

Bringing the *exceptio doli generalis* back from the grave

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SUMMARY

The *exceptio doli generalis*, which is the Roman law defence of 'bad' faith, in the general form, has , until the decision of *Bank of Lisbon and South Africa (SA) (Pty) Ltd*, been one of the mechanisms that has been utilised by South African courts to apply abstract values of fairness and equity into the South African substantive law. The *exceptio doli generalis* was available to a party in circumstances where the act of bringing the action by the other party constituted an act of 'bad' faith.

The court in the *Bank of Lisbon and South Africa* case decided that the *exceptio doli generalis* had never been received into Roman Dutch law and didn't accept it as a defence that could be utilised and applied in South African law. After the decision in the *Bank of Lisbon* case there have been many differing views on whether the *exceptio doli generalis* can and should still be applied in South African law and concern in legal circles regarding the 'gap' that the decision left in our law and the need to develop other means of ensuring greater fairness in the operation of the law of contract through possibly legislative intervention which at a stage was being investigated by the Law Commission.

With the introduction of the Consumer Protection Act, Act 68 of 2008, the question which now comes to the fore is whether the Consumer Protection Act is a reintroduction of the *exceptio doli generalis* or whether the Act is merely a codification of the common law principles and abstract values of public policy/interest and good faith, which could mean one and the same thing.

In order for this question to be answered an in depth investigation and study of the *exceptio doli generalis*, its applicability and development in South African law is required. Such a study is of importance in order for the aim and purpose of the defence to be properly understood. It is also necessary in order to understand how such a defence ties in and is closely linked with the abstract values and concepts of good faith and public policy/interest, which we have seen courts recognise in decisions subsequent to the *Bank of Lisbon and South Africa* case.

Once this question is answered, attention will be turned to the Consumer Protection Act, its provisions and the effect thereof, and whether such provisions amount to the reintroduction of the *exceptio doli generalis* but in an indirect way by the codification of the concepts of public policy/interest and good faith, which in turn could be the *exceptio doli generalis* just called by a different name.

The answer to this research question is very relevant and of extreme significance. It could mean that the South African legislature eventually got to doing what the legal profession has been asking of it for years and that is to put clarity on the defence of the *exceptio doli generalis*.

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CHAPTER 1

Introduction

The *exceptio doli generalis*¹ as a defence has in the past been one of the mechanisms utilised by South African courts to apply the abstract values of fairness and equity into South African substantive law.² However, the application of the *exceptio doli generalis* came to an abrupt halt when the court in the *Bank of Lisbon and South Africa Ltd*³ case, decided that the *exceptio doli generalis* had never been received into Roman Dutch law, and it did not accept it as a defence that could be utilised and applied in South African law.⁴

The death, by abolishment, of the application of the *exceptio doli generalis* in South African law,⁵ raised concern in various legal circles regarding the gap and uncertainty that this decision left in South African law.⁶ On the one hand there have been many differing views on whether the defence can and should still be applied in South African law. On the other hand many believed that there was a need to develop other means of ensuring greater fairness in the operation of the law of contract, possibly through statutory intervention.⁷

¹ Hutchinson D, Pretorius CJ, *et al The Law of Contract in South Africa* (2009) 450 - which is the Roman law defence of bad faith in the general form.

² Hutchinson 28.

³ *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1983 (3) SA 580 (A).

⁴ Hutchinson 28.

⁵ *Ibid.*

⁶ Hutchinson 28 and 29.

⁷ Hutchinson 29.

With the introduction of the Consumer Protection Act⁸ the question, which in my opinion comes to the fore, is whether the broad defences in the Act has brought the *exceptio doli generalis* back from the grave, and whether it serves as codification of the abstract values of good faith and public policy.

⁸ Consumer Protection Act 68 of 2008 (hereinafter “the Act”).

CHAPTER 2

The *exceptio doli generalis*: a journey through the past

2.1 Roman law: its origin and purpose

The *exceptio doli* was introduced into Roman law in 66BC⁹ and is viewed as being one of the most important legal phenomena of its time.¹⁰ In basic terms, the *exceptio doli* brought the requirements of good faith into the *stipulatio*.¹¹ The formula of the *exceptio doli* can be found in G4 119 where it is described as follows:¹²

*“A claim could be defeated if the plaintiff had acted contrary to the requirement of good faith at the moment the contract was entered into, or at the moment of enforcing the action, dolus in the classical law being synonymous with mala fides, that is when one does not act according to the requirements of good faith.”*¹³

In Roman law a distinction was drawn between *negotia stricti juris* and the *negotia bonae fidei* as well as the actions and defences that arose from them, namely the *exceptio doli specialis* and the *exceptio doli generalis*.¹⁴ In *negotia stricti juris* agreements, the parties to the agreement were bound to perform exactly what they had undertaken to do.¹⁵ In these agreements a debtor was not required to perform in

⁹ Hawthorne L and Thomas Ph J “Bank of Lisbon and South Africa Ltd v De Ornelas 1988 (2) SA 580 (A): the *exceptio doli*” (1980) *De Jure* 145.

¹⁰ Viljoen F “The *exceptio doli*: its origin and application in South African law” (1981) *De Rebus* 173.

¹¹ The *stipulatio* being the basic form of contract in Roman law, which was made in the format of a question and answer.

¹² Hawthorne and Thomas 145.

¹³ *Ibid.*

¹⁴ Aronstam PJ “Unconscionable contracts: the South African solution” (1979) *THRHR* 29.

¹⁵ *Ibid.*

accordance with the principles and dictates of good faith unless he had expressly in the formula, undertaken to do so.¹⁶ In actions that were based on these types of agreements, a judge in making his decision, was entitled to take into account two factors:

- (a) that which was expressly mentioned in the formula; and
- (b) the *dolus*¹⁷ of the plaintiff at the time when he/she concluded the agreement in question.¹⁸

In these scenarios the *exceptio doli specialis* afforded a defence to a person against who an action had been brought in breach of the requirements of good faith.¹⁹ In these cases it was a plea alleging that the defendant had been induced by the fraud or intimidation of the plaintiff to conclude the agreement on which the plaintiff was suing.²⁰

In *negotia bonae fidei* agreements parties were required to perform what was reasonably and fairly expected of them in each particular case.²¹ These types of agreements always imposed a duty of good faith upon the parties thereto, irrespective of whether the parties had undertaken this duty or not.²² Judges, who made decisions in respect of actions based on these types of agreements, took into account any conduct, which they deemed to fall short of the required standard of *bona fides*.²³ The defence, used by the defendant, in actions based on these types of agreements, was the *exceptio doli*

¹⁶ Aronstam 30.

¹⁷ *Idem* 28. In the words of Aronstam “*Dolus* was present when the plaintiff knew for some reason, for example, because of his fraud or intimidation, that his action was inconsistent with good faith” (Aronstam 28).

¹⁸ Aronstam 28.

¹⁹ *Ibid.*

²⁰ Viljoen 173.

²¹ Aronstam 29 – the court only considered what was expected of them and not actually what they had promised to do.

²² *Idem* 30.

²³ *Ibid.*

generalis.²⁴ The defendant could raise a defence of bad faith (*mala fides*) of the plaintiff, when the plaintiff's conduct illustrated an absence of good faith (*bona fides*), either in the institution of the action itself or in the negotiations surrounding the conclusion of the agreement.²⁵ When utilising this plea or defence the defendant had to prove that the plaintiff was fraudulent²⁶ in bringing the action.²⁷

In Viljoen's opinion, Gaius' formulation of the defence of the *exceptio doli* had its advantages, in that:

"it could be used as an exception to *dolus* which had already occurred, in this case the *exceptio doli specialis* applied.²⁸ It could also be used as an exception to *dolus*, which occurred at the moment of *litis contestation*,²⁹ in this case the *exceptio doli generalis* applied."³⁰

The Romans however, in the use and application of the *exceptio*, did not distinguish between the *exceptio doli generalis* and the *exceptio doli specialis* but instead the term *exceptio doli* was used unsystematically in either sense.³¹ In light of this, many authors are of the opinion that it is perhaps accurate to describe the *exceptio doli* as a general equitable defence that was applied by the Romans to effect and ensure simple justice between parties.³²

²⁴ *Ibid.*

²⁵ Aronstam 31.

²⁶ Aronstam 30 – "...there was no requirement that the *exceptio doli* be expressly mentioned in the formula or *intentio* before a defendant was entitled to rely upon it as a defence....".

²⁷ Aronstam 30.

²⁸ Viljoen 173.

²⁹ In the formulary procedure the *litis contestatio* was achieved by agreement of the parties about the formula- Berger A "Encyclopedic Dictionary of Roman law, Volume 43" www.books.google.com (25 May 2012).

³⁰ *Supra* fn 28.

³¹ Viljoen 173 and Aronstam 28.

³² *Ibid.*

2.2 Roman Dutch law: the uncertainty

The exact role that the *exceptio doli* played in Roman Dutch law and whether or not it was accepted by Roman Dutch law has never been clearly stated, and it appears as though it will forever remain an uncertainty.³³ There appears to be two differing viewpoints on the role of the *exceptio doli* in Roman Dutch law. On the one hand there is support for the view that the *exceptio doli* was accepted and applied in Roman Dutch law, but impliedly, by virtue of the fact that it was accepted as a requirement of good faith,³⁴ which was a basis of contract during that time.³⁵ Then there exists another view that the *exceptio doli* was never accepted into Roman Dutch law due to the fact that reference to the *exceptio* cannot be found in any of the works of Roman Dutch writers³⁶ of that time.

In my opinion, the differing viewpoints stem entirely from the development of Roman Dutch law, specifically with regard to the law of contract. Unlike Roman law, Roman Dutch law did not have the division of agreements into *stricti juris* and *bonae fidei*.³⁷ It was actually during the eighteenth century that the writers of that time stated succinctly that all agreements were based on consent and as a result *bona fide* in character.³⁸ As all agreements were now considered *bona fide*³⁹ no room was left for the technical defence of the *exceptio doli*.⁴⁰ Therefore, it became incumbent and expected of the parties to an agreement to perform in terms thereof and in accordance with the dictates of good faith.⁴¹

³³ Viljoen 173.

³⁴ *Ibid.* Aronstam held this opinion despite the fact that no reference to the *exceptio doli* can be found in Roman Dutch law.

³⁵ *Ibid.*

³⁶ Viljoen 173 - writers such as Van Leeuwen, Van der Linden, Van der Keessel and Van Bynkershoek. Aronstam 31 – Aronstam reiterated this sentiment when he stated “Voet was also of the opinion that the distinction between *stricti juris* and *bonae fidei* agreements was obsolete....”.

³⁷ Aronstam 31.

³⁸ Hutchinson 28.

³⁹ Aronstam 32.

⁴⁰ Hutchinson 12.

⁴¹ Aronstam 32. The idea of good faith being the informing principle of the law of contract (Hutchinson and Pretorius 28).

What this meant in practice was that the parties to an agreement were now required to conduct themselves in a manner that was consistent with good faith.⁴² As a result, if an action was based on these agreements, judges had the option of taking into account the absence of *bona fides*,⁴³ and therefore no need existed for the defendant to raise the defence of *exceptio doli* in these types of actions.⁴⁴ In simple terms all this meant was that where the *exceptio doli* was raised as a defence, all the defendant was alleging was that the plaintiff's conduct did not meet the requirements of good faith.⁴⁵ Roman Dutch courts therefore were only ever faced with one question and that was, whether the conduct of a party to an agreement⁴⁶ had met with the requirements of good faith.⁴⁷

It is submitted that it is because of these reasons; it became unnecessary for contractants, when entering into an agreement, to plead the *exceptio doli* specifically in the intention as this had been implied by good faith,⁴⁸ and the *exceptio doli* formed part of the requirements of good faith.⁴⁹ However the opinion on the other side of the fence appears to be based on the fact that contracts were *bonae fidei* and the requirements of good faith prevailed. Therefore the *exceptio doli* was not accepted as part of Roman Dutch law or applied during its time, and as a result no reference was made to the *exceptio* by Roman Dutch writers.

I am in agreement with this submission made by Aronstam,⁵⁰ namely that due to the *exceptio* forming part of the requirement of good faith, it became unnecessary for contractants to plead the *exceptio*

⁴² Hutchinson 12 and 28.

⁴³ Aronstam 32.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Either in the negotiation that preceded the agreement or in any action based on the agreement.

⁴⁷ Aronstam 32.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Supra* fn 47.

specifically as it was implied by good faith. This is the reason why no references are made to the *exceptio doli* in the works of the Roman Dutch writers.

CHAPTER 3

The application of the *exceptio doli generalis* in South African law

The question that one is faced with when it comes to the *exceptio doli generalis* and its application in South African law is not whether it formed part of our law, but how this defence was dealt with over time. Its requisites, limits and scope of application also deserve careful scrutiny.

It is my submission that the *exceptio doli generalis* did in fact form part of South African law.⁵¹ The *exceptio doli generalis* first surfaced in South African law reports in the late nineteenth century, when it was, at first, controversially used by courts, to input a number of equitable doctrines from English law.⁵² However, over time and with its application by South African courts, authorities became sceptical about the *exceptio doli generalis* and its relevance and utility in South African law.⁵³ This scepticism was mainly due to two reasons. Firstly there was the argument that it was not received into Roman Dutch law and therefore could not form part of South African law.⁵⁴ This argument was based on the fact that historically the defence applied to claims brought in terms of Roman *ius civile*,⁵⁵ and that once the formulary procedure was abandoned, all contracts were recognised to be contracts of good faith and the defence fell away.⁵⁶ Secondly, the *exceptio* was criticised for being a loosely articulated defence, that was contrary to the notion that courts ought not to sink down to the level where they find

⁵¹ Aronstam P “Consumer Protection, Freedom of Contract and the Law” (1979) 181.

⁵² Hutchinson 28. The English doctrines that were imported were estoppel, rectification and the right to rescind a contract induced by innocent misrepresentation.

⁵³ Glover G “Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?” (2007) SALJ 449 at 449 - 450.

⁵⁴ This can be seen in the decision of the judge in the *Aris Enterprise (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T).

⁵⁵ Latin for “citizen law”. It was the body of common law that applied to Roman citizens and the *praetores urbani*, the individuals who had jurisdiction over cases involving citizens; see Wikipedia www.en.wikipedia.org/wiki/Ius_civile (25 May 2012).

⁵⁶ Glover 450.

themselves having to settle disputes concerning fairness and equity of contractual terms that have been agreed to by the parties.⁵⁷

3.1 *The exceptio doli* and its application in South African law: the earlier cases

The Appellate Division in the early cases of *MacDuff and Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd*,⁵⁸ *Weinerlein v Goch Buildings Ltd*⁵⁹ and *Zuurbekom Ltd v Union Corporation Ltd*⁶⁰ tried to give the *exceptio doli* a wide, general meaning.⁶¹ In these cases the judges cited authority to support their view⁶² that the *exceptio doli* vested in the courts equitable jurisdiction⁶³ as it had an inherent equitable basis.⁶⁴ On a number of occasions the courts were prepared to assume that such a defence was still possible and could be raised as a defence in modern law, particularly in circumstances where the enforcement of the plaintiff's remedies "would cause some great inequity and would amount to unconscionable conduct on his part".⁶⁵

The cases mentioned above laid the foundation for the application of the *exceptio doli generalis* in South African law, and focused not on whether the *exceptio doli generalis* formed part of the law, as this was assumed, but rather on its scope and field of application.

⁵⁷ *Ibid.*

⁵⁸ *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573.

⁵⁹ *Weinerlein v Goch Buildings Ltd* 1925 AD 252.

⁶⁰ *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A).

⁶¹ Aronstam 181.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Hutchinson 28.

⁶⁵ *Supra* fn 61.

3.1.1 *MacDuff and Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd*

In 1924, the *MacDuff and Co Ltd (in liquidation)* case was before the Appellate Division. In its decision, the Appellate Division focused on the explanation, foundation and application of the *exceptio doli*. De Villiers JA, in giving reasons for his decision, was of the opinion that the present case fell under the rule formulated in D.45.1.85.sec.7, which states that “The person who is being conditionally bound takes steps to prevent the condition being fulfilled is none the less bound”.⁶⁶ He further held that the practical implications of this rule were that where a debtor intentionally or purposefully acts in a way to prevent or hinder the fulfilment of a condition contained in a contract, he will be guilty of bad faith and as a result thereof the condition will be taken as being fulfilled against him.⁶⁷ De Villiers JA then goes on to further state that, according to Savigny⁶⁸ the reason for the rule is that the ground lies in the *dolus* of the person. If the person, for his own benefit, does away with the unexpected and uncertain character of the condition, then his *dolus* cannot be used to his benefit.⁶⁹

Innes J in delivering his judgment on the same facts expressed similar views to that of De Villiers JA. In his decision he stated that:

“The civil law regarded a condition as fulfilled if its non fulfilment was brought about by a person who would have been under an obligation if the condition had actually been fulfilled⁷⁰ and that in order to escape the obligation acted in bad faith”.⁷¹

He also relied on the viewpoint expressed by Savigny, namely that where non-fulfilment of the condition is due to the deliberate and calculated action of the debtor, then *dolus* will ordinarily be present.⁷²

⁶⁶ *MacDuff and Co Ltd (in liquidation)* 607.

⁶⁷ *Ibid.*

⁶⁸ *MacDuff and Co Ltd (in liquidation)* 607, where reference is made to Savigny’s System III, sec 119b, p 141.

⁶⁹ *MacDuff and Co Ltd (in liquidation)* 608.

⁷⁰ *Idem* 588.

⁷¹ *Idem* 589.

⁷² *Ibid.*

Kotze JA stated “where the debtor has acted with the object of directly frustrating, for their own benefit, the fulfilment of a condition, conduct of this nature is contrary to the equitable principle of our law”.⁷³ He was of the opinion and found that this was indeed the case before him. He also relied on Savigny in his judgment. However, as Savigny did not precisely explain what is to be understood by *dolus*, Kotze JA decided to go one step further and take it upon himself and make the assumption that Savigny was using the term in its wider and more general sense. Therefore, according to him, the term embodied anything which the law does not allow, which is inequitable, and done with the awareness of acting contrary to the law and good faith.⁷⁴ Kotze JA concluded by finding that this principle is but a branch of the broad equitable rule of law, that no one can take advantage of his own wrong, for it is unjust and contrary to good faith that he should do so.⁷⁵

3.1.2. *Weinerlein v Goch Buildings Ltd*

It was during the following year that the Appellate Division once again had to consider the nature and scope of the *exceptio doli*.⁷⁶ In the discussion by Aronstam⁷⁷ on the decision in the *Weinerlein*⁷⁸ case, he discusses that fact that Wessel JA relied on passages from the works of Donellus and Vinnius.⁷⁹ In the court’s decision,⁸⁰ he stated that Donellus submitted that as a general proposition a claim might be supported by a strict interpretation of the law.⁸¹ However, as an exception, it cannot be supported in a

⁷³ *MacDuff and Co Ltd (in liquidation)* 610.

⁷⁴ *Ibid.*

⁷⁵ *MacDuff* 611.

⁷⁶ Aronstam 174.

⁷⁷ Aronstam (1979) 33.

⁷⁸ *Supra* fn 59.

⁷⁹ *Weinerlein* 291.

⁸⁰ *Ibid.*

⁸¹ Donellus *De Jure* cn.bk.23,cc.n.3, vol 5 1509-10. See *Weinerlein* 292.

case against a particular adversary, where to do so would be inequitable and unjust. To allow this would empower and allow the party, under the cloak of the law, to put forth a fraudulent claim.⁸² As the exception lies whenever the court regards it as a fraudulent act to rely on your *summum jus* when you know that your claim is founded on mutual error, according to Vinnius, the excipient does not have to prove actual fraud in order to succeed in this *exceptio doli*.⁸³

Relying on the view of these commentators, Wessel JA stated that the maxim “*summum jus ab aequitate dissidens jus non est*” embodied the principle of the inherent equitable jurisdiction of the Roman courts⁸⁴ and of our courts,⁸⁵ to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it would be inequitable to do so.⁸⁶ He further held that the *exceptio doli* could be applied in cases where the enforcement of a right would cause some great inequity and would amount to unconscionable conduct.⁸⁷ It is therefore clear that under the civil law, the courts will refuse to allow a person to make an unconscionable claim⁸⁸ even though the strict reading of the law might support his claim.⁸⁹

3.1.3 *Zuurbekom Ltd v Union Corporation Ltd*

In 1947 the Appellate Division heard the *Zuurbekom*⁹⁰ case. Tindall JA in his judgement held that he would be prepared to assume, for the purposes of the argument, that the defence known as the

⁸² *Weinerlein* 292.

⁸³ *Weinerlein* 292.

⁸⁴ *Weinerlein* 292-293.

⁸⁵ *Weinerlein* 293.

⁸⁶ *Ibid.*

⁸⁷ *Viljoen* 173.

⁸⁸ In the *Weinerlein* case the court had to decide whether or not a contract of sale of land, which was required by statute to be in writing, could be rectified to reflect correctly the prior oral agreement of sale between the parties (*Aronstam* (1979) 33).

⁸⁹ *Aronstam* 174.

⁹⁰ *Supra* fn 60.

exceptio doli may embrace something falling short of conduct constituting an estoppel against the plaintiff. However, even on that assumption, it seemed to him that, before the plaintiff's delay can be a valid obstacle to his claim for an interdict, it must be shown, as the very name *exceptio doli* indicates, that in the circumstances of the particular case the enforcement of that remedy by the plaintiff would cause some great inequity and would amount to unconscionable conduct on his part.⁹¹

The dicta of the Appellate Division in *Weinerlein*⁹² and *Zuurbekom*⁹³ were followed by courts in a number of subsequent cases.⁹⁴ However, uncertainty pertained, especially as to the scope of the *exceptio doli* and the requirements of its application as well as the relationship between the *exceptio doli* and related doctrines.⁹⁵

3.1.4 *Paddock Motors v Igesund*

The Appellate Division in the *Paddock Motors*⁹⁶ case held that the *exceptio doli generalis* does not operate to change the substantive law or to alter unfair terms of an otherwise validly concluded contract. According to the court, the *exceptio doli generalis*, within the sphere of contract, may possibly serve to preclude reliance on a contractual term, in circumstances, which make it unconscionable to do so, in view of subsequent events or subsequent conduct of the contractant.⁹⁷ The learned judges in this case attempted to give the principle in the *Weinerlein*⁹⁸ case more precision and clarity⁹⁹ with Jansen

⁹¹ Aronstam 174.

⁹² *Supra* fn 59.

⁹³ *Supra* fn 60.

⁹⁴ These cases include, *North Vaal Mineral v Lovasz* 1961 (3) SA 604 (T); *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T); *Otto en 'n ander v Heymans* 1971 (4) SA 148 (T).

⁹⁵ Van Der Merwe SWJ, Lubbe GF, Van Huyssteen LF "The *exceptio doli generalis*: *requiescat in pace-vivat aequitas*" (1989) SALJ 235.

⁹⁶ *Paddock Motors v Igesund* 1976 (3) SA 16 (A).

⁹⁷ *Paddock Motors* 28E-F.

⁹⁸ *Supra* fn 59.

JA placing a restrictive interpretation upon the statement made in the *Weinerlein*¹⁰⁰ case by Wessels JA.¹⁰¹ In justification of narrowing the interpretation of the statement Jansen JA stated that:

“As today all transactions are *bona fide*, the field of operation of the *exceptio doli generalis* is necessarily more restricted. If, however, a contract required to be in writing is considered to be analogous to a *negotium stricti juris*, then of course the *exceptio* may aptly be applied, as was done by Wessels JA in the *Weinerlein* case.”¹⁰²

He found that in this case, the appellant sought to disregard the specific terms of the contract settlement merely because, in their opinion, the terms were not fair.¹⁰³ He stated that the court had not been referred to any authority indicating that the *exceptio doli generalis* could be utilised to alter the terms of a valid agreement entered into between the parties.¹⁰⁴ Subsequently that the *exceptio doli generalis* in his view did not operate to alter the substantive law in this manner.¹⁰⁵

3.1.5 Criticism by Aronstam

The restrictive interpretation of the *exceptio* and the reasoning therefore received criticism from Aronstam. His first criticism regarded the effect on the operation of the *exceptio doli generalis* in light of the fact that in modern law all contracts were regarded as being *bona fide*. He submitted the following:¹⁰⁶

⁹⁹ Aronstam (1979) 36.

¹⁰⁰ *Supra* fn 59.

¹⁰¹ Aronstam (1979) 37.

¹⁰² *Paddock Motors* 28D.

¹⁰³ *Paddock* 28F.

¹⁰⁴ *Paddock* 28E.

¹⁰⁵ *Idem* 28F.

¹⁰⁶ Aronstam 178 - 179.

“It is, with the greatest respect to the learned judges of appeal, questionable whether the fact that, in modern law, all contracts are *bona fides* has necessarily narrowed down the field of operation of the *exceptio*.¹⁰⁷ All, it is submitted, that this development has done to the law has been to make it unnecessary specifically to lead the *exceptio* in the intention of the contract: instead, the *exceptio* is now implied in the contract as an element of good faith.”¹⁰⁸

He was of the opinion that this development did not narrow down the scope of the *exceptio doli generalis*. All it did was make it unnecessary to expressly plead it.¹⁰⁹

His second criticism related to the correctness of the analogy between the *negotium stricti juris* and the contract required by law to be in writing. He agreed that in both contracts compliance with formalities was a prerequisite for their validity. However, where the difference came in was that in Roman law, in certain instances the formalities by themselves created the contract, whereas in South African law, the mere fact that formalities have been complied with did not necessarily create a contract as consensus is required as well.¹¹⁰

3.2 The *exceptio doli generalis* and its application in South African law: the later cases

3.2.1 *Aris Enterprise (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd*

As evidenced in the passage above, various attempts were made by courts to define the scope of the *exceptio doli generalis*.¹¹¹ However, it was in the *Aris Enterprise*¹¹² case that the question was raised

¹⁰⁷ Aronstam 178.

¹⁰⁸ Aronstam 179.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Aronstam 176.

¹¹² *Aris Enterprise (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T).

whether the *exceptio doli generalis* actually did form part of South African law.¹¹³ Coetzee J before applying the *exceptio*, turned to consider whether the *exceptio* was in fact part of our law. In his opinion, the *exceptio doli generalis* was not part of Roman Dutch law and that by the time of Justinian, it had already served its purpose and Roman law had no longer any need for it thereafter.¹¹⁴ He further said that the influence exerted by the *exceptio doli generalis* resulted in the creation of principles, which no longer required the fiction of *dolus*, which was deemed to be inherent in *litis contestatio* under certain circumstances.¹¹⁵ Despite his opinion, he was bound by the decision of the Full Bench in *Otto en n Ander*,¹¹⁶ where the existence of the *exceptio doli* in South African law was assumed. Coetzee J however expressed, with great respect to the judges who delivered the judgement and other judges who hold similar views, that he disagreed with their decision and recorded his dissent.¹¹⁷

In addressing the applicability of the *exceptio doli* to the circumstances of the case, he stated that for the *exceptio doli* to be applicable, the defendant need merely prove that the plaintiff violated *fides* by bringing the action. This was the position of Roman law and the only test seems to be whether the evidence shows that by the institution of this action to claim a remedy to which it is entitled, the plaintiff indeed violated good faith.¹¹⁸

He then asked the question whether, if the institution of the action in his view proved to be a violation of *fides*, he could nevertheless refuse to non-suit the plaintiff. He found no guidance on this matter anywhere in modern law, meaning anything past the time of Justinian. He therefore assumed that the *exceptio doli generalis*, in its contemporary form, did not admit to the exercise of judicial discretion. In other words, that if it could be proved that the plaintiff's institution of the action violated *fides*, *caedit*

¹¹³ Aronstam 179.

¹¹⁴ *Aris Enterprise (Finance) (Pty) Ltd* 438A.

¹¹⁵ *Aris Enterprise (Finance) (Pty) Ltd* 438B.

¹¹⁶ *Supra* fn 92.

¹¹⁷ *Aris Enterprise (Finance) (Pty) Ltd* 437G-H and Aronstam 179 - 180.

¹¹⁸ *Aris Enterprise (Finance) (Pty) Ltd* 438E-F.

quaestio, the defendant must then succeed. He therefore found on the evidence that *mala fides* on the part of the plaintiff was present, and accordingly granted absolution from the instance.¹¹⁹

3.2.2 *Rand Bank v Rubenstein*

In *Rand Bank v Rubenstein*¹²⁰, the existence of the defence based on the *exceptio doli* was again assumed and confirmed. Botha J declared himself to be bound to accept the existence of such a defence. According to the judge, Rand Bank acted contrary to good faith when it attempted to use the suretyship for a purpose for which it was never intended. That Rand Bank sought to rely on the wide wording of the deed of suretyship and in so doing attempted to abuse the right acquired for a particular purpose at that time. In the judge's view if they succeeded in their attempt to convert the right acquired into a remedy in respect of a later unforeseen event, it would undoubtedly result in a gross injustice or gross inequity towards the defendant.¹²¹

Botha J also stated that the application of broad considerations of fairness and justice is almost an everyday occurrence in a court of law. Furthermore, that judges in the exercise of their judicial function, often find themselves in areas of relative uncertainty which necessitates the formation of moral judgments without being assisted by precise guidelines, limits or requisites and that question still remains to be answered.¹²²

3.2.3 *Nowick v Comair Holdings Ltd*

In *Nowick v Comair Holdings Ltd*¹²³ Colman J mentioned that a minimum requirement for the application of the *exceptio doli generalis* would be if the enforcement of its rights by one of the litigants

¹¹⁹ *Aris Enterprise (Finance) (Pty) Ltd* 438H – 439A. See also Aronstam 179.

¹²⁰ *Rand Bank v Rubenstein* 1979 (2) SA 848 (W).

¹²¹ Viljoen 174.

¹²² *Ibid.*

¹²³ *Nowick v Comair Holdings Ltd* 1979 (2) SA 116 (W).

would amount to unconscionable conduct on his part and would cause some great inequity. However, he confirmed that he was uncertain about whether there existed any other requirements or limits upon the field of application and operation of the *exceptio doli*. He assumed that they must exist.¹²⁴

The *exceptio doli* did form part of the South African law and this is evidenced above by its application in various cases. The *exceptio* was an established defence that remains clouded in a veil of uncertainty, vagueness and obscurity¹²⁵ and this appears to be as a result of the courts never using the opportunities to be clear on the exact and precise limits of the *exceptio* as well as the requisites for its application.

In 1998 there was a ground breaking and law changing decision, when the majority of the Appellate Division finally took a stand on the *exceptio doli*, and decided in the *Bank of Lisbon and South Africa Ltd*¹²⁶ case that the *exceptio doli generalis* had never been received into Roman Dutch law. As such it afforded no grounds for the recognition of a substantive defence based on equity in modern South African law.¹²⁷

¹²⁴ Aronstam 174 – 175.

¹²⁵ Aronstam 175.

¹²⁶ *Supra* fn 3.

¹²⁷ Hutchinson 28.

CHAPTER 4

The abolishment of the *exceptio doli generalis*

“All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as a superfluous, defunct anachronism. *Requiescat in pace*”.¹²⁸ These are words that sent shockwaves through the legal fraternity and cause comment and controversy amongst legal academics.¹²⁹ In delivering the majority judgment in the *Bank of Lisbon and South Africa Ltd*¹³⁰ case, Joubert JA intended to effectively and undoubtedly put an end to the application of the *exceptio doli generalis* in South African law.¹³¹ This judgment and those words have been subject to severe criticism in subsequent years, as it had generally been assumed that the *exceptio doli generalis* provided a remedy against the enforcement of unfair contracts and/or the enforcement of contracts in unfair circumstances.¹³²

In this ground breaking decision the Appellate Division, after a thorough review of old and modern authorities, reached the conclusion that the *exceptio doli generalis* is not part of South African law.¹³³ The court held that in fact that it was not bound by the *dicta* in the Appellate Court Division decisions on which reliance had always been placed in the past.

This chapter will focus on the *Bank of Lisbon and South Africa Ltd*¹³⁴ case and more specifically the effect this decision has had on South African law. A closer and more in depth look will be made into

¹²⁸ Jager L “The *exceptio doli generalis*: an obituary” (1988) *Annual Survey of South African Law* (June issue 8) 123 and *Bank of Lisbon and South Africa Ltd* 607B.

¹²⁹ Lambiris MA “The *exceptio doli*: an obituary” (1998) *SALJ* 644.

¹³⁰ *Supra* fn 3.

¹³¹ Christie RH “The Law of Contract in South Africa” 5th ed (206) 12.

¹³² Forsyth CF and Pretorius JT “Recent Developments in the Law of Suretyship” (1993) *SA Merc LJ* 181at 183.

¹³³ *Supra* fn 127.

¹³⁴ *Supra* fn 3.

what transpired subsequent to this decision, which is that litigants who had been denied the use of the *exceptio* sought other ways in which to resist the enforcement of unconscionable contracts. This was done by the use of public policy, good faith and *boni mores* to fulfil such a role.¹³⁵

4.1 *Bank of Lisbon*: the facts

An application was brought by the respondents, in a Provincial Division, for an order against the appellants,¹³⁶ that the security provided by the respondents, for money lent on overdraft facilities granted by the appellants, secured by the suretyship, mortgage bonds and a negotiable certificate of deposit, be returned and/or cancelled.¹³⁷ The respondent had discharged its indebtedness under the overdraft to the appellant and closed its account. Thereafter, it requested the return and cancellation of all the security provided.¹³⁸

The appellant resisted the application, on the basis that it had a contractual right to continue to possess the securities even though the respondents had discharged their principal indebtedness.¹³⁹ The appellant claimed that a contract had been concluded between the parties for the forward purchase of dollars. That the respondent had unlawfully repudiated the contract as a result thereof the appellant cancelled the contract and suffered damages.¹⁴⁰ As a result, the appellant held that it was contractually entitled to retain the securities until the respondent had discharged its entire indebtedness to the appellant, which also flowed from the breach of contract for the forward purchase of dollars.¹⁴¹

¹³⁵ Forsyth and Pretorius 183 - 184.

¹³⁶ Lambiris 644.

¹³⁷ *Bank of Lisbon and South Africa Ltd* 581E.

¹³⁸ *Ibid.*

¹³⁹ *Bank of Lisbon and South Africa Ltd* 581F-G.

¹⁴⁰ *Ibid.*

¹⁴¹ *Bank of Lisbon and South Africa Ltd* 581G-H.

In response to the appellant's claim/counterclaim, the respondents contended the following:

- (a) The bank's refusal to return the securities amounted to *dolus generalis*.
- (b) It was contrary to good faith for the bank to rely on those terms to their full extent when the original contemplation was that the securities provided would only apply to the original/principal overdraft facilities.
- (c) That the respondent's had discharged its principal indebtedness to the appellant in terms of the original/principal overdraft facilities.¹⁴²

4.2 Bank of Lisbon: the decision

The decision of the Appellate Division in this case stands out for various reasons and I will deal with each judgment in detail.

4.2.1 The majority decision

Two aspects that stand out in the approach by the majority, more specifically the judgment of Joubert JA in making the decision in this case. Firstly, the historical investigation and reasoning in his determination that the *exceptio doli generalis* as a defence did not form part of and was not accepted into South African law. Secondly, the fact that in the decision he rejected previous *dicta*, favouring the recognition of the *exceptio doli generalis*, as binding.

He continued to decide the matter on a "strict reading of the contracts involved and the wording of the provisions contained therein". He based his decision solely on whether or not the bank had a contractual right derived from the deeds of suretyship and the mortgage bonds to retain the security as claimed.¹⁴³ Based on this approach, he reached the decision that the appeal should succeed.

¹⁴² *Bank of Lisbon and South Africa Ltd* 581F-G.

¹⁴³ *Bank of Lisbon and South Africa Ltd* 608F-G.

4.2.2 The historical investigation

In Joubert's opinion, the appeal before the court concerned the applicability of the *exceptio doli generalis* to written contracts. He stated that in South African law there was always uncertainty that surrounded its very existence as well as its scope of application. He therefore found it necessary to investigate the origin, development, scope and applicability of the *exceptio doli generalis*.¹⁴⁴

During the course of his investigation, he looked at the *exceptio's* origins in Roman law, addressed the issue of its possible development in medieval law and then finally its eventual reception into Roman-Dutch law.¹⁴⁵ He then reached the conclusion that the *exceptio* did not form part of Roman-Dutch law and as a result its application in South African law would be without foundation.¹⁴⁶

4.2.3 Joubert's rejection of previous *dicta*

Joubert found that the *dicta* in previous decisions discussed the *exceptio* in its guise in classical Roman law, without taking cognisance of subsequent developments.¹⁴⁷ In his judgment, he dealt with the three leading decisions, which formed the basis for the application of the *exceptio doli generalis* in South African law. He found that these *dicta* were not binding on the courts for the existence of the *exceptio doli generalis* in South African law. He felt that as a result, the time had now arrived to bury the *exceptio doli generalis*.¹⁴⁸ He then proceeded to individually disregard each decision and based it on the following:

- (a) He began with the case of *Weinerlein*. In his opinion, he found that Wessels JA expressed views that are not binding on the court. He felt that Wessels JA in making his decision, wished

¹⁴⁴ *Bank of Lisbon and South Africa Ltd* 592G.

¹⁴⁵ Van Der Merwe, Lubbe and Van Huyssteen 236.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Supra* fn 141.

¹⁴⁸ *Bank of Lisbon and South Africa Ltd* 607A-B.

to approach the matter “from another angle” and this he did by invoking the *exceptio doli generalis*. In motivating his decision, Wessels JA relied upon Vinnius *Inst* 4.13.1 and two mutilated sentences from the French jurist Donellus *De Jure Civili lib 2 cap 6 No 3*. Joubert said that from a historical survey, both of these authors were commenting on Roman law and as a result cannot be relied upon as presenting, with authority, the position according to Roman-Dutch law.¹⁴⁹

(b) He then tackled *Zuurbekom*¹⁵⁰. Here he felt that the question whether the *exceptio doli generalis* formed part of Roman-Dutch law was never mooted. When Tindall JA made his judgment he referred to the *exceptio doli generalis*, for which he relied heavily on Sohm. In Joubert’s view, Sohm explained the function of the *exceptio doli generalis* during the heyday of the formulary procedure of classical Roman law. He also held that Schreiner JA’s brief reference to the *exceptio doli generalis* was also based on Roman law and not on Roman-Dutch law.¹⁵¹

(c) Lastly, he turned to Jansen JA’s decision in the *Paddock Motors*¹⁵² case. He was of the view that Jansen just accepted the assumption that the *exceptio doli generalis* was part of our modern law, without an investigation into Roman-Dutch law.¹⁵³ That this was done for the purposes of his judgment.¹⁵⁴ He then went on further to state that the same conclusion reached in respect of the *exceptio doli generalis* equally holds for the *replicatio doli generalis*.¹⁵⁵

¹⁴⁹ *Bank of Lisbon and South Africa Ltd* 606E-G.

¹⁵⁰ *Supra* fn 60.

¹⁵¹ *Bank of Lisbon and South Africa Ltd* 606H-I.

¹⁵² *Supra* fn 94.

¹⁵³ *Bank of Lisbon and South Africa Ltd* 606J – 607A.

¹⁵⁴ *Bank of Lisbon and South Africa Ltd* 606J to 607A-B.

¹⁵⁵ *Bank of Lisbon and South Africa Ltd* 607A-B.

4.3 The dissenting judgment of Jansen JA

Jansen JA in his dissenting judgment, held the view that the Appellate Division had always assumed that a defence based on the *exceptio doli generalis* at least existed. He felt that the Appellate Division had relied on the existence of the *exceptio doli generalis* as a defence based on equity, and that the lower courts have overwhelmingly assumed for many years that this defence is available.¹⁵⁶ However, he did note that the role that the *exceptio doli generalis* has played in South African law has always been a matter of debate.¹⁵⁷

Critics of the *exceptio doli generalis* see it merely as a label for a defence that a plaintiff has no cause of action.¹⁵⁸ There are others who have found¹⁵⁹ that it has been accepted as part of South African law and as a result applied as such for a considerable period of time, by both the Provincial Divisions as well as the Appellate Division.¹⁶⁰

He felt that it was of no relevance whether the *leges* dealing with the *exceptio* were received into or fell into disuse.¹⁶¹ He felt that the reason for the silence on the exception being used in practice was perhaps due to the fact the occasion did not present itself due to the social circumstances that existed and the *mores* of the time.¹⁶² He was of the opinion that the underlying principle can be traced back to the Digest and that in the absence of contrary statutes or usage, it had to be accepted that the principles of the *exceptio doli generalis* were in fact part of the Roman law and that they were received in the Netherlands.¹⁶³

¹⁵⁶*Bank of Lisbon and South Africa Ltd* 616H-J.

¹⁵⁷ *Bank of Lisbon and South Africa Ltd* 611G.

¹⁵⁸*Bank of Lisbon and South Africa Ltd* 612B.

¹⁵⁹ *Bank of Lisbon and South Africa Ltd* 612D-F.

¹⁶⁰ *Ibid.*

¹⁶¹ *Bank of Lisbon and South Africa Ltd* 616H-J.

¹⁶² *Bank of Lisbon and South Africa Ltd* 617E.

¹⁶³ *Ibid.*

Jansen JA was of the view that the *exceptio doli generalis* constitutes a substantive defence based on the sense of justice of the community and therefore it is closely related to the defence based on public policy or *boni mores*. He felt that they could overlap, as in appropriate circumstances it would be considered against public policy or *bonos mores* to enforce a grossly unreasonable contract. He was also of the view that as things presently stood, there is no general definition of what could constitute *dolus*, although Tindall JA provided some guidance in this regard in his judgment in the *Zuurbekom Ltd* case.¹⁶⁴ Each case will, however, have to be judged on its own facts bearing in mind the sense of justice of community.¹⁶⁵

He felt that with the abolishment of the *exceptio doli generalis*, a vacuum would be left which the requisite of good faith would not be able to completely fill. This is because it had not yet absorbed the principles of the *exceptio doli generalis* nor has the concept of *contra bonos mores* yet been specifically applied in this field.¹⁶⁶

In his opinion the facts in this case would offend the sense of justice of the community.¹⁶⁷ He was of the view that if the appeal had to be upheld it would mean allowing the appellant to rely on the strict wording of the documents and therefore the right to retain the security after the overdraft had been paid.¹⁶⁸ He dismissed the appeal.¹⁶⁹

¹⁶⁴ Where the enforcement of a remedy by a plaintiff would cause some great inequity and would amount to unconscionable conduct on his part – *Bank of Lisbon and South Africa Ltd* 617G-H.

¹⁶⁵ *Bank of Lisbon and South Africa Ltd* 617G-H.

¹⁶⁶ *Bank of Lisbon and South Africa Ltd* 616C.

¹⁶⁷ *Bank of Lisbon and South Africa Ltd* 617J-I.

¹⁶⁸ *Bank of Lisbon and South Africa Ltd* 618A-B.

¹⁶⁹ *Ibid.*

4.4 Comments and criticisms

Criticism has been levied at the judgment “for its positivist and overly scholarly method of historical reasoning”.¹⁷⁰ Many felt that it was an “unfortunate judgment”¹⁷¹ and that it lacked an in depth discussion of general policy considerations or the responsibility of a court to ensure justice.¹⁷² The general opinion was that “the judgment was not in keeping with the spirit of justice and reasonableness, which informed the Justianic Roman law, the Roman–Dutch law and therefore also the South African common law”.¹⁷³

There was also a sense of belief that the judgment reached by the court, after its brief historical survey, was incorrect. That the conclusion should have been reached that the *exceptio doli generalis* did in fact form part of Roman Dutch law and that there is no doubt that the *exceptio doli generalis* was accepted in South African law.

The first striking criticism of the judgment centres on the similarities in the facts that the case had with the *Rand Bank*¹⁷⁴ case but the completely different judgments reached by the respective courts. In the *Rand Bank*¹⁷⁵ case, the court was of the opinion that the facts of the case were tailor made for the general application of the *exceptio doli*. In fact, the court had no reservations in applying the *exceptio doli* in order to reach an equitable decision and the judge stated that he was pleased to do so in the context of the present case.¹⁷⁶

¹⁷⁰ Christie 12.

¹⁷¹ Domanski A “*Mortgage Bondage*” (1995) SALJ 159.

¹⁷² Christie 12.

¹⁷³ Domanski 165.

¹⁷⁴ *Supra* fn 116.

¹⁷⁵ *Ibid.*

¹⁷⁶ Hawthorne and Thomas 163.

However, Joubert JA in the *Bank of Lisbon and South Africa Ltd*¹⁷⁷ case, decided:

“On proper construction of these passages in their contextual settings I am satisfied that they were intended to cover any transaction, which might arise out of the customer/banker relationship between the company and the bank. The contract for the forward purchase of dollars indisputably qualifies as such a transaction.”¹⁷⁸

This decision was reached, despite the fact that it was admitted by counsel for the bank,¹⁷⁹ that the contract for the forward purchase of dollars was not in contemplation of the respondents and the bank when the securities were furnished.¹⁸⁰

In the opinion of Hawthorne and Thomas, when Joubert completely denied the existence of the defence he turned back the clock 2054 years, by completely ignoring the principle of equity embodied in the *exceptio doli*. He dealt with the contract as though it was a *negotium stricti iuris* prior to the introduction of the *exceptio doli generalis* in 66BC.¹⁸¹

Since the decision in this case, the question that was left to be dealt with was whether a remedy exists for parties who are at the mercy of standard form contracts.¹⁸² The Appellate Division left our legislature with no choice but to enact protection against unfair contracts. The judgment in this case brought South African law to the point where an analysis of *bona fides*, at policy and technical levels, became inescapable.¹⁸³

¹⁷⁷ *Supra* fn 3.

¹⁷⁸ *Bank of Lisbon and South Africa Ltd* 609F and Hawthorne and Thomas 153 - 154.

¹⁷⁹ *Bank of Lisbon and South Africa Ltd* 608H.

¹⁸⁰ *Supra* fn 168.

¹⁸¹ Hawthorne and Thomas 154.

¹⁸² Lambiris 644.

¹⁸³ Jager 123.

CHAPTER 5

The aftermath: the development of the principle of good faith

The abolishment of the *exceptio doli generalis* has generally been accepted by our courts,¹⁸⁴ and this has called for consideration of other approaches to the question of unconscionable contracts.¹⁸⁵ The law appears to since have focused on living issues such as public policy, good faith and constitutional values rather than the remains and memoirs of the *exceptio doli generalis*.¹⁸⁶ Although the death of the *exceptio doli generalis* appears to still be mourned years and years after the judgment, all attempts to bring it back to life in subsequent case law, have failed dismally.¹⁸⁷

The treatment of public policy and good faith in this aftermath appears to be that in respect of good faith a constructive approach has been adopted. This entails that the “substantive” content of the *exceptio doli generalis* has been absorbed into the requirement of good faith which underlies the conclusion, performance and execution of all consensual contracts.¹⁸⁸ Jansen JA envisaged that public policy might now play a role in the question of unconscionable contracts. Pending an express and decisive revival and reaffirmation of the *exceptio doli generalis* and the *replicatio doli generalis* by the Appellate Division, it would seem as though public policy assumed and fulfilled the role previously played by the *exceptio* and the *replicatio* in South African contract law.¹⁸⁹

¹⁸⁴ Glover 450.

¹⁸⁵ Malan FR and Pretorius JT “Contemporary Issues in South African Banking Law” (2001) *THRHR* 268 at 283.

¹⁸⁶ Glover 450.

¹⁸⁷ Barnard J “Death, Mourning and melancholia in post modern contract: a call for (re)establishing contract’s connection with the ethical” (2006) *Stellenbosch Law Review* 386 at 394.

¹⁸⁸ Malan and Pretorius 286.

¹⁸⁹ Domanski 165.

In this chapter the investigation will deal with what occurred in the aftermath of the *Bank of Lisbon and South Africa Ltd*¹⁹⁰ decision, and more specifically the development of public policy and good faith over the years that followed.

5.1 The development of the principle of good faith: *Saayman* case

The principle of good faith goes back a long way and in fact has always been the foundation upon which the *exceptio doli generalis* was based.¹⁹¹ After the abolishment of the *exceptio doli generalis* attempts were made by some members of the judiciary to expand and revive the concept of good faith as an informing principle of the law of contract.¹⁹² This all began with Olivier JA's minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*.¹⁹³

In this case Olivier JA declined to enforce a deed of suretyship signed by a frail, 85 year old woman in favour of a company owned by her son. He based his decision on the grounds that the bank should either have advised her to get independent legal advice before committing herself or should itself have explained to her the implications of what she was doing.¹⁹⁴ He reached his decision on the basis of applying the *bona fide* principle¹⁹⁵ to the facts of the case. Upon measuring the way in which the contract had been concluded, he was of the opinion that it was concluded in a manner that was against the principles of *bona fides*.¹⁹⁶

¹⁹⁰ *Supra* fn 3.

¹⁹¹ Glover 451.

¹⁹² Pretorius CJ "Individualism, Collectivism and the limits of good faith" (2003) *THRHR* 638 at 643.

¹⁹³ *Eerste Nasionale Bank v Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 SCA at 318-331.

¹⁹⁴ Hutchinson 29.

¹⁹⁵ *Saayman* 331 and for an example of the operation of the good faith principle refer to Malan and Pretorius 286.

¹⁹⁶ Glover GB "Good faith and procedural unfairness in contract: *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (A)" (1998) *THRHR* 328 at 329-330.

Olivier JA stated that the function of good faith is to give expression to the community's sense of what is fair, just and reasonable and that the majority decision in *Bank of Lisbon and South Africa Ltd*¹⁹⁷ should not be read as denying it this role.¹⁹⁸ In his judgment he focused more on the *bona fide* principle as he was not convinced that the respondent had not satisfied its burden of proof in this regard.¹⁹⁹ In giving reasons for his judgment he considered the concept of good faith²⁰⁰ as well as its applicability and role in the law of contract,²⁰¹ its relationship to the principle of public interest²⁰² and the thorny issue of the *exceptio doli generalis*.²⁰³ He also emphasised the close link between good faith and public policy.²⁰⁴

5.2 Application and role of good faith in the law of contract: *Saayman* case

Oliver JA applied his mind to the circumstances surrounding the conclusion of the agreement and the factors considered by him in making his decision were:

- “(a) Whether the surety was elderly,²⁰⁵ frail, obviously physically weak and most likely not able to fully understand the contents of the agreement;²⁰⁶
- (b) Whether the surety was, to the knowledge of the creditors, the debtor's spouse or elderly parent;

¹⁹⁷ *Supra* fn 3.

¹⁹⁸ *Supra* fn 184.

¹⁹⁹ Glover (1998) 329.

²⁰⁰ *Saayman* 391H.

²⁰¹ *Ibid.*

²⁰² *Saayman* 391H – I.

²⁰³ Glover (1998) 330.

²⁰⁴ Hutchinson 29.

²⁰⁵ Malan and Pretorius 287.

²⁰⁶ *Ibid.*

(c) That public policy required that the creditor ensure that the surety understood the full impact of the agreement and any consequent cessions.”²⁰⁷

In his opinion, public policy based on the circumstances of the case, did not require a strict application of the general rule that contracting parties must always be bound by the contents of the agreement.²⁰⁸

In this case the bank did not act in accordance with *bona fides* or good faith. This was due to the fact that the surety signed the documentation without her fully understanding the content and without their import being explained to her and having read them.²⁰⁹ All that the bank should have done was requested and insist that the surety obtain independent legal advice²¹⁰ or sit her down and explain the full implications of the agreement and the related documents,²¹¹ if any.

In this case none of the above had occurred, nor was undertaken by the bank and as a result *bona fides* or good faith required that the suretyship and cession in question not be enforced.²¹² He further submitted that good faith should be applied to all contracts because “public policy demands that this should be so.”²¹³ He felt that there is a close connection between the doctrine of *bona fides* and those of public policy, public interest and *iusta causa*.²¹⁴

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Malan and Pretorius 286-287.

²¹⁰ *Idem* 287.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ Glover (1998) 330.

²¹⁴ *Ibid.*

5.3 The thorny issue of the *exceptio doli generalis*: Saayman case

The reason that Olivier JA discussed the *exceptio doli generalis* was because the debate concerning the continued existence of this defence is inextricably linked to the concept of *bona fides*. He agreed with the majority in the *Bank of Lisbon and South Africa Ltd*²¹⁵ case, basically that the need for such a remedy had fallen away since all contracts in South African law were *negotiate bonae fidei* and therefore would have to automatically comply with the dictates of good faith.²¹⁶

He found that the problem with the *Bank of Lisbon and South Africa Ltd*²¹⁷ case was one of interpretation. In his opinion it was never the intention of the majority to imply that no equitable jurisdiction based upon good faith exists at all in our law. In fact, in his judgment he indicated that the Appellate Division had continued, after that case, to actively employ the dictates of good faith in deciding contractual disputes, although they often did so under the guise of public policy and public interest.²¹⁸

Due to the above, he felt justified in applying the principles of public policy, which by definition include the precepts of good faith, to a dispute over a suretyship²¹⁹ agreement and cession.

5.4 The significant features of Olivier JA's judgment

Firstly, his re-assertion of the meaningful role that the principle of *bona fides* has to play *in contrahendo* in South African law. He used the doctrine of good faith not to strike down a contractual term for being

²¹⁵ *Supra* fn 3.

²¹⁶ *Ibid.*

²¹⁷ *Supra* fn 3.

²¹⁸ *Ibid.*

²¹⁹ *Idem* 330-331.

unfair, but because he held that the Bank's failure to act sensitively driving the process of concluding²²⁰ the contract rendered it unenforceable.²²¹

Secondly, it was the first time that the doctrine of *bona fides* was invoked to entitle a respondent to rescind a contract in circumstances where actions based upon misrepresentation, duress and undue influence could not be used.²²²

Lastly, his minority judgment was an indication for courts to in future feel justified in using the doctrine of public policy, good faith and unconscionability to rescind contracts tainted by procedural unfairness and indeed for reasons other than the traditional misrepresentation, duress and undue influence.²²³

²²⁰ Glover (1998) 332.

²²¹ *Idem* 332-333.

²²² Glover (1998) 333.

²²³ *Idem* 334.

5.5 *Brisley v Drotsky*: the debate about the role of good faith in the law of contract

Whatever concretisation Olivier JA gave the concept of good faith in the *Saayman*²²⁴ case was declined when the Supreme Court of Appeal in *Brisley v Drotsky*²²⁵ chose not to follow his lead.²²⁶ In *Brisley*²²⁷, the majority of the Supreme Court of Appeal accepted that the *exceptio doli generalis* is not part of the South African law and harshly criticised the attempts to bring it back to life. The court accepted in principle, that the unfair enforcement of a contract could be contrary to public policy,²²⁸ however found that the lessee's case fell far short of the requirement of exceptional unfairness.²²⁹

The Supreme Court of Appeal held that a court cannot refuse to enforce a contractual provision simply on the basis of good faith. Good faith is not a "free floating" principle capable of independent application²³⁰ but instead is an underlying value that informs the various rules and principles of the law of contract, including the rules regarding illegality.²³¹ As a result good faith could not be relied upon directly to strike down or to refuse to enforce an otherwise valid contractual term.²³² The test is not whether enforcement of the non-variation clause would be in bad faith, but rather whether it would be contrary to the public interest. The fact that enforcement would be unfair is relevant in determining whether a non-variation clause would be against public policy.²³³

²²⁴ *Supra* fn 183.

²²⁵ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

²²⁶ Pretorius 643.

²²⁷ *Supra* fn 211.

²²⁸ Hutchinson 185.

²²⁹ *Ibid.*

²³⁰ Hutchinson 167.

²³¹ *Ibid.*

²³² Pretorius 638.

²³³ *Ibid.*

In the court's opinion no public interest was infringed. It found that the lessee's case fell short of the requirements of exceptional unfairness.²³⁴ The contract and the fact that the creditor acted in bad faith by attempting to enforce the clause does not in itself mean that such enforcement is against public policy. Such a clause will not be enforced where enforcement would be contrary to public policy, namely, where it would be so unfair as to be detrimental to the interest of the community.

Pretorius' opinion was that if good faith had no application in the circumstances of *Brisley*,²³⁵ it then begs the question whether this principle has any real meaning or significance for the law of contract at all.²³⁶ What appears to have transpired is that the mourners of the *exceptio doli generalis* were in a state of paralysis. Courts lacked precisely the energy and creativity to imagine and develop new ways in which the law of contract, in a constitutional democracy, may accommodate the equitable and indeed ethical goals of the *exceptio doli generalis*. As a result our courts chose for the major part to continue with its insistence on the death of the *exceptio* and the values it represents.²³⁷

This melancholia allowed the courts to continue holding that freedom of contract and the sanctity of contract prevails, despite the severe consequences of those decisions on the lives of the citizens of this country.²³⁸ Hawthorne submitted²³⁹ that what was necessary was for good faith to be given concrete content in its application both to particular instances and to the operation of the contract.²⁴⁰

²³⁴ Refer to Hutchinson 167 for the reasons why the court felt this way.

²³⁵ *Supra* fn 211.

²³⁶ Pretorius 645.

²³⁷ Barnard 394.

²³⁸ *Ibid.*

²³⁹ Hawthorne L "Principle of equality in law of contract" (1995) *THRHR* 157.

²⁴⁰ Hawthorne 172.

CHAPTER 6

The Concept of Public Policy and its development through case law

Concepts like public policy and *boni mores* represent the public opinion of a particular community at a particular time²⁴¹ and therefore change constantly and have proved to be difficult to define.²⁴² These concepts can differ in content from society to society and from time to time as it is an open ended standard. At first glance, “the exercise of the power to declare a contract contrary to public policy seems to be a difficult and contentious task, but public policy is not as problematic as it initially appears to be”.²⁴³

Considerations of public policy indicating that agreements that are contrary thereto should not be enforced, are to be found in legislation, the common law, good morals and the public interest.²⁴⁴ When dealing with contracts that are perceived as incompatible with general social norms and customs, the principle of *pacta sunt servanda*, will always be superseded by other policy considerations. The result is that certain contracts are not enforced for the sake of the public interest.²⁴⁵

6.1 *Sasfin (Pty) Ltd v Beukes*

In *Sasfin (Pty) Ltd v Beukes*²⁴⁶ the role of public policy in striking down an unconscionable bargain was illustrated, and the court found that the contract was unenforceable as it was contrary to public policy.²⁴⁷

²⁴¹ Hutchinson 175.

²⁴² Malan and Pretorius 283.

²⁴³ *Supra* fn 225. Also refer to Hutchinson 173, 176 and 182.

²⁴⁴ Hutchinson 173.

²⁴⁵ Hutchinson 173.

²⁴⁶ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

²⁴⁷ Malan and Pretorius 283.

The case centered on the following:

- (a) The enforceability of certain deeds of cession entered into with Sasfin (Pty) Ltd by the doctor concerned.²⁴⁸
- (b) A consideration of whether there were provisions in the deed of cession which offended public policy and, if so, whether they were severable from the remainder of the document.²⁴⁹

On Smalberger JA's interpretation of the relevant clauses he found that the effect thereof was to put Sasfin, from the time that the deed of cession was executed, in immediate and effective control of all Beukes' earnings as a specialist anaesthetist.²⁵⁰ As a result Beukes could effectively be deprived of his income and means of support for himself and his family and would essentially be working for the benefit of Sasfin on an indefinite basis.²⁵¹

According to Smallberger, an agreement having this effect was clearly unconscionable, not in line with the public interest,²⁵² and therefore could not be enforced by courts on the grounds of expedience.²⁵³ He felt that the interest of the community, are of paramount importance in relation to the concept of public policy.²⁵⁴ Agreements which are clearly detrimental to the interests of the community, whether they are contrary to law or morality, or ran counter to social or economic expedience, therefore, on grounds of public policy, could not be enforced.²⁵⁵

He further held that courts needed to be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend ones individual sense of propriety and

²⁴⁸ *Sasfin* 2I.

²⁴⁹ *Sasfin* 7D.

²⁵⁰ *Sasfin* 13F.

²⁵¹ *Sasfin* 13H.

²⁵² *Sasfin* 13I-J.

²⁵³ *Sasfin* 8B.

²⁵⁴ *Ibid.*

²⁵⁵ *Sasfin* 8C-8D.

fairness.²⁵⁶ Public policy does demand, in general, full freedom of contract, the right of men to freely bind themselves in respect of all legitimate subject matter,²⁵⁷ however it should also take into account “the doing of simple justice between man and man”.²⁵⁸

With regard to the deed of cession, he held the following:

- (a) that the agreement was subject always to terms and conditions that were designed to ensure maximum benefits and the widest possible protection for Sasfin.²⁵⁹
- (b) that most, if not all, of the clauses which offend public policy are fundamental to the nature and scope of the security which Sasfin obviously required²⁶⁰ and this was strengthened by the fact that Sasfin wanted to enforce the deed of cession as a whole, ignoring the fact that Beukes has earlier contended that certain clauses were contrary to public policy, therefore being invalid and unenforceable.²⁶¹

In passing the court stated, that if Beukes elected to raise illegality as a defence against the enforcement of the agreement, he would not have been regarded as acting *mala fides*.²⁶² The appeal was dismissed.

²⁵⁶ *Sasfin* 9B – 9C.

²⁵⁷ *Sasfin* 9F.

²⁵⁸ *Sasfin* 9F – G.

²⁵⁹ *Sasfin* 17C.

²⁶⁰ *Ibid.*

²⁶¹ *Sasfin* 17G-H.

²⁶² *Sasfin* 19E-F.

6.2 *Barkhuizen v Napier*

*Barkhuizen v Napier*²⁶³ involved an application for leave to appeal against a decision of the Supreme Court of Appeal²⁶⁴ which concerned the constitutionality of a time-limitation clause in a short-term insurance policy.²⁶⁵ The clause prevented an insured claimant from instituting legal action, if summons was not served on the insurance company within the time limits set out in the clause.²⁶⁶

On leave to appeal, the applicant contended that the clause was contrary to public policy and unenforceable,²⁶⁷ in that it prescribed an unreasonably short time to institute action and constituted an infringement on the right of the insured to seek the assistance of the court.²⁶⁸

6.2.1 Ngcobo J's judgment

Ngcobo JA, in his judgment, had to determine whether clause 5.2.5 was contrary to public policy and as a result unenforceable²⁶⁹ as well as the fairness of the clause. He was of the view that no reason exists either in logic or principle as to why public policy would not tolerate time-limitations clauses,²⁷⁰ provided that the clauses are subject to the considerations of reasonableness and fairness.²⁷¹ To enforce a time-limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress would be contrary to public policy.²⁷² As a result, the question is

²⁶³ *Barkhuizen v Napier* 2007 (5) SA 323.

²⁶⁴ *Barkhuizen* 327C.

²⁶⁵ Glover G "Lazarus in the Constitutional Court: an exhumation of the *exceptio doli generalis*?" (2007) *SALJ* (vol124 Part 3) 449 at 453.

²⁶⁶ *Barkhuizen* 327C-D.

²⁶⁷ *Barkhuizen* 331C.

²⁶⁸ *Barkhuizen* 328A.

²⁶⁹ *Barkhuizen* 337E.

²⁷⁰ *Barkhuizen* 338B-C.

²⁷¹ *Barkhuizen* 338E-F.

²⁷² *Barkhuizen* 339E.

such a case, will be whether the contract contains a time-limitation clause that affords a contracting party an adequate and fair opportunity to have disputes arising from the contract resolved by a court of law.²⁷³

The next aspect which was dealt with by the court was how one has to determine fairness. In determining fairness he stated that two questions needed to be answered. Firstly, whether the clause itself is unreasonable, and secondly, if it is reasonable, whether it should be enforced in the light of the circumstances²⁷⁴ that prevented compliance with the time limitation clause.²⁷⁵ What this means practically is, if it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that in the circumstances there was good reason why he/she failed to comply.²⁷⁶

The judge endorsed the principle that unequal bargaining power is a factor, which together with other factors, plays a role in the consideration of public policy.²⁷⁷ That the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy.²⁷⁸ Therefore in his determination of whether clause 5.2.5 was so manifestly unreasonable that it offended public policy he found that the following should be considered:

- (a) The contract between the parties is relevant;
- (b) The reasonableness or otherwise of the period allowed by the clause must be assessed by reference to the circumstances²⁷⁹ of the parties²⁸⁰;

²⁷³ *Barkhuizen* 340G-H.

²⁷⁴ This would entail an inquiry into the circumstances that prevented compliance with the time clause.

²⁷⁵ *Barkhuizen* 341A.

²⁷⁶ *Barkhuizen* 341 E-F.

²⁷⁷ *Barkhuizen* 341G-H.

²⁷⁸ *Barkhuizen* 341H-I.

²⁷⁹ *Barkhuizen* 342I.

²⁸⁰ *Barkhuizen* 343A.

- (c) Bargaining power relevant in determining fairness and that in this country many people conclude contracts without bargaining power and with no understanding of what they are agreeing to.²⁸¹

However, in this case, the court could only consider the evidence presented to it²⁸² and there was no admissible evidence that the contract was not freely entered into, bargaining power an issue, that clause not brought to the attention,²⁸³ therefore no indications that he was not aware of the time-limitations.²⁸⁴

²⁸¹ *Barkhuizen* 343C.

²⁸² *Barkhuizen* 343C-D.

²⁸³ *Barkhuizen* 343D.

²⁸⁴ *Barkhuizen* 343E.

6.3 *Bredenkamp and others v Standard Bank of South Africa*

*Bredenkamp and others v Standard Bank of South Africa*²⁸⁵ the appellants sought relief against the bank's enforcement of its right to cancel their accounts on the basis that such cancellation was unfair and invalid for being unconstitutional.²⁸⁶ The accounts were closed by the bank after it became aware that the United States Department of Treasury's Office of Foreign Assets Control listed Mr Bredenkamp, the first appellant, as a "specifically designated national" because of his alleged ties to the Zimbabwean Mugabe regime.²⁸⁷ The appellants had succeeded in obtaining interim interdicts preventing the bank from closing the accounts in the absence of good cause shown.²⁸⁸ This was obtained even though it was an express term of the underlying agreements that they could be cancelled with reasonable notice.²⁸⁹

In this case the court was of the opinion that the view that recent case law revived *exceptio doli generalis* was incorrect.²⁹⁰ That *Barkhuizen*²⁹¹ confirmed that our common law always recognised the right of the aggrieved person to seek the assistance of a court of law, and that a term in a contract which deprived a party of this right, was contrary to public policy.²⁹² Further, that *Barkhuizen*²⁹³ also confirmed that a contractual term which only limited a constitutional right, as opposed to one which deprived someone of it, was not necessarily contrary to public policy, but would be so if it were unreasonable and unfair.²⁹⁴

²⁸⁵ *Bredenkamp and others v Standard Bank of South Africa* 2010 (4) SA 468 (SCA).

²⁸⁶ *Bredenkamp and others* 468H-I.

²⁸⁷ *Bredenkamp and others* 468F.

²⁸⁸ *Bredenkamp and others* 468G-H.

²⁸⁹ *Bredenkamp and others* 468H.

²⁹⁰ *Bredenkamp and others* 469E.

²⁹¹ *Supra* fn 247.

²⁹² *Bredenkamp and others* 469F.

²⁹³ *Supra* fn 247.

²⁹⁴ *Bredenkamp and others* 469F.

That *Barkhuizen*²⁹⁵ did not hold that the enforcement of valid contractual terms had to be fair and reasonable even if no public policy considerations found in the Constitution, or elsewhere, were implicated, nor were there any indications in²⁹⁶ the minority judgments of an overarching requirement of fairness.²⁹⁷ That it was difficult to see how it could be fair to have an obligation imposed on a bank that a client was to be retained simply because other banks were not likely to accept that entity as a client. There was no constitutional niche or other public policy considerations justifying such a demand.²⁹⁸ That the submission, that the bank's decision to close the accounts was procedurally and substantially unfair, was without basis.²⁹⁹ That it was not for a court to assess whether or not a bona fide business decision, which on the face of it was reasonable and rational, was objectively wrong where, in the circumstances, no public policy considerations were involved. The appeal was dismissed.³⁰⁰

Based on the case law and the decisions that were made by courts during the aftermath of the *Bank of Lisbon and South Africa*³⁰¹ case, it becomes clear that courts started leaning towards the principles of good faith and public policy in addressing matters that concerned unfair and/or unconscionable contracts. An argument was put forth in Hutchinson,³⁰² "that good faith could better serve as a counterweight, in the scales of public policy, to the dominant principle of individual autonomy than the rather unsophisticated notion of 'simple justice between man and man'".³⁰³

It was further put forth that based on the reasoning above "public interest in freedom and sanctity of contract therefore needed to be balanced against the public interest in the preservation of good faith in

²⁹⁵ *Supra* fn 247.

²⁹⁶ *Bredenkamp and others* 469I.

²⁹⁷ *Bredenkamp and others* 469I-J.

²⁹⁸ *Bredenkamp and others* 470A.

²⁹⁹ *Bredenkamp and others* 470A-B.

³⁰⁰ *Bredenkamp and others* 470D.

³⁰¹ *Supra* fn 3.

³⁰² Hutchinson 29.

³⁰³ *Ibid.*

contractual relations. The unreasonable and one-sided promotion of one's own interest at the expense of another might in extreme cases infringe the principle of good faith to such a degree as to outweigh the public interest in the strict enforcement of contracts."³⁰⁴ Essentially towards the end we see the courts turn to public policy in order to seek support for an equitable approach.³⁰⁵

³⁰⁴ Hutchinson 29.

³⁰⁵ Domanski 166.

CHAPTER 7

The Consumer Protection Act

Legislation to protect consumers against unfair contract terms has long been overdue in South Africa³⁰⁶ and the Consumer protection Act can be seen as the big step forward in giving a voice to South African consumers. The Act has been labelled as “one of the best consumer protection acts on the continent”³⁰⁷ and is the first piece of legislation that contains over-arching, comprehensive set of consumer protection rules and principles in South Africa.

The Act was signed on 24 April 2009³⁰⁸ and came into operation incrementally.³⁰⁹ The early effective date was April 2010³¹⁰ and the general effective date was 31 March 2011.³¹¹ The Act repealed and replaced the country’s outdated and fragmented consumer protection laws with one single consolidated statute.³¹²

The Act lessens the imbalance between contracting parties, which historically was brought about by the Industrial Revolution, where bargaining powers between individuals and corporations became very unequal.³¹³ The Act, tries to achieve this by, entrenching a “quasi-Bill of Rights” for consumers and then further sets out detailed provisions to achieve each of these. Though these rights have existed in the

³⁰⁶ Naude T “The consumer’s right to fair, reasonable and just terms under the new consumer protection act in comparative perspective” (2009) SALJ (vol 126 Part 3) 505.

³⁰⁷ Melville NJ “The Consumer Protection Act Made Easy” (2010) Preface xiiiib.

³⁰⁸ The Department of Trade and Industry “Consumer Protect Act: your guide to consumer rights and how to protect them” <http://www.dti.gov.za> (21/12/2011) 4.

³⁰⁹ Dinnie D “Exposure to consumer court under the Consumer Protection Act – more litigation for the medical industry” (December 2009) SAJBL (vol 2 No 2) 43.

³¹⁰ The Department of Trade and Industry 5.

³¹¹ *Ibid.*

³¹² Gouws M “A Consumer’s Right to Disclosure and Information: Comments on the plain language provisions of the Consumer Protection Act” (2010) SA *Merc LJ* 79.

³¹³ Melville 27.

past they have never been properly enforced due to limited redress and weak enforcement capacity, and a codification of the common law.³¹⁴

7.1 The Act: bringing the *exceptio doli generalis* back from the grave

It is my opinion and I submit that the Act has brought the *exceptio doli generalis* back from the grave! It appears that the drafters of this piece of legislation went through the history of South African case law and drafted this Act based on every scenario where the *exceptio doli generalis* was raised as a defence. It appears as though they considered every “problem” and concern raised by the legal fraternity when it came to the application and abolishment of the *exceptio doli generalis* as well as every suggestion made by the courts and tried to address same by the enactment of certain clauses/provisions in this Act. This is evident from the clauses in the Act that are particularly focused on the protection of consumers against unconscionable, unjust and other deceptive and misleading trade practices.

The main purpose and aim of the Act is to promote fair business practices and to protect consumers from unconscionable, unjust and other improper trade practices and deceptive, misleading, unfair or fraudulent conduct.³¹⁵ This was due to situation getting to such a point that in 1996 the South African Law Commission published a report recommending the introduction of legislation that would allow the courts to review unfair contract terms.³¹⁶

The introduction of this legislation will alter the way in which courts approach contractual disputes fundamentally as the Act has substantial sections dealing with unlawful agreements and provisions.³¹⁷ Legislation to protect consumers against unfair contract terms has long been overdue in South Africa. The inclusion of provisions on unfair contract terms in the Act should therefore be welcomed³¹⁸ as it is the legislation that had been long yearned for in South African law.

³¹⁴ Maphosa J “Manufacturers and Suppliers Beware” (June 2009) *Without Prejudice* 36.

³¹⁵ Woker T “Why the need for consumer protection legislation: A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act.” (2010) *Obiter* 217 at 224.

³¹⁶ Woker 228.

³¹⁷ *Ibid.*

³¹⁸ Naude 505.

In support of my opinion that the *exceptio doli generalis* is back from the grave, I will focus on the right to disclosure of information,³¹⁹ the right to fair and honest dealing,³²⁰ and the right to fair just and reasonable terms and conditions.³²¹

7.2 The right to disclosure of information: the right to information in a plain and understandable language

Section 22 applies to all consumers³²² and elevates the plain language requirement to a fundamental consumer right.³²³ The Act provides that this requirement of plain and understandable language applies to any notice, document or visual representation that a supplier is required to produce or provide.³²⁴ They should be in a form prescribed by the Act, if no form is prescribed then must be in plain language.³²⁵

In this section, the Act seeks to ensure that consumers understand the terms and conditions of the transactions or agreements that they enter into and that they are able to make informed choices about the products and/or services they consume.³²⁶ After all, if one party in a relationship cannot understand what he or she is agreeing to, that person is disempowered. For a truly balanced relationship, both parties need to have equal access to understanding their relationship and how their relationship is to be governed.³²⁷

³¹⁹ Part D s22 of the Act.

³²⁰ Part F s40 of the Act.

³²¹ Part G s48-52 of the Act.

³²² Jacobs W, Stoop P and Van Niekerk R "Fundamental consumer rights under the Consumer Protection Act 68 of 2008: a critical overview and analysis" (2010) *PELJ* 329 at 330.

³²³ Gouws 85 - this is confirmed by the use of the word "right" in the heading of s22.

³²⁴ Melville 42 and s22(1) of the Act.

³²⁵ Jacobs, Stoop and Van Niekerk 330.

³²⁶ Gouws 85 and s22(1) of the Act.

³²⁷ Melville 157.

Consumers need to understand not only the content or what the document states, but also its relevance and importance, namely why the document is significant to them and how the document applies to them. Consumers need to understand how the contract binds them and the consequences of breaching it, “without undue effort”.³²⁸

This right, in my opinion, is one of the ways in which the Act has codified and/or brought the *exceptio doli* back from the grave. The *exceptio* has been described as “a general equitable defence applied by Romans to effect and ensure simple justice between the parties”. What this provision does is equal the bargaining power between parties and ensure fairness and equity when agreements are entered into and when decisions are being made.

Historically, when agreements were entered into without one of the parties thereto fully understanding the terms and conditions thereof as well as the implications and consequences of non-compliance therewith, the aggrieved party could raise the defence of “bad faith” on the part of the other party at the time of the conclusion of the agreement. This right has the effect of “forcing” parties to agreements, especially the party in a stronger position, to act in good faith and in accordance with what public policy demands, and will now ensure that the parties understand exactly what it is that they are agreeing to as well as the implications thereof.

7.3 The right to fair and honest dealing: unconscionable conduct

It could be said that, in the legal fraternity it is common cause that if one thinks “unconscionable conduct” the immediate next thought is the *exceptio doli generalis* and vice versa. This is purely due to the fact that historically the *exceptio* as a defence has always been applied to circumstances where the enforcement of the plaintiff’s or one of the litigant’s remedies “would cause some great inequity and amount to unconscionable conduct”. In fact the minimum requirement for the application of the *exceptio doli generalis* was “unconscionable conduct”.

The *exceptio* as a defence served to preclude the reliance on a contractual term in circumstances where it would be unconscionable to do so, taking into account events that occurred after the conclusion of the contract or the subsequent conduct of one of the parties. Where the difficulty arose or

³²⁸ Melville 162.

rather the uncertainty prevailed, was in determining what behaviour or conduct could be viewed as “unconscionable conduct” as well as the exact and precise limit and scope of the *exceptio*’s application.

By the enactment of section 40, the Act has not only brought the *exceptio* back from the grave but it has also gone a step further and recognised and defined the exact principle and/or conduct that this defence was “tailor-made’ to apply to. The Act has also now given guidance and clarity regarding behaviour or conduct that should be considered when determining “unconscionable conduct”.³²⁹

The Act defines unconscionable conduct as “conduct having a character contemplated in section 40; or conduct that is otherwise unethical or improper to a degree that would shock the conscience of a reasonable person.”³³⁰ It also regulates unconscionable conduct, by clearly and concisely setting out what “suppliers” are not allowed to do in certain circumstances. In terms of the provisions of this section, suppliers are not allowed to use physical force, coercion, undue influence, pressure, harassment, unfair tactics or any other similar conduct when marketing, supplying or recovering goods from consumers, or when collecting payments for goods or services. This applies specifically when negotiating, concluding, executing or enforcing agreements to supply goods and services.³³¹

The Act has also introduced section 40(2). This provision expands on the ambit of “unconscionable conduct” by stating that it is also unconscionable for suppliers to knowingly take advantage because a consumer was not in a position to protect their own interests due to a physical or mental disability, illiteracy, ignorance, inability to understand the language on any similar factor.³³² By doing this it affords the consumer even further protection and ties in with the provisions of section 22 relating to the right of the consumer to plain and understandable language.

³²⁹ Jacobs, Stoop and Van Niekerk 346.

³³⁰ Part A of the Act under “Definitions”.

³³¹ s40(1) of the Act.

³³² s40(2) of the Act. Also Jacobs, Stoop and Van Niekerk 347.

7.4 The right to fair, just and reasonable terms and conditions

The principle of *pacta sunt servanda* forms the basis of South African contract law.³³³ The reason for this was purely based on the principles or understanding, that if the parties have come to an agreement then the law would enforce that agreement. However, abuses arose as a result of this principle and the very unequal bargaining power that exists in most transactions.

To remedy these abuses the Act, more specifically sections 48 to 52, deals with unfair contract terms and also make provision for a court to strike out unfair contract terms.³³⁴ The Act, as a result of these provisions, now limits the terms and conditions that can be included in an agreement and it also requires that the consumers be aware of certain aspects, when entering into an agreement so that they can apply their minds.³³⁵

7.4.1 Unfair, unreasonable or unjust contract terms

Section 48 contains the general prohibition against unfair, unreasonable or unjust terms.³³⁶ It aims to provide for control of the content of contract terms, whether already incorporated into a specific transaction or merely put on offer for general use by the supplier.³³⁷ It attempts to cover every possible base, by not only prohibiting the inclusion of unfair terms in agreements, but also prohibits the suppliers from supplying, offering to supply or enter into an agreement to supply goods or services on terms that are unfair, unreasonable or unjust.³³⁸ A supplier is not allowed to market any goods or services, or negotiate, or administer or enter into a transaction or agreement for the supply of goods or services in a manner that is unfair, unjust or unreasonable.³³⁹

³³³Jacobs, Stoop and Van Niekerk 353.

³³⁴ Naude 507.

³³⁵ Melville 76.

³³⁶Naude 514.

³³⁷ *Ibid.*

³³⁸ s48(1)(a) of the Act. See also Jacobs, Stoop and Van Niekerk 355.

³³⁹ s48(1)(b) of the Act. See also Jacobs, Stoop and Van Niekerk 355.

It has been usual practice for contracts to contain clauses³⁴⁰ in which the consumer agreed to waive the rights and protections provided by the law or to absolve the other party from liability for losses that it might otherwise be liable for.

The practice of using such clauses has now been curtailed as in terms of the Act. A supplier must not require a consumer or a person to whom goods or services are supplied at the consumer's direction 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 terms as a condition of entering into a transaction.³⁴¹

In terms of section 42(2)(a) to (d), a transaction, agreement, term or condition or notice will be regarded as unfair, unreasonable or unjust if:

- (a) it is excessively one-sided in favour of any person other than a consumer;³⁴²
- (b) the terms of the transaction or agreement are so adverse to the consumer as to render them inequitable (not equally fair to both parties/unbalanced);³⁴³
- (c) a consumer relied to his/her detriment on a false, misleading or deceptive representation (of the type listed in s41),³⁴⁴ or a statement of opinion provided on or behalf of a supplier;³⁴⁵
- (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer regarding the assumption of risk dealt with by s49(1), and the term, condition or notice itself is unfair, unreasonable, unjust or unconscionable or the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer,³⁴⁶ as required by s49(1).³⁴⁷

³⁴⁰ Melville 78 - these clauses are referred to waiver and exemption clauses.

³⁴¹ s48(1) (c) of the Act. See also Jacobs, Stoop and Van Niekerk 355.

³⁴² s42(2)(a) of the Act. See also Jacobs, Stoop and Van Niekerk 355.

³⁴³ s42(2)(b) of the Act. See also Melville 79.

³⁴⁴ Refer to s41 of the Act. See also Melville 79.

³⁴⁵ s42(2)(c) of the Act. See also Jacobs, Stoop and Van Niekerk 355.

³⁴⁶ Melville 79.

The *exceptio doli generalis*, due to its wide scope and discretionary application, provided a remedy against the enforcement of unfair contracts. Although it did not apply to alter contractual terms it also did not allow parties to rely on a term that was unjust, unfair and where the enforcement thereof would amount to and result in unconscionable conduct.

We have seen from case law that the *exceptio* was relied upon when parties used contract terms for purposes never intended or where the terms were totally one-sided and unfair. However, it is also clear from case law that courts had no hard and fast rule when it came to the application of the *exceptio* to these types of circumstances. In most cases the judges, due to the uncertainty, exercised their discretion in making the determination on whether or not to apply the *exceptio* to the facts of the case before them.

As a result of the uncertainty, we saw cases with almost identical facts being decided in completely different ways. An obvious example would be the *Bank of Lisbon and South Africa*³⁴⁸ case where the *exceptio* was abolished versus the *Rand Bank*³⁴⁹ case where the court was of the opinion that the facts of the case were ideal for the application of the *exceptio doli generalis*.

After the *Bank of Lisbon and South Africa*³⁵⁰ case and the abolishment of the *exceptio doli generalis*, judges were even more careful in exercising their discretion as some of them understood this decision to mean that courts had no inherent equitable jurisdiction.

The drafters of this section of the Act, clearly paid attention to Hawthorne, when he stated “it is necessary for good faith to be given concrete content in its application both to particular instances and to the operation of contract”. As a result, in this specific right, we see the *exceptio* revived by virtue of a right granted to protect consumers from the same conduct and behaviour that the defence was applied to in the past.

³⁴⁷ s42(2)(d) of the Act. See also Jacobs, Stoop and Van Niekerk 355.

³⁴⁸ *Supra* fn 3.

³⁴⁹ *Supra* fn 116.

³⁵⁰ *Supra* fn 3.

7.4.2 Notice required for certain terms and conditions

Section 49(1) imposes a new obligation upon suppliers, namely, to draw to the attention of consumers any clause in the agreement that purports to:³⁵¹

- (a) Limit in any way the risk or liability of the supplier;³⁵²
- (b) Constitute an assumption (acceptance) of risk or liability by the consumer;³⁵³
- (c) Impose an obligation on the consumer to indemnify (relieve of liability) the supplier;³⁵⁴
- (d) Be an acknowledgement of any fact by the consumer (such as that they have received something or been informed of something).³⁵⁵

Section 49 purports to set down formal requirements for incorporation of certain types of terms, such as the requirement that certain types of terms must be signed or initialled or the consumer must have otherwise acted in a manner consistent with acknowledgement of such terms.³⁵⁶ What this section does is to prevent consumers from entering into an agreement that contains provisions that could affect their rights or that could be unexpected, should the consumer not be aware of its existence.³⁵⁷ Therefore, should an agreement contain specific terms and conditions set out in section 49(1), they must be brought to the attention of the consumer in the prescribed form and manner as set out in section 49(3)

³⁵¹ Melville 76.

³⁵² s49(1)(a) of the Act.

³⁵³ s49(1)(b) of the Act.

³⁵⁴ s49(1)(c) of the Act.

³⁵⁵ s49(1)(d) of the Act.

³⁵⁶ S 49(2) of the Act. See also Naude 507.

³⁵⁷ Jacobs, Stoop and Van Niekerk 357.

and (5) of the Act.³⁵⁸ The consumer must be given an adequate opportunity to receive and comprehend the term.³⁵⁹

This is another measure of protection provided by the Act to the consumer and once again ensures that the consumer is fully aware and understands what they are agreeing to when they enter into any type of agreement.

7.4.3 Powers of the court to ensure fair and just conduct, terms and conditions

This section is of utmost importance and so relevant for the purposes of this Act being a success and achieving its aims and purposes. This section strengthens the viewpoint that this Act has resuscitated the abolished *exceptio doli generalis* and as gone even further and codified it in the form of rights and obligations imposed on certain parties when entering into agreements. Not only does the Act codify the defence, that for years has been applied in our law before the *Bank of Lisbon and South Africa*³⁶⁰ case or after under the guise of good faith and public policy but it also provides a clear process for courts to follow when faced with unconscionable conduct, unfair contract terms and unjust behaviour as a whole.

Section 52 bestows powers on courts in cases involving unfair contract terms³⁶¹ and in respect of unconscionable conduct. This section not only applied to section 48, unfair contract terms but also to contravenes of section 40, on “unconscionable” conduct, and section 41 which deals with misrepresentations.³⁶²

Essentially, section 52 grants courts the power to declare agreements, in whole or in part, unfair or unconscionable.³⁶³ A court may also make any further order it considers just and reasonable, including, but not limited to, an order to restore money or property to the consumer, to compensate the consumer for losses or expenses and requiring the supplier to cease any practice or alter any practice, form or

³⁵⁸ *Ibid.*

³⁵⁹ S49(5) of the Act.

³⁶⁰ *Supra* fn 3.

³⁶¹ s52(1)(a) of the Act.

³⁶² s51(1) of the Act. See also Naude 524

³⁶³ s52(3)(a) of the Act. See also Jacobs, Stoop and Van Niekerk 360.

document to avoid repetition of the supplier's conduct.³⁶⁴ However, all of these orders may only be made if the Act "does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability".³⁶⁵

In terms of this section, the court has the power to declare a transaction, wholly or partly, unconscionable, unjust, unreasonable or unfair, or to make any reasonable or just order in the circumstances, including an order to compensate the consumer for losses or expenses relating to the transaction or the proceedings of the court, to restore money or property to the consumer, or to require the supplier to cease or alter any practice, form or document in order to prevent repetition of that conduct.³⁶⁶

If an agreement, notice or terms are void in terms of the Act, or the requirement of written notice in terms of section 49 was not satisfied, the court may declare the agreement, notice or terms void and sever the relevant part to render it lawful or declare the entire agreement, provision or notice *ab initio* void, or if the section 49 requirements were not satisfied, the court may sever the relevant part from the rest or declare it to have no force or effect in respect of the transaction.³⁶⁷

Section 52(4) provides that if a term or notice failed to satisfy the requirements of section 49, the court may make an order severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction. The court may also make any further order that is just and reasonable in the circumstances.³⁶⁸

³⁶⁴ s52(3)(b) of the Act. See also Naude 525.

³⁶⁵ s52(1)(b) of the Act. See also Naude 525.

³⁶⁶ s52(3)(a)–(b) of the Act. See also Jacobs, Stoop and Van Niekerk 360.

³⁶⁷ s52(4)(a) of the Act. See also Jacobs, Stoop and Van Niekerk 360.

³⁶⁸ s52(4)(b) of the Act. See also Naude 509.

CHAPTER 8

Conclusion

The common law of contract is premised on the basis that there must be a meeting of the minds between two parties before there can be a legally binding agreement. This suggests that the parties negotiate every term contained in the contract.³⁶⁹ However, in practice what occurred was that consumers were presented with standard-form contracts, which are signed by consumers without them reading and even most times understanding the legal nature and implications of the agreements. These contracts usually were several pages long and contain small print which consumers have found difficult to prove that they are not bound by the terms.³⁷⁰ Consumers were also influenced and manipulated into agreements they did not necessarily want or understand, by the unacceptable conduct of the other contract party. The way in which some agreements are concluded, is often contrary to public interest.

The *exceptio doli generalis* is a defence of bad faith in the general form and it constitutes a substantive defence based on the sense of justice of the community and therefore closely related to the defence based on public policy. The minimum requirement for the application of the *exceptio doli* would be if the enforcement of its rights by one of the litigants would amount to unconscionable conduct on his part and cause some great inequity and was used by parties as a defence when they found themselves faced with an unfair contract or an unconscionable term.

When the *exceptio* was abolished in the *Bank of Lisbon and South Africa Ltd*³⁷¹ case, South African courts adapted and through case law attempted to adapt the concept of good faith to fulfil the function of the *exceptio*, since good faith has been the foundation upon which the *exceptio* was built. Good faith forms an element of the umbrella concept of public policy, and therefore it was found that it should be applied to all contracts yet only as public policy demands it. Towards the end of our journey through the case law we see that over time public policy was turned to in order to seek support for an equitable approach.

³⁶⁹ Woker 227.

³⁷⁰ *Ibid.*

³⁷¹ *Supra* fn 3.

The courts have held that people who sign documents are agreeing to whatever words appear above their signatures and it is only in instances where it can be proved that the signatory was misled by the supplier that the offending terms will not apply.³⁷² Courts have been found to condemn contracts that are contrary to public policy by virtue of them being totally one sided and prejudicial and offensive, however, the Supreme Court of Appeal has stated that the Courts power to interfere with contracts in this manner should be “exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest”.³⁷³

South Africa has a long history of law moving from not accepting any limitation of freedom of contract to the Act that regulates law regarding fair, just and reasonable contract terms. As shown in the above chapters, there has been a progression in the development of measures addressing contractual terms which appear to have culminated in the enacted of the Act. The Act in my opinion is a codification and recognition of all principles, points and concerns that have been raised and stated by courts over the years when faced with unfair or unconscionable contracts.

The Act addresses issues such as plain and understandable language which can be used as a mechanism to ensure that consumers are aware and understand the content and implications of the contracts that they are entering into. It also goes one step further and defines the concept which the courts have struggled with for years, namely, unconscionable conduct. By doing this, the Act had clarified the concept and enables the parties to an agreement to understand what it entails and protect themselves from being victims of such conduct.

Chapter 2 Part G contains measures dealing with unfair, unreasonable and unjust terms and conditions. However, the most important is that the Act has bestowed power on courts in cases involving unfair contract terms and unconscionable conduct to declare transactions wholly or partly unconscionable, unjust, unreasonable or unfair and to make reasonable or just orders in the circumstances. This is a massive step as in the past courts were hesitant to interfere with the principle of “*pacta sunt servanda*” and are now given the authority to do so in cases provided for by the Act.

³⁷² *Supra* fn 346.

³⁷³ *Woker* 228.

By the enactment of sections 22, 40, 48 and 49 the legislature has determined that it is the manner in which the parties to an agreement conduct themselves prior and during the entering into of the agreement that will afford the consumer the right to avoid a contractual claim. It has done this by providing the consumer with a “*quasi* bill of rights”, which protects the consumer against unconscionable conduct, the definition of which is so broad that it includes inducing a party to enter into an agreement on unfair, unreasonable and unjust terms.

It places a burden on the supplier to conduct themselves in a manner that is in line with the provisions as set out in the Act. It also further ensures that consumers, who were previously duped and kept in the dark when entering into agreements, now have a clear set of rights that they can rely upon when faced with conduct that the Act regards as unconscionable.

This Act has brought *exceptio* back from the grave and has taken cognisance of issues raised by courts and consumers over the years with regard to the *exceptio doli generalis* and appears to have codified it in a single piece of legislation.

CHAPTER 9

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