness.

I wish to conclude my argument with the following quote founded in a late nineteenth century case from the English law, called *Printing and Numerical Registering Co v Sampson*:

> 'If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.' [310]

[307] 2002 (6) SA 21 (SCA).
[308] *Supra*.
[309] Constitution of the Republic of South Africa 1996.
[310] 1875 LR 19 Eq 462 per Jessel MR.

This reflects the position in our law of contract that has always been one of the core principles, which now seems to be distorted by the CPA.

4.3 A final word

Although the CPA does improve the position of the consumer in many ways, the legislation contains numerous foreign terms and principles as discussed in this dissertation, which seem to change our common law principles on which our law of contract is based on. One can only hope that practice and precedent will eventually even out many of the practical and interpretation difficulties.

It is submitted that some problematic sections of the CPA should be reconsidered for amendment by the legislature, to bring this significant piece of legislation in line with the common law principles on which our contract law system is based on. The legislature will need to set out guidelines to limit the court's powers of intervention. It should also be kept in mind that a huge cost implication is involved for suppliers to get their contracts and business practices in line with the CPA. This will at the end of the day be passed onto the consumer's pocket.

One needs to ask whether this legislation does not take consumer protection too far without considering the basic South African common law principles. In terms of the CPA courts have the power to renegotiate contracts between parties and base their decision to enforce a contract on their basic morals and discretion, which is based on what they belief are reasonable, fair and just. One can only hope that the courts will interpret and enforce the CPA in line with the South African contract law principles.

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