

**Does the Consumer Protection Act 68 of 2008 have the effect of
reviving the abolished *exceptio doli generalis*?**

by

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Summary

The question to which this study will attempt to find a satisfactory answer, is whether the new Consumer Protection Act 68 of 2008 (CPA) has revived the abolished *exceptio doli generalis*. The *exceptio doli* was introduced in about 66 BC by the praetor Gaius Aquilius Gallus. An *exceptio* was a legal defence to a claim. The *exceptio doli* required the judge to take account of the fraud of which the plaintiff had been guilty of at the time of concluding the transaction, or of the *dolus* of which the plaintiff was guilty in actually instituting the action.

It appears that the provisions of sections 40, 41 and 48 of the CPA reaffirm the existence of the *exceptio doli generalis* in the South African law of contract, since these provisions provide the same function and outcome that defence did. The section that speaks to the heart of the *exceptio doli generalis*, is section 40(1) which provides that a supplier or an agent of the supplier must not use physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with the supply of services to a consumer and also in the negotiation, conclusion, execution or enforcement of an agreement.

Section 52 of the Act deals with contraventions of sections 40, 41 and 48 of the Act. It grants the ordinary courts the power to declare agreements, in whole or in part, unfair or unconscionable. That only the ordinary courts would have jurisdiction in respect of unfair contract terms, is not stated unequivocally, but is implicit in the absence of any reference to the NCT or provincial consumer courts in section 52. It is a well-known fact that the costs, risks and effort of court action are just too high for ordinary consumers, including middle class consumers. For this reason it is unlikely that this legislation in its current form will have a real impact on the eradication of unfair contract enforcement. What is suggested, is an amendment to section 52 in order to bestow jurisdiction on the NCT and the consumer courts as well may also make any further order it considers just and

As an alternative to the amendment of section 52, it is submitted that the legislature should create a statutory rule, because it seems that the *exceptio doli generalis* as well as the CPA are not up to the task. What is suggested, is legislation that deals specifically and exclusively with unreasonableness, unconscionableness and oppressiveness in contracts or terms of contract. The enactment of legislation dealing specifically with the problems previously dealt with by applying the *exceptio doli generalis*, will ensure that legal certainty is created as to the availability of a remedy in circumstances where the enforcement of a contract is unfair. This is in accordance with the proposal made by the South African Law Commission's Project 47.

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Chapter 1

The current status of the *exceptio doli generalis* in the South African law of contract

1.1 Introduction

The question to which this study will attempt to find a satisfactory answer, is whether the new Consumer Protection Act 68 of 2008 has revived the abolished *exceptio doli generalis*. The history and the application of the *exceptio doli generalis*, with reference to relevant case law, will be explained.¹ The provisions of the Consumer Protection Act, specifically those provisions that might lead to a revival of the *exceptio doli generalis* will then be examined.² Finally, the issue of whether the Consumer Protection Act is efficient in ensuring that consumers are protected against the enforcement of contracts in circumstances that are unfair, will be discussed.³

1.2 The *exceptio doli generalis*

1.2.1 Background

The reason for the introduction of the *exceptio doli* in early Roman law will be examined briefly.⁴ The *exceptio doli* was introduced in about 66 BC by the praetor Gaius Aquilius Gallus.⁵ An *exceptio* was a legal defence to a claim. The *exceptio doli* required the judge to take account of the fraud of which the plaintiff had been guilty of at the time of concluding the transaction, or of the *dolus* of which the plaintiff was guilty in actually instituting the action.⁶ The plaintiff would be guilty of *dolus* in this second sense if his suit was inconsistent with good faith; wherever, in other words, the very act of commencing a suit constitutes a deliberate violation of the requirements of *bona fides*.⁷ The introduction of the *exceptio doli* effectively changed the nature of the Roman law of contract, for it made possible the pleading of any factor, which might have vitiated the consent of one of the parties.⁸ The overall effect was to shift the emphasis from formalism to consensus, which constitutes the backbone of the modern approach to

¹ Chap 1.

² Chaps 2 and 3.

³ Chaps 4 and 5.

⁴ Lewis C “The Demise of the *exceptio doli generalis*: is there another route to contractual equity?” (1990) 107 SALJ p 31-33.

⁵ Digest 4.3.1.1.

⁶ *Dolus*: evil intent, embracing both malice and fraud.

⁷ *Sohm's Institutes of Roman Law* op cit note 17 at 280.

⁸ See fn 4, p 32.

contract. When the formulary system of procedure was replaced by *cognitio extraordinaria* in the fourth century AD, the formalities to pleading and parts of the formula, including the *exceptio* fell away.⁹ The situations covered by the *exceptio doli* are for the most part catered for in modern law by specific remedies and defences: the actions for misrepresentation, rectification and mistake, and the defence of estoppel.¹⁰ Although these are all designed to ensure that justice is done, there yet remains one type of situation in which the *exceptio doli* has been expressly invoked – the use of a contract for a purpose not intended by the parties.

1.2.2 Application and scope with reference to case law

1.2.2.1 Introduction

The most important situation where the *exceptio doli* was applied, was where the defendant tried to enforce a right for a purpose that was never contemplated by either of the parties at the time of conclusion of the contract. In *Bank of Lisbon and South Africa Ltd v De Ornelas and another*¹¹ the question arose whether the *exceptio doli* could be used to reach a fair decision. The majority of the Appellate Division decided that the *exceptio doli* was never part of the Roman-Dutch law and therefore could not be a part of South African law. Joubert JA stated the following:

“All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as superfluous, defunct anachronism. *Requiescat in pace.*”¹²

Jansen JA delivered an important minority judgment in which he took an opposite view than the rest of his fellow judges. He held that the abolishment of the *exceptio doli* would leave a vacuum in our law.¹³ Before the details of the *Bank of Lisbon* case are examined in this chapter, four cases that were heard by the Appellate Division prior to *Bank of Lisbon*, where the *exceptio doli generalis* was applied and accepted as a part of South African law, will be summarised briefly.

1.2.2.2 *Weinerlein v Goch Buildings Ltd*¹⁴

In the *Weinerlein v Goch Buildings Ltd* the Appellate Division had cause to consider the nature and scope of the *exceptio doli*. The court had to decide whether or not a contract of

⁹ Codex 2.57.1.

¹⁰ See *Weinerlein v Goch Buildings Ltd* 1925 AD 282, especially at 292; *Zuurbekom Estates Ltd v Union Corporation* 1947 (1) SA 514 at 534-5; *Von Ziegler & another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 409; and *CFC van der Walt* in (1986) 103 SALJ 646 at 652.

¹¹ 1988 (3) SA 580 (A).

¹² *Bank of Lisbon* p 605.

¹³ 1988 (3) SA p 616.

¹⁴ 1925 AD 282.

sale of land, which was required by statute to be in writing, could be rectified to correctly reflect the prior oral agreement of sale between the parties. Wessels JA declared :

“In order to succeed in this *exceptio doli* the excipient need not prove actual fraud; the exception lies whenever the court regards it as a fraudulent act to rely on your *summum jus* when you know full well that your claim is founded on mutual error...”¹⁵

According to Wessels JA it was therefore clear that under the civil law the courts refused to allow a person to make an unconscionable claim even though a strict reading of the law might support his claim. This inherent equitable jurisdiction of the Roman courts (and of our courts) 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, dates back to antiquity and is embodied in the maxim *summum jus ab aequitate dissidens jus non est*.¹⁶

1.2.2.3 *Zuurbekom Ltd v Union Corporation Ltd*¹⁷

In 1947, in the case of *Zuurbekom Ltd v Union Corporation Ltd*, the Appellate Division once again considered the nature and scope of the *exceptio doli generalis*. The respondent sold the appellant a part of farm Z, reserving for itself mineral rights on the farm. Without informing the respondent, the appellant later laid out a portion of the farm as agricultural holdings. The holdings were subsequently sold by the appellant, despite the fact that the requisite ministerial permission for the sale had not been obtained. Thereafter the appellant applied for permission to divide up another part of the farm into agricultural holdings. The respondent objected to this in that it would cause serious harm to it, as a number of gold-bearing reefs lay under the area to be sub-divided. It obtained an interdict prohibiting the appellant from proceeding with the sub-division. On appeal the appellant argued that the respondent should have begun prospecting at an earlier date, when it had become reasonable to do so from the point of view of a reasonable mining man, or when it had realized that the appellant had wished to divide and sell the land. The appellant argued that because the respondent had known that it had applied for approval to sub-divide the farm in 1943 but had waited until 1946 to obtain the interdict, that it was on the basis of the *exception*, inequitable to allow the respondent to obtain the interdict because it had, by its delay, estopped itself from doing so. Tindall JA conceded that he was prepared to assume that something falling short of constituting an estoppel against the plaintiff may be embraced by the defence known as the *exceptio doli*.¹⁸ But even on that assumption it seemed that, before the plaintiff's delay can be a valid obstacle to his claim for an interdict, it must be shown 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 an unconscionable conduct on his part.¹⁹

¹⁵ Voet 44.4 4.D.44.4.2.5.

¹⁶ 1925 AD p. 292-293.

¹⁷ 1947 1 SA 514 (A).

¹⁸ 1947 1 SA p 527.

¹⁹ p 527.

1.2.2.4 *Paddock Motors (Pty) Ltd v Ingesund*²⁰

More recently, Miller J, in *Paddock Motors (Pty) Ltd v Ingesund*, attempted to interpret the principle in *Weinerlein's* case with more precision and clarity. The learned judge, after accepting counsel's contention that the *exceptio* could be used not only by a defendant but also by a plaintiff to deny his opponent the success that he, the opponent would otherwise have achieved through his unconscionable conduct, stated that for the *exceptio* to succeed it must be shown (i) that some great inequity would otherwise result, and (ii) that it is unconscionable for the defendant, in the particular circumstances of the case, to attempt to enforce his rights.²¹ The court found that it was difficult to conceive of circumstances in which it could be said that by doing no more than exercising his clear rights under a firm agreement, a party acted unconscionably. Different considerations might arise if such party was not only guilty of exercising his contractual rights but had by his conduct in relation to the contract or enforcement thereof created circumstances which rendered attempted enforcement by him in the face of such circumstances quite unscrupulous or unconscionable.²²

1.2.2.5 *Rand Bank Ltd v Rubenstein*²³

The defendant in this case had signed a deed of suretyship in favour of the bank, binding himself as surety and co-principle debtor for the obligations of Glen Anil Development Corporation Ltd to the bank. The suretyship was in broad terms with the surety undertaking liability for the "payment of each and every amount which the debtor presently owes the creditor or which the debtor may hereafter owe the creditor however such indebtedness may arise." The suretyship had been given as security for guarantee facilities made available by the bank in respect of the provision of township services to local authorities. Three years after the signing of the deed of suretyship the bank lent Glen Anil R10 000 000. Various arrangements were made to secure the loan, but no reference was ever made to the suretyship of the defendant. When Glen Anil was placed in liquidation, soon after the loan had been made, the bank sued the defendant for the payment of nearly R10 000 000 and interest, basing its claim on the deed of suretyship given in respect of the guarantee facilities. One of the defences raised, and the only one that was ultimately successful, was the *exceptio doli* – raised in this context because the plaintiff was attempting to enforce a right acquired for one purpose to achieve a totally different and un contemplated purpose.

The court took the view that the bank was indeed attempting to use the suretyship for a purpose that had not been intended, and that this conduct amounted to a clear exhibition of bad faith on its part. Accepting that the *exceptio doli* still existed as a defence in our law, Botha J said that the case appeared to be 'tailor-made for the application of the

²⁰ 1975 3 SA 294 (D).

²¹ p 297-298.

²² 1975 3 SA p 297-298.

²³ 1981 (2) SA 207 (W).

general defence of the *exceptio doli*, and upheld the defence, thereby absolving the surety from liability.²⁴

1.2.2.6 *Bank of Lisbon and South Africa Ltd v De Ornelas and another*²⁵

(i) The facts

The respondents were the joint managing directors of a fishing company. They approached the appellant for overdraft facilities which were duly granted and secured by deeds of suretyship and mortgage bonds, passed by the respondents over their respective dwellings. Subsequently, this overdraft limit was increased on two occasions on the additional security of a third mortgage bond and of a negotiable certificate of deposit furnished by first respondent. During 1985 the company discharged its entire indebtedness under the overdraft to the appellant and closed its account. It the return of the negotiable certificate of deposit and cancellation of the deed of suretyship and mortgage bonds from the appellant. The appellant's attitude, however, was that it would not return or cancel the securities it held pending the outcome of an action for damages it intended instituting against the company. It claimed that it had concluded a contract with the company for the forward purchase of dollars, that the company had unlawfully repudiated the contract, which was then cancelled by the appellant and who suffered damages as a result. The respondents then brought an application in the Provincial Division for an order against appellant that the securities in question be cancelled and/or returned. They contended that the company had discharged its principal indebtedness to the appellant and that the appellant's conduct in retaining these amounted to *dolus*. In their action the respondents relied on the *replicatio doli*. The appellant resisted the application, arguing that it was contractually entitled to retain the securities until the company had discharged its entire indebtedness to the appellant, which included a breach of the contract for the forward purchase of dollars. The court *a quo* upheld the application.

(ii) Judgment of the Appellate Division

Joubert JA in his majority judgment stated that the conclusion was inevitable: the *exceptio doli generalis* was never part of the Roman-Dutch law.²⁶ The appeal thus succeeded.

Jansen JA delivered a minority judgment in which he was driven to a different conclusion. It was his contention that to deny the *exceptio* right of place, would leave a vacuum in our law.²⁷ It was his opinion that the *exceptio doli generalis* constitutes a substantive defence, based on the sense of justice of the community. As such, it is closely

²⁴ At 214H.

²⁵ See fn 11.

²⁶ See fn 9 *supra*.

²⁷ See fn 10 *supra*.

related to the defences based on public policy (interest) or *boni mores*. He concluded these defences may overlap: to enforce a grossly unreasonable contract may in appropriate circumstances be considered as against public policy or *boni mores*.²⁸

He pointed out that the facts in this case present a number of salient features: the respondents were suppliants for an overdraft (or its increase) and they did not have equal bargaining power with the bank. The bank used a standard form contract containing standard terms and requested security far beyond its needs. The respondents never actually contemplated that the security would cover anything but the overdraft. These facts go beyond mere unreasonableness of the contract *per se*. It was Judge Jansen's view that it would offend the sense of justice of the community to allow the bank to use the strict wording of the documents to retain the securities after payment of the overdraft. He found support for this in the views expressed by Botha J in *Rand Bank Ltd v Rubenstein*²⁹ and that of the Judge *a quo* in the present matter. It was Judge Jansen's contention that he would have dismissed the appeal.

Thus, where our courts previously accepted the *exceptio doli generalis* as a part of South African law and tried to define the scope of this defence, the Appellate Division in the *De Ornelas* case decided that it was never part of Roman-Dutch law and therefore not a part of the South African law of contract. According to the majority of the court in this case, the *exceptio doli generalis* is dead and should be left to rest in peace.³⁰

1.2.2.7 *Van der Merwe v Meades*³¹

In this case the *replicatio doli* was reaffirmed.³² The facts in *Van der Merwe v Meades* were as follows. In about 1958 Mr. Human built a house on Erf 4169 in Kimberley in which he and his wife lived for about twenty years. After his death his widow sold it to a Mrs. Du Plooy. On 1 August 1983 Du Plooy sold it to the appellant for R180 000, occupation being taken on 23 March 1984. On 10 September 1986 the appellant sold it to the respondent for R220 000, the contract incorporating a standard voetstoots clause. The erf was transferred to the respondent on 6 February 1987, though the appellant continued to occupy the house until 31 March 1987. In May 1987 the respondent sued the appellant for R32 000, being the cost for repairing a latent defect in the roof. The court *a quo* gave judgment for the plaintiff, and the defendant appealed. It was common cause that there was a latent defect, that its repair cost R32 000, and that the respondent was not aware of the defect when he bought the erf. The questions in issue were (1) whether the appellant knew of the defect at the time of the sale, and (2) whether the appellant purposefully and fraudulently, alternatively negligently, concealed the existence of the defect from the

²⁸ 1988 3 SA p 617.

²⁹ See fn 23.

³⁰ Majority judgment: Joubert JA with Rabie ACJ, Hefer JA and Grosskopf JA concurring. Minority judgment: Jansen JA.

Glover G "Lazarus in the Constitutional Court: an exhumation of the *exceptio doli generalis*?" (2007) 124 SALJ 449.

³¹ 1991 (2) SA 1 (A).

³² Kerr AJ "The *replicatio doli* reaffirmed" (1990) 108 SALJ 583.

respondent. The appellant denied that he was aware of the existence of the defect at the time of the sale and pleaded that the provisions of the voetstoots clause excluded any responsibility on his part. After reviewing the evidence, Joubert ACJ found as follows:

“Die bewyslas is op Meades om aan te toon dat Van der Merwe ten tyde van die koop eerstens van die bestaan van die verborge gebrek bewus was en dit tweedens doelbewus verswyg het. Daar is geen aanvaarbare getuienis waarvan selfs die eerste afleiding gemaak kan word nie.”³³

As the onus of proof had not been discharged, the appeal was allowed. It was held that the buyer was not entitled to recover the cost of repairing the defect from the seller. Giving a summary of the position in Roman law, Joubert ACJ elaborated as follows:

“Waar ‘n koper nieteenstaande die aanwesigheid van ‘n voetstootsklousule die verkoper aanspreek met ‘n aediliese aksie of ‘n *actio empti* omdat die *merx* verborge gebreke het, dan kon die verkoper met die *exceptio pacti* hom op die voetstootsklousule beroep. Die koper kan dan repliseer met die *replicatio doli*, sodat hy dan moet bewys dat die verkoper ten tyde van die aangaan van die koop bewus was van die bestaan van die verborge gebreke maar hul bestaan opsetlik verswyg het met die oogmerk om die koper te mislei. Die koper moet dus bewys dat die verkoper *dolo malo* die verborge gebreke verswyg het. Slaag die koper daarin om dit te bewys dan kan die verkoper hom nie op die beskerming van die voetstootsklousule beroep nie.”³⁴

The importance of this notation is to point out that the Appellate Division regarded the *exceptio pacti* and *replicatio doli* as available in post-classical Roman law and in Roman-Dutch law and that the position in modern law was basically the same.

The conclusion that can be formulated at this stage, is that the *exceptio doli* and the *replicatio doli* are either both available in our law or neither is available. In *Bank of Lisbon* it was a *replicatio doli* that was at issue. Having discussed the *exceptio doli generalis* at length, Joubert JA stated that the conclusion to which he have come concerning the *exceptio doli generalis* in our modern law, holds equally for the *replicatio doli generalis*.³⁵

The linking of the *exceptio* and *replicatio* is correct. If, as appears to have been the view of the majority of the court in the *Bank of Lisbon* case, the *exceptio doli* fell away when the formulary procedure ceased to be used, so did the *replicatio doli*. If, on the other hand, the *replicatio doli* survived the supersession of the formulary procedure, as the court in *Van der Merwe's* case ruled, so too the *exceptio doli* survived. It follows that the reaffirmation of the survival of the *replicatio doli* in *Van der Merwe's* case reaffirms also the survival of the *exceptio doli*. In *Van der Merwe's* case the Appellant Division reaffirmed the availability of the *replicatio doli* not only in post-classical Roman law but also in Roman-Dutch and in modern law.³⁶ In this it contradicts the statements to the

³³ 1991 (2) SA at 10F-G.

³⁴ 1991 (2) SA at 4H-5A.

³⁵ 1888 (3) SA at 608F-G.

³⁶ 1991 (2) SA at 4H-5A.

opposite effect concerning the *exceptio doli* in the *Bank of Lisbon* case. As both approaches cannot be correct, one needs to follow the one or the other. It is suggested that the approach in *Van der Merwe's* case is correct. The *exceptio doli*, whether *generalis* or *specialis*, and the *replicatio doli*, whether *generalis* or *specialis*, were available in our law.

1.2.2.8 *Barkhuizen v Napier*³⁷

Only the most relevant passages in the majority judgment that pertain to the *exceptio doli generalis* will be examined, even though there is no specific mention of the *exceptio* anywhere in the judgment.³⁸

(i) Facts

The case concerned the constitutionality of a time-bar clause in a short-term insurance contract. Clause 5.2.5 of the contract stipulated that in the event of initial repudiation by the insurer, the insured would not be entitled to a claim against the insurer unless summons was served within 90 days of the notice of repudiation. Since the applicant issued summons only two years after repudiation, its claim was met by a special plea – that his claim was barred by the contractual prescription clause. The applicant submitted a replication in response. By the time the appeal was heard in the Constitutional Court, the argument ran as follows. First, he alleged that the time-bar clause was contrary to public policy for stipulating an unreasonable time in which to institute his action, and thus infringing his rights to seek the assistance of a court. Secondly, he alleged that the clause was contrary to s34 of the Constitution, which guarantees a person a right of access to court.

(ii) The judgments

The applicant had successfully convinced the Pretoria High Court that the time-bar clause was not enforceable, but the Supreme Court of Appeal overturned that decision, finding that the clause was indeed valid on the meager facts before it.³⁹ A majority of the Constitutional Court confirmed the order granted in the Supreme Court of Appeal, and dismissed the appeal.

The majority held that there were two questions to be asked in determining whether the time-bar clause was enforceable. Ngcobo J stated⁴⁰ that the first question was whether the clause itself was unreasonable. Secondly, if the clause was found to be reasonable, whether it should be enforced in the light of the circumstances which prevented

³⁷ 2007 (7) BCLR 691 (CC).

³⁸ Glover G “Lazarus in the Constitutional Court: an exhumation of the *exceptio doli generalis*?” (2007) 124 SALJ 449.

³⁹ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

⁴⁰ 2007 (7) at par 56.

compliance with the time limitation clause. The majority concluded that the clause itself was not so unreasonable that it could be considered to be contrary to public policy. Accordingly, the court turned its focus to the second aspect of the inquiry, which Ngcobo J rearticulated as follows:

“The inquiry is whether in all circumstances of the particular case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause. This would require the party seeking to avoid the enforcement of the clause to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances. Thus, insisting on compliance with a 90-day time bar clause against a claimant who, shortly after repudiation lapsed into a coma and came round six months later, would no doubt be unfair and its enforcement would be contrary to public policy.”⁴¹

Ngcobo J further explained that while it is necessary to recognize the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of a clause if it would result in unfairness or would be unreasonable. The approach requires the person to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause.⁴²

Ultimately, the majority decided that since the applicant’s pleadings had furnished no cogent reasons for not complying with the time-bar clause, his appeal on this ground also had to fail. It was simply not possible to determine whether the enforcement of the clause, in these circumstances, was contrary to public policy. Although the majority did not use the terminology, this defence described above would perform, in substance, exactly the same function as that once performed by the *exceptio doli generalis* prior to the *Bank of Lisbon* case. The interesting question that then arises, is whether the Constitutional Court in this judgment resuscitated the *exceptio* and the *replicatio doli generalis*?⁴³

Although this certainly is a controversial idea, there are a few reasons that could be raised in support of this possibility. The first is the clear congruence between the Constitutional Court’s formulation of the defence and the formulation of the *exceptio doli* in cases like *Weinerlein* and *Zuurbekom*. A second reason for reintroducing the *exceptio doli generalis* is the attitude that the majority in *Barkhuizen* took regarding the role and place of good faith, as this was the philosophical basis upon which the *exceptio doli generalis* was notionally based. Joubert JA confirmed in *Bank of Lisbon* that the principle of good faith remains a fundamental underlying value of our contract law, but of course declined to accept that the principle of good faith had taken the place of the *exceptio doli generalis*.

One can accept quite clearly that it would be contrary to the principle of good faith to unreasonably enforce a contract in the specific circumstances and facts of a particular case. However, Ngcobo J accepted the finding of the Supreme Court of Appeal that good

⁴¹ 2007 (7) at par 69.

⁴² 2007 (7) at par 70.

⁴³ Glover G.

faith is not a self-standing rule of law.⁴⁴ It is an underlying contractual value that is given expression through existing rules and doctrines of law. The majority specifically refrained from calling into question this approach.

That being the case, what is the doctrine that gives effect to the principle of good faith in such a case? Might it not be possible to say that the decision in *Barkhuizen* could be read as overruling *Bank of Lisbon*, and that the most suitable doctrine that encapsulates and articulates the principle of good faith is in fact the *exceptio doli generalis*? Christie points out that it would not be desirable to resuscitate the *exceptio doli generalis* because the half-life of the *exceptio* from 1925 to 1988 showed it to be so entangled in its history that it was not a satisfactory instrument for modern courts to use.⁴⁵ Support for this approach can be found in the decision of the majority in *Barhuizen* itself: the Constitutional Court chose to locate the defence in the doctrine of public policy rather than refer expressly to the *exceptio doli generalis*. From the point of view of substance, the inquiry to be undertaken in terms of this defence will not be any different whether one locates it in the arena of public policy or describes it in terms of the *exceptio doli* – the test is whether, in the circumstances of the case, the enforcement of the clause is contrary to public interest and unreasonable.

In conclusion, one may question whether the Constitutional Court decision of early 2007 presaged a phoenix-like recovery for the *exceptio doli generalis*. The finding of the Constitutional Court suggests that perhaps one last exhumation and inquest may be in order, to reconsider the suitability of the *exceptio doli generalis* a final time. But the chances of this happening are, according to Glover, very slim.⁴⁶ It is likely that the courts will accept that the *exceptio* is too much a victim of its own history, and that it carries too much baggage. The Constitutional Court chose to continue the trend of locating this sort of development in the public policy inquiry, and it will inevitably be within the bounds of this doctrine that the difficult choices about refining and moulding this defence will be made in the years to come. Ironically, considering how close the formulation of the defence in *Barkhuizen* is to the formulation of the *exceptio doli generalis*, the decision to choose public policy as the locus of the defence may well signal, in a strictly terminological sense, the last post for the *exceptio doli generalis*. The consolation will be that its equitable benefits have at last been embraced.⁴⁷

1.3 Conclusive summary of the current status of the *exceptio doli generalis*

On the question whether or not the *exceptio doli* existed in post-classical Roman law and in Roman-Dutch law and exists in modern South African law, two Appellate Division decisions given less than three years apart are in direct opposition to each other, the latter

⁴⁴ 2007 (7) at par 82.

⁴⁵ Christie RH *The Law of Contract* (5th ed) Butterworths (2006).

⁴⁶ See fn 34, p 458.

⁴⁷ See fn 34, p 458-459.

not referring to the earlier: *Bank of Lisbon and South Africa v De Ornelas and another* and *Van der Merwe v Meades*.⁴⁸ The lower courts are free to choose which case they want to follow, but it appears that it is generally accepted that the *Bank of Lisbon* case should be followed.⁴⁹ Most courts and academic writers just assume that *Bank of Lisbon* was the last word regarding this matter. The *Van der Merwe* case can be regarded as a direct confirmation that the *exceptio doli generalis* is an acceptable defence in our law, and the *Barkhuizen* case can be regarded as an indirect confirmation of this fact.

Thus, it appears that the abolished *exceptio doli generalis* doesn't need revival via the Consumer Protection Act, since the court that declared the *exceptio doli generalis* dead, also announced its return from the grave. But since so many legal minds and writers and even some courts accept the view of the majority of the court in *Bank of Lisbon*, the focus will be turned to the question whether the rightful place of this defence in our legal system will be fully restored and confirmed by the new Consumer Protection Act. Maybe this Act will ensure that the current uncertain status of the *exceptio doli generalis* becomes more certain and defined.

⁴⁸ Christie, see fn 45 *supra*.

⁴⁹ *Brisley v Drotosky* 2002 (4) SA 1 (SCA).

Chapter 2

The Consumer Protection Act 68 of 2008

2.1 Introduction

Before the provisions of the Consumer Protection Act 68 of 2008⁵⁰ that might lead to a revival of the presumably abolished *exceptio doli generalis* can be evaluated, the relevant provisions of this Act needs to be examined and understood. In this chapter, a brief summary of the CPA will be provided, along with a short study of the effect that this Act is going to have on the South African law of contract and consequently also on the *exceptio doli generalis*.

2.2 Purpose and application of the Act

2.2.1 Introduction

The Consumer Protection Act introduces a single, comprehensive legal framework for consumer protection which outlines the entitlements of consumers and the responsibilities of suppliers.⁵¹ The Act is far-reaching, ambitious and the first legislation of its kind in South Africa. The purpose of the Act is to promote and advance the social and economic welfare of consumers in South Africa. The Act aims to achieve this through establishing a legal framework for maintaining a fair, accessible and efficient marketplace for consumers, reducing the disadvantages experienced in assessing goods/services by vulnerable consumers, protecting consumers from unfair trade practices, encouraging responsible consumer behavior, promoting consumer empowerment and providing an efficient system of redress for consumers.⁵²

The Act covers not only contracting parties, but also users, recipients and beneficiaries of goods or services.⁵³ Consumers who benefit from this Act are furthermore not limited to South African citizens.

The definition of “persons” includes juristic persons. The Act pertains to the general marketing and provisions of goods and services. “Goods” are defined as “anything marketed for human consumption, any tangible object on which may be written or encoded, any literature, music, photograph, motion picture, game, information, data,

⁵⁰ Here after referred to as the “CPA”.

⁵¹ Wright R: “Summary of the Consumer Protection Act 68 of 2008” www.marketingweb.co.za (date last accessed: 2011-09-28).

⁵² Preamble to the CPA.

⁵³ See the definition of “consumer” in sec 1.

software, code or other intangible product written or encoded on any medium.” It also includes under goods a legal interest in land or any other immovable property as well as gas, water and electricity. “Services” includes any work or undertaking performed by one person for the direct or indirect benefit of another. This includes the provision of education, banking, financial and insurance services, information, consultation, transportation, accommodation, entertainment, access to electronic communication infrastructure, access to an event, right of occupancy and rights of a franchisee.⁵⁴

This is a very wide definition as the Act aims to cover any conceivable tangible and intangible product.

2.2.2 Application of the Act

The Act applies to:⁵⁵

1. transactions occurring in South Africa between suppliers and consumers with regards to goods/services unless specifically exempted;
2. the promotion of goods and services;
3. the goods and services themselves;
4. goods which from the subject of an exempted transaction (therefore, even where the transaction is exempted, the goods sold under the transaction are still protected).

Specifically excluded from the ambit of the Act are:⁵⁶

1. transactions including supply of goods and services to the State;
2. transactions involving supply of goods and services to juristic persons whose asset value or annual income is over the threshold value (R 2 million);
3. any credit agreement under the National Credit Act (but the goods and services themselves are covered);
4. services supplied under an employment contract;
5. collective agreements and collective bargaining agreements in terms of the Constitution and Labour Relations Act;
6. if the Minister has exempted the transaction.

2.2.3 Consumer rights introduced by the CPA

Chapter 2 introduces a formal set of consumer rights by referring to eight specific consumer rights and a ninth right, which is actually a duty enforced on suppliers:

⁵⁴ Chap 1, Part A, sec 1.

⁵⁵ Sec 5(1) of the CPA.

⁵⁶ Sec 5(2) of the CPA.

1. The right to equality in the consumer market and protection against discriminatory marketing practices.
2. The right to privacy.
3. The right to choose.
4. The right to disclosure of information.
5. The right to fair and responsible marketing.
6. The right to fair and honest dealing.
7. The right to fair, just and reasonable terms and conditions.
8. The right to fair value, good quality and safety.
9. The right to accountability from suppliers.

2.2.4 Enforcement and consequences of non-compliance⁵⁷

The Act recognizes consumer complaints and investigations require quick and effective resolution for both consumers and businesses. Sanctions for non-compliance include the imposition of a fine or imprisonment for 12 months or in the case of disclosure of private information, imprisonment for 10 years. The Act makes provision for an administrative penalty not exceeding the greatest of either 10% of the contravener's annual turnover during the preceding financial year or R1 million. It appears that the danger of suffering reputational risk forms a greater incentive to businesses to comply.

2.2.5 A short history of the Act

2.2.5.1 Introduction

The purpose of this paragraph is to give a short overview of the circumstances that gave rise to the enactment of the CPA. A short summary will be given of the South African Law Commission's Project 47 and also of the Consumer Protection Bill.

2.2.5.2 The South African Law Commission's Project 47

The principle that the courts will enforce contracts, expressed in Latin as *pacta sunt servanda*,⁵⁸ is obviously necessary as a general principle. But it is by no means obvious that the courts should enforce unfair contracts, and it is a regrettable fact that, on any objective view, the making of a contract, the terms of a contract or the enforcement of a contract are often unfair. The South African Law Commission's Project 47 was set up to investigate this particular problem, which had become urgent as a result of the unexpected decision in the *Bank of Lisbon* case.⁵⁹ The Law Commission's proposal was to cover unfair making, unfair terms and unfair enforcement of contract in a comprehensive statute to be called the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act. The aim was that the act would establish a

⁵⁷ Chap 6 of the CPA.

⁵⁸ Latin for "agreements must be kept."

⁵⁹ See par 1.2.2.6.

criterion of unreasonableness, unconscionableness or oppressiveness to be applied by the court to all contracts. This proposal by the Law Commission never became a reality.

2.2.5.3 The Consumer Protection Bill

Marsland wrote an article about the Consumer Protection Bill before the CPA came into force and identified some of the problem areas in the Bill.⁶⁰ She stated that while the Bill outlawed some very negative consumer marketing which is accepted by the industry, it restricted retailer, marketer and many supplier services to the point of impacting on commercial enterprise. While the Bill sought to address a variety of topics and forms of consumer practices, it did so in too much of a generalized sense. Its approach should have been more specific and contextual. In addition, an uncertainty as to what amounted to ‘goods’ and ‘services’ under the Bill had been raised and the definitions queried and critiqued. Again, these have been found to be too wide and seeking to cover too much, creating vast confusion. The big question that remained for many was whether the Bill applied to their goods and services or not.⁶¹

2.2.5.4 The timing for implementation of the CPA

The CPA was signed into law by the former president Kaglema Motlanthe on 24 April 2009 and came into full force in October 2010.⁶²

2.2.6 Criticism regarding the CPA

The intention of the legislature to provide for extensive consumer protection is welcomed – we are all consumers and have not been adequately protected in the past. The danger is that the provisions may not adequately cater for every business. The uncertainty created through the removal of established common law principles could further more result in increased litigation and a lack of confidence in the South African economy.

Despite the plain and understandable language requirement included in the Act, the structure of the Act itself is not user friendly and it will probably be very difficult for the average consumer or supplier to make sense of. Suppliers will need to familiarize themselves with the Act sooner rather than later and ensure that they comply.

⁶⁰ Marsland L: “Marketers reject new consumer bill as ‘unworkable’”
<http://www.bizcommunity.com> (date last accessed: 2011-09-28).

⁶¹ The same concerns that were raised by Marsland concerning the Consumer Protection Bill, can also be raised with regards to the CPA.

⁶² Melville NJ, *The Consumer Protection Act made Easy*, Book of Life Publications, 2011.

2.3 The influence of the CPA on the South African law of contract

2.3.1 Interpretation of the CPA⁶³

The CPA contains explicit indications regarding its interpretation, which briefly entails the accountability to the spirit and purpose of the Act, including the consideration of foreign and international law, conventions, declarations or protocols relating to consumer protection and applicable decisions of consumer courts, ombud or arbitrators.⁶⁴ The interpretation of certain documents, such as any standard form, contract or other document relating to suppliers, is also prescribed by the Act. Thus, in the event of any ambiguity or restriction, limitation, exclusion and deprivation of a consumer's legal rights, such document must be interpreted and resolved to the benefit of the consumer.⁶⁵

If there is any inconsistency with any other Act and the CPA, the provisions of both Acts apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the section. If this is not possible, the provision that extends the greater protection for the consumer prevails.⁶⁶

No provisions of the CPA must be interpreted in a manner as to preclude a consumer from exercising any common law rights. The courts have a duty to develop the common law to improve the realization and enjoyment of consumer rights.⁶⁷

2.3.2 Legal framework of CPA

The CPA does not codify or replace the common law. Any transaction which does not fall within the CPA, will still be governed by the common law.⁶⁸ The following provisions of the CPA explicitly preserves the common law, namely: a consumer's right to cooling-off⁶⁹ and to return goods⁷⁰, implied warranties of quality and a court's power to enforce consumer rights.⁷¹ However, the law of contract is fundamentally amended by Parts A to G of Chapter 2 ('fundamental consumer rights'). Contrary to the common law, which is not concerned with the 'fairness' of a contract, the CPA contains mechanisms to address unfairness in contracts between consumers and suppliers.⁷² A supplier will no longer be able to assert that a court is precluded from looking at that which lies behind

⁶³ Chap 1, Part A, sec 2.

⁶⁴ Sec 2(2).

⁶⁵ Sec 4(4).

⁶⁶ Sec 2(9).

⁶⁷ Sec 2(10).

⁶⁸ Sec 2(10).

⁶⁹ Sec 16(2).

⁷⁰ Sec 20(1)(b).

⁷¹ Sec 76(2)(a).

⁷² Parts F & G.

the consumer's signature, or that the format or fairness of a contract is irrelevant. However, the ground rules defining a contract are still contained mainly in the common law of contract as amplified by legislation.

Two generic forms of contractual abuse, namely procedural deficiencies (unfairness) and contractual terms per se. In terms of the CPA procedural fairness requires that suppliers make specific information available to consumers, refrain from making false or deceptive representations and provide material notices in writing. With regard to fair contractual terms, the CPA embrace fair, reasonable and just contractual terms,⁷³ requires consumer agreements to be in writing,⁷⁴ proper notification of certain contractual terms and conditions to be affected,⁷⁵ prohibited certain agreements, terms and conditions⁷⁶ and empower the courts to enforce the aforementioned.⁷⁷

2.3.3 Formalities⁷⁸

The CPA does not require all consumer agreements to be in writing, but the Minister may prescribe categories of consumer agreements that must be in writing. If a consumer agreement is in writing as required by the CPA, or put in writing voluntarily, the written agreement is valid, whether the consumer signed it or not. Such written agreement must satisfy the requirements of plain and understandable language.⁷⁹ It is not required that the agreement should be provided in one of the official languages. A consumer is entitled to a free copy or free electronic access to such agreement.⁸⁰ If a consumer agreement is not in writing, a supplier must keep a record of transactions entered over the telephone or any other recordable form as prescribe.⁸¹ A consumer is not entitled to such record. However, in the event of a complaint the National Consumer Commission⁸² may summon a supplier to furnish a copy thereof.

2.3.4 Unfair, unreasonable or unjust contract terms

A supplier must not enter into an agreement to supply any goods or services at a price or term that is unfair, unreasonable or unjust.⁸³ Hence, it seems that the abolished *laesio enormis* doctrine is revived in respect of price. A supplier is also not entitled to request a consumer to waive any of his rights, or the liability of a supplier, or **assume any**

⁷³ Sec 48.

⁷⁴ Sec 50.

⁷⁵ Sec 49.

⁷⁶ Sec 51.

⁷⁷ Sec 52.

⁷⁸ Sec 50.

⁷⁹ Chap 2, Part D, sec 22.

⁸⁰ Sec 50(2)(b).

⁸¹ Sec 50(3).

⁸² Hereafter the "NCC".

⁸³ Sec 48(1)(a) and sec 48(1)(b).

obligations on terms that are unfair, unreasonable or unjust.⁸⁴ A transaction, agreement, term or condition is unfair, unreasonable or unjust if it is excessively one-sided in favour of a non-consumer or so adverse to a consumer that it is inequitable⁸⁵ or where a consumer relied upon a misrepresentation or term as contemplated respectively in sections 41 and 49.

2.3.5 Enforcement and dispute resolution

2.3.5.1 Dispute resolving routes

A consumer can enforce a right or resolve a dispute by referring the matter directly to the National Consumer Tribunal⁸⁶ or applicable ombud with jurisdiction. A consumer may also approach a consumer court with jurisdiction, or refer the matter to an alternative dispute resolution agent contemplated in section 70, or file a complaint with the NCC. If all other remedies available to a consumer in term of national legislation have been exhausted, he or she may approach a court with jurisdiction.⁸⁷

2.3.5.2 Dispute resolving agents

(i) Alternative dispute resolution agents

An alternative dispute resolution agent (ADR) includes an ombud with jurisdiction, an industry ombud accredited in terms of section 82(6), a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes and a consumer court.⁸⁸ If an ADR concludes that there is no reasonable probability of the parties resolving their dispute through this process, the ADR may terminate the process. The referring party may then lodge a complaint with the NCC in accordance with section 71. If an ADR has resolved a dispute the agent may record the resolution of that dispute in the form of an order, and if the parties to the dispute consent to that order, submit it to the NCT or High Court to be made a consent order, in terms of its rules.⁸⁹ If agreed thereto, a consent order may include an award of damages.⁹⁰

(ii) Consumer courts

Consumer courts are set up in terms of provincial legislation. Consumer courts, like an ADR, may record a resolution or settlement of a dispute in the form of an order and such

⁸⁴ Own emphasis; sec 48(1)(c).

⁸⁵ Sec 48(2)(a) and sec 48(2)(b).

⁸⁶ Hereafter the “NCT”.

⁸⁷ Sec 69, 70 and sec 71.

⁸⁸ Sec 70(1).

⁸⁹ Sec 70(3).

⁹⁰ Sec 70(4).

order may be made a consent order by the NCT or High court.⁹¹ If a person is involved in any prohibited conduct as contemplated by the CPA, the NCC may refer the matter to a consumer court. The consumer court must then conduct its proceedings in the same manner as is applicable to the hearings of the NCT and make any order that the NCT could have made, had it heard the matter, with the same force and effect. If the NCC issues a notice of non-referral, a consumer may then approach a consumer court with jurisdiction.⁹²

(iii) NCC

The NCC is a juristic person with jurisdiction throughout South Africa and its main responsibility is to enforce the CPA. As an enforcement body it is responsible for investigating complaints in terms of sections 72 to 75. After concluding an investigation into a complaint, the NCC may issue a notice of non-referral to the complainant in the prescribe form, or refer the matter to the National Prosecuting Authority if a person has committed an offence.⁹³ The matter may be referred to an equality court if the NCC believes that a person has engaged in prohibited discriminatory marketing or differential treatment conduct. If a person, to the belief of the NCC, is involved in any other prohibited conduct, the NCC may propose a draft consent order, or issue a compliance notice, or refer the matter to a consumer court or NCT. When directed to do so by the Minister or on request of a regulatory authority or accredited consumer protection group, the NCC may itself initiate a complaint concerning any alleged prohibited conduct.⁹⁴

(iv) The NCT

The NCT is established in terms of section 26 of the National Credit Act⁹⁵ (NCA), it is a juristic person and has jurisdiction throughout South Africa. Whether by the NCC or by a complainant, a referral to the NCT must be in the prescribe form.⁹⁶ After receiving a complaint, the NCT must conduct a hearing into the matter in accordance with the requirements of the CPA and the applicable provisions of the NCA. The NCT may make any applicable order contemplated in the CPA or sections 150 or 151 of the NCA, such as: the grant of interim relief, declare conduct to be prohibited, issue an interdict, etc. Failure to comply with an order of the NCT, constitutes an offence punishable with a fine or imprisonment of not more than 10 years or both. A decision of the NCT may be appealed against to a full panel of the NCT and then to the High Court.

(v) Ordinary courts

As an option of last resort, the ordinary courts may assist a consumer if all the consumer's other rights have been exhausted. A court has several categories of power in

⁹¹ Sec 73(3) (a) & (b).

⁹² Sec 75(1) (a).

⁹³ Sec 73(1) (a) & (b).

⁹⁴ Sec 71(1).

⁹⁵ Act 34 of 2005.

⁹⁶ Sec 75(3).

terms of section 52 to ensure fair and just conduct, terms and conditions. It seems, however, that there is a contradiction between sections 69 and 52. In terms of section 69 a court may only be approached if all other remedies have been exhausted. On the other hand, in terms of section 52 the right to fair, just and reasonable terms and conditions and the right to honest and fair dealings can only be enforced by a court. If a person alleges that a supplier contravened sections 40 (unconscionable conduct), 41 (false, misleading or deceptive representation) or 48 (unfair contractual terms) and the CPA does not otherwise provide a sufficient remedy, the court may, after determining that an agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, make a declaration to that effect, including any further just and reasonable order, which includes that an agreement, term, condition, or notice in terms of the CPA is void or failed to satisfy the requirements of section 49 (notice re terms and conditions), the court may make the following orders, namely, in case of a provision or notice that is void:

- Severing any part of the relevant agreement, provision or notice;
- Alter it to the extent required to render it lawful, provided it is reasonable to so in the circumstances; or
- Declaring the entire agreement, provision or notice *ab initio* void.

In case of a provision or notice that fails to satisfy any requirement of s 49:

- Severing the provision or notice from the agreements; or
- Declaring it to have no force or effect; and
- Make any further order that is just and reasonable in the circumstances.

Chapter 3

The Consumer Protection Act 68 of 2008 and a revival of the *exceptio doli generalis*

3.1 Introduction

As discussed previously, the position regarding the existence of the *exceptio doli generalis* in the South African law of contract remains quite unclear. With two conflicting decisions of the Appellate Division⁹⁷ which are in direct opposition to each other, it is not clear whether the *exceptio doli generalis* was in fact ever abolished entirely. This chapter examines whether the provisions of the CPA might lead to a revival of the presumably abolished *exceptio doli generalis*. Perhaps the inquiry should be whether the provisions of the CPA create more **clarity** and in fact **confirm** the existing presence of the *exceptio doli generalis*. One must keep in mind that the purpose of the *exceptio doli generalis* was that it was applied when the enforcement of a contract was unreasonable and when the plaintiff enforced a right in a manner that was never contemplated by the parties at the time when the contract was concluded.

3.2 The relevant provisions of the CPA

The following sections of the CPA are crucial for the discussion that follows:

“40. Unconscionable conduct”⁹⁸

- 1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any—
 - a) marketing of any goods or services;
 - b) supply of goods or services to a consumer;
 - c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;
 - d) demand for, or collection of, payment for goods or services by a consumer;or

⁹⁷ *Bank of Lisbon and South Africa v De Ornelas and another* 1988 (3) SA 580 (A) & *Van der Merwe v Meades* 1991 (2) SA 1 (A).

⁹⁸ Chap 2, Part F.

- e) recovery of goods from a consumer.
- 2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer's own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.
- 3) Section 51 applies to any court proceedings concerning this section.

41. False, misleading or deceptive representations

- 1) In relation to the marketing of any goods or services, the supplier must not, by words or conduct—
 - a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
 - b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
 - c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.
- 2) A person acting on behalf of a supplier of any goods or services must not—
 - a) falsely represent that the person has any sponsorship, approval or affiliation; or
 - b) engage in any conduct that the supplier is prohibited from engaging in under subsection (1).
- 3) Without limiting the generality of subsections (1) and (2), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that—
 - a) the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have;
 - b) any goods or services—
 - i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
 - ii) are of a particular standard, quality, grade, style or model;
 - iii) are new or unused, if they are not or if they are reconditioned or reclaimed, subject to subsection (4);

- iv) have been used for a period to an extent or in a manner that is materially different from the facts;
 - v) have been supplied in accordance with a previous representation; or
 - vi) are available or can be delivered or performed within a specified time;
 - c) any land or other immovable property—
 - i) has characteristics that it does not have;
 - ii) may lawfully be used, or is capable of being used, for a purpose that is in fact unlawful or impracticable; or
 - iii) has or is proximate to any facilities, amenities or natural features that it does not have, or that are not available or proximate to it;
 - d) the necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period;
 - e) any service, part, replacement, maintenance or repair is needed or advisable;
 - f) a specific price advantage exists;
 - g) a charge or proposed charge is for a specific purpose;
 - h) an employee, salesperson, representative or agent has the necessary authority to negotiate the terms of, or conclude, an agreement;
 - i) the transaction affects, or does not affect, any rights, remedies or obligations of a consumer;
 - j) a particular solicitation of, or communication with, the consumer is for a particular purpose; or
 - k) the consumer will derive a particular benefit if they assist the supplier in obtaining a new or potential customer.
- 4) A representation contemplated in subsection (3)(b)(iii) to the effect that any goods are new is not false, misleading or deceptive if those goods have been used only—
- a) by or on behalf of the producer, importer, distributor or retailer; and
 - b) for the purposes of reasonable testing, service, preparation or delivery.
- 5) Section 51 applies to any court proceedings concerning this section.

48. Unfair, unreasonable or unjust contract terms⁹⁹

- 1) A supplier must not—
 - a) offer to supply, supply, or enter into an agreement to supply, any goods or services—
 - i) at a price that is unfair, unreasonable or unjust; or
 - ii) on terms that are unfair, unreasonable or unjust;
 - b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or
 - c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—
 - i) to waive any rights;
 - ii) assume any obligation; or
 - iii) 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.
- 2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—
 - a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;
 - b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;
 - c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or
 - d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—
 - i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or
 - ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.”

⁹⁹ Chap 2, Part G.

3.3 A demonstration of the practical application of the CPA's provisions with reference to *Bank of Lisbon*

3.3.1 Introduction

It is a rule of South African law that contracts must be performed in accordance with the doctrine of *pacta servanda sunt*.¹⁰⁰ As a basic principle the terms of the contract must be strictly adhered to. Unilateral departure from those terms can for obvious reasons not be allowed. In principle the rule that contracts must be performed should not operate unfairly. In theory the rules regarding the basis of contractual liability and the obtaining of agreement, the requirement of legality, the rules regarding the interpretation of contracts and so on, ought to ensure that the terms of the contract and the effect thereof should be equitable as regards both parties. However, this is not always the case. It may happen that a party as a result of his weak bargaining position, or his lack of judgment, agrees to terms which will operate unfairly towards him. Sometimes circumstances change after conclusion of the contract to such a degree that the terms which appeared fair at the time of conclusion later become extremely unfair in respect of one of the parties during the existence of the contractual relationship. The question therefore arises how the law can ensure that a contract, which was concluded in a wholly proper manner, will not have an unfair result at a later stage.

There are various possibilities. One possibility would be to authorize a court to enforce a contract by testing it against a general norm such as equity or good faith. The court may then refuse enforcement or adapt it to the extent required by the norm. Another option might be for the legislature to create an Act with application to these situations.¹⁰¹ Another possibility is to make use of a specific remedy which makes provision for the continual development of the requirements for its application in accordance with changing ideas as to what is right and fair.

In Roman law one such a remedy existed, namely the *exceptio doli generalis*. This remedy made it possible for a defendant brought before a court in terms of a contract to say that he acknowledges the existence of a contract between himself and the plaintiff and acknowledges that according to the *ius civile* he has no defence against the claim, but that there are circumstances present which would render enforcement of the contract by the plaintiff tantamount to fraud. As stated above, it began to appear as if it was fairly generally accepted that the *exceptio doli generalis* formed part of the law.¹⁰² Until the Appellate division in the *Bank of Lisbon* case held that the *exceptio doli generalis*

¹⁰⁰ *Bank of Lisbon* as discussed by Hawthorne L *et al*, *The Contract Law Casebook*, second ed, Juta, 2007, p 192-193.

¹⁰¹ As is the case with the new CPA.

¹⁰² See *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W).

did not form part of our law. The court also did not indicate that any remedy existed in our law that could replace the *exceptio doli generalis*.¹⁰³

3.3.2 The CPA applied to the facts in the *Bank of Lisbon* case

If the *Bank of Lisbon* case came before the court after the implementation of the CPA, the outcome of this case would have undoubtedly have been different. This case presented a number of salient features. The respondents were applicants for an overdraft; they did not have equal bargaining power with the Bank; standard forms with standard terms were used by the Bank; the Bank stipulated for security far beyond its needs; and the respondents never actually contemplated that the security would cover anything but the overdraft.

If this was a present day case and the CPA was already implemented in full force, the respondents would have had a number of statutory sections to rely on in defence of their case. They could have relied on section 40(1) which prevents a supplier or an agent of the supplier from using physical force, coercion, undue influence, pressure, duress or harassment, **unfair tactics or any other similar conduct**, in connection with the supply of services to a consumer and also in the negotiation, conclusion, execution or **enforcement of an agreement**.¹⁰⁴ Section 40(2) provides that it is unconscionable for a supplier to knowingly take advantage of the fact that a consumer was substantially unable to protect his own interest because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor. The respondents could have argued that they were unable to protect their own interests because of the unequal bargaining power that existed between them and the Bank.

In the alternative the respondents could have made use of section 41(1) which provides that in relation to the marketing of any goods or services, the supplier must not, by words or conduct: (a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer; (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.

The respondents could have argued that a misleading representation concerning a material fact was made to them in the sense that they were under the impression that the security would only cover the company's overdraft. They could have stated that they were misled when the bond's and deeds of suretyship were drafted in the widest

¹⁰³ See fn 4.

¹⁰⁴ Own emphasis.

possible terms to provide that they would secure any debt which the company owned to the appellant, irrespective of how the debt arose.

Section 41(3)(i) further states that it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that the transaction affects any rights, remedies or obligations of a consumer.

Section 48(1)(b) could also have been relied on by the respondents which provides that a supplier must not market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust.

Section 48(1)(c) furthermore provides that a supplier must not require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer to waive any rights, assume any obligation or waive any liability of the supplier on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

Section 48(2) also aids the respondents's case by providing that a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if: (a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied; (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable.

3.4 Conclusion

It is quite clear from the paragraphs quoted above that the CPA will have a profound impact on the South African law of contract, and more specifically, on contracts that are enforced in circumstances that are unfair. If the CPA was in force at the time that the *Bank of Lisbon* case was decided and applicable to the transaction in question, the outcome would undoubtedly have been in favour of the respondents. The CPA will provide our courts with an equitable jurisdiction, which did not exist in our law according to Joubert JA in the *Bank of Lisbon* case.¹⁰⁵ For the first time in the history of the South African law of contract, unfair terms and conditions and the unfair enforcement of contracts are regulated by statute.

It appears that the provisions of sections 40, 41 and 48 of the CPA reaffirm the existence of the *exceptio doli generalis* in the South African law of contract, since

¹⁰⁵ p 606 at A.

these provisions provide the same function and outcome that defence did. The section that speaks to the heart of the *exceptio doli generalis*, is section 40(1) which provides that a supplier or an agent of the supplier must not use physical force, coercion, undue influence, pressure, duress or harassment, **unfair tactics or any other similar conduct**, in connection with the supply of services to a consumer and also in the negotiation, conclusion, execution or **enforcement of an agreement**.¹⁰⁶ The conclusion can be drawn that this section specifically reintroduces the presumably abolished *exceptio doli generalis*. Whether the courts will call this defence by its name - *exceptio doli generalis* - or not, the fact remains that it appears as if this defence, by which the consumer can defend himself against a claim by a supplier, is alive and kicking. The statutory remedies thus appear to serve the same function as the *exceptio doli generalis* did.

The question that needs to be asked at this stage is whether this Act is practical and effective. If not, consumers will still be left without proper protection and the injustice caused by the *Bank of Lisbon* case will continue. It should also be kept in mind that the Act does not apply to everyone and every contract. There are entities that are not considered as consumers. These entities will not enjoy the benefits of consumer protection, although they may still be bound by the requirements that apply to suppliers.¹⁰⁷ One might ask in what way the enforcement of a contract in circumstances that are unfair will be remedied in the case of an agreement not covered by the CPA and if the courts continue to accept that the *exceptio doli generalis* is not available in our law. What is clear, is that there is a need for a remedy that performs the function of the *exceptio doli generalis*. The enquiry at this stage, is whether the CPA will take over this function effectively, or if it is accepted that the *exceptio doli generalis* is still very much alive, if it is still effective in the modern South African law of contract. If not, alternatives need to be explored in order to assist a defendant which finds himself in the same position as the defendants in the *Bank of Lisbon* case.

¹⁰⁶ Own emphasis.

¹⁰⁷ Melville NJ *The Consumer Protection Act made Easy*, Book of Life Publications, 2011.

Chapter 4

The Consumer Protection Act 68 of 2008 examined from a practical point of view

4.1 Introduction

Legislation to protect consumers against unfair contract terms has long been overdue in South Africa.¹⁰⁸ The inclusion of provisions on unfair contract terms in the new Consumer Protection Act should therefore be welcomed.¹⁰⁹ However, the provisions on unfair contract terms in the Act are lacking in some respects, also where the enforcement of the Act's provisions are concerned. In this chapter the powers of court to ensure fair and just conduct, terms and conditions will be explored with specific reference to section 52 of the CPA. Section 52 of the Act provides as follows:

“52. Powers of court to ensure fair and just conduct, terms and conditions

- 1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that—
 - a) the supplier contravened section 40, 41 or 48; and
 - b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability,the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3).
- 2) In any matter contemplated in subsection (1), the court must consider—
 - a) the fair value of the goods or services in question;
 - b) the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
 - c) those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, irrespective of whether this Act was in force at that time;

¹⁰⁸ Naude T “The consumer’s ‘right to fair, reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” *SALJ*, p 505-536.

¹⁰⁹ Take note that the comments on the Act’s provisions on unfair contract terms also applies to the provisions aimed at preventing the enforcement of contracts in circumstances that are unfair.

- d) the conduct of the supplier and the consumer, respectively;
 - e) whether there was any negotiation between the supplier and the consumer, and if so, the extent of that negotiation;
 - f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
 - g) the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22;
 - h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any—
 - i) custom of trade; and
 - ii) any previous dealings between the parties;
 - i) the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
 - j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.
- 3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may—
- a) make a declaration to that effect; and
 - b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—
 - i) to restore money or property to the consumer;
 - ii) to compensate the consumer for losses or expenses relating to—
 - aa) the transaction or agreement; or
 - bb) the proceedings of the court; and
 - iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.
- 4) If, in any proceedings before a court concerning a transaction or agreement between a supplier and a consumer, a person alleges that an agreement, a term or condition of an agreement, or a notice to which a transaction or agreement is purportedly subject, is void in terms of this Act or failed to satisfy any applicable requirements set out in section 49, the court may—
- a) make an order—
 - i) in the case of a provision or notice that is void in terms of any provision of this Act—
 - aa) severing any part of the relevant agreement, provision or notice, or alter it to the extent required to render it lawful, if it is

- reasonable to do so having regard to the transaction, agreement, provision or notice as a whole; or
- bb) declaring the entire agreement, provision or notice void as from the date that it purportedly took effect; or
 - ii) in the case of a provision or notice that fails to satisfy any provision of section 49, severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction; and
- b) make any further order that is just and reasonable in the circumstances with respect to that agreement, provision or notice, as the case may be.’

4.2 An evaluation of section 52: Powers of court to ensure fair and just conduct, terms and conditions

Although situated in Part G on the consumer’s right to fair contract terms, section 52 applies not only to unfair contract terms, but also to contraventions of section 40 on ‘unconscionable conduct’ and section 41 on misrepresentations (both of which appear in Part F). Essentially, section 52 grants courts the power to declare agreements, in whole or in part, unfair or unconscionable.¹¹⁰ 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 document, to avoid repetition of the supplier’s conduct.¹¹¹ However, all 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’.¹¹²

It is unclear whether this means that the consumer must first approach the alternative dispute resolution agents mentioned in the Act or the provincial consumer courts before she may approach an ordinary court. This conclusion seems to be borne out by s 69(1)(d), which provides that the consumer may only approach a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted. On the other hand, if this was the intention, it does not make sense for section 52 to grant only the ordinary courts powers to make orders on unfair terms, and not to grant such powers to the provincial consumer courts as well. The consumer dealing with an intractable supplier must therefore first go through the motions of discussing the matter before a provincial consumer court, only to have to refer the matter to the ordinary courts thereafter in order to obtain any relief where the supplier refuses to stop relying on the term.

¹¹⁰ Sec 52(3)(a).

¹¹¹ Sec 52(3)(b).

¹¹² Sec 52(2)(b).

That only the ordinary courts would have jurisdiction in respect of unfair contract terms, is not stated unequivocally, but is implicit in the absence of any reference to the NCT or provincial consumer courts in section 52. It seems to be that consumers may either directly approach the court for a declaration that a term is unfair, or may approach the relevant ombud, who could then enter a consent order, which could be taken to court or the NCT to be made an order of court. If such consensus was reached and reflected in a consent order, there would therefore not be a dispute which had to be decided by an ordinary court. However, the NCT and consumer courts would not have jurisdiction over contractual disputes; otherwise section 52 would have bestowed powers on these institutions as well.

Whereas the existence of the small claims courts would provide some relief to consumers who cannot afford litigation in the Lower or High Courts, many cases would fall outside the jurisdiction of these courts. It is a well-known fact that the costs, risks and effort of court action are just too high for ordinary consumers, including middle class consumers. For this reason it is therefore unlikely that this legislation in its current form will have a real impact on the eradication of unfair contract terms.

It is presumed that South African courts would be prepared to raise the issue of the unfairness of a term on their own initiative, given the well-established principle that courts may decide issues overlooked by the parties where this is required in the interest of justice. Nevertheless, it may be advisable to include an explicit provision in the Act that courts may raise the issue of unfairness on their own initiative.¹¹³

4.3 Conclusion

It is clear that the Act's failure in section 52 to bestow jurisdiction on the consumer courts and the NCT over contractual disputes, is a hindrance in the way of the Act's success. The Act aims at protecting the vulnerable members of society, the consumers who usually do not have enough money to afford legal action in the ordinary courts.¹¹⁴ Thus, it is submitted that section 52 should be amended in order to grant jurisdiction to the NCT and consumer courts with regards to the enforcement of sections 40, 41 and 48 of the Act. These forums will provide a more affordable option for a consumer faced with the enforcement of a contract in unfair circumstances. Such an amendment will give ordinary courts as well as the NCT and the consumer courts the power to make any of the following orders when sections 40, 41 and 48 are contravened:¹¹⁵

If the court, National Tribunal or Consumer court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court, the National Tribunal or Consumer Court may-

- a) make a declaration to that effect; and

¹¹³ See fn 108.

¹¹⁴ See the preamble to the CPA.

¹¹⁵ An amended section 52(3).

- b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order—
 - i) to restore money or property to the consumer;
 - ii) to compensate the consumer for losses or expenses relating to—
 - aa) the transaction or agreement; or
 - bb) the proceedings of the court; and
 - iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct.

This recommended amendment will ensure that a very accessible, statutory replacement of the *exceptio doli generalis* is created. This being said, it should also be kept in mind that the Act does not apply to everyone and every contract. There are entities that are not considered as consumers and these entities will not enjoy the benefits of consumer protection.¹¹⁶ One might ask in what way the enforcement of a contract in circumstances that are unfair will be remedied in the case of an agreement not covered by the CPA and if the courts continue to accept that the *exceptio doli generalis* is not available in our law.

It is clear that the CPA in its current form is by no means perfect. If section 52 is not amended to empower the NCT and the consumer courts with the necessary jurisdiction, it is unlikely that this legislation will prevent the enforcement of contracts in circumstances that are unfair. With the uncertainty surrounding the availability of the *exceptio doli generalis* in our law and the problems that are likely to occur with the enforcement of the CPA, one has to ask the question whether a defendant who finds himself in a similar position as the defendants in the *Bank of Lisbon* case did, will be able to find any relief. Accordingly, alternative remedies to assist a party to a contract enforced in circumstances that are unfair, need to be explored.

¹¹⁶ Melville NJ *The Consumer Protection Act made Easy*, Book of Life Publications, 2011.

Chapter 5

Alternatives to prevent the enforcement of contracts in circumstances that are unfair

5.1 Introduction

With the uncertain status of the *exceptio doli generalis* in South African law of contract and with the problems that are foreseen with the enforcement of the CPA, the question arises how the law can ensure that a contract which was concluded in a wholly proper manner will not have an unfair result at a later stage. In this chapter alternatives to the *exceptio doli generalis* and the CPA will be explored, since it is quite clear that there is a need for a remedy to assist a party faced with the enforcement of a contract in circumstances that are unfair.

5.2 Alternatives to the *exceptio doli generalis* and the provisions of the CPA

5.2.1 Changing the rules of interpretation of contracts

5.2.1.1 Case law

Lewis argues that if our rules of interpretation of contracts were different, equity can be achieved.¹¹⁷ She starts her argument with the circumstances that gave rise to the dispute in the *Bank of Lisbon* case and also turns to another case, that of *Rand Bank Ltd v Rubenstein* in which the issue was substantially similar.¹¹⁸

Lewis believes that the circumstances giving rise to the *Bank of Lisbon* case and the *Rand Bank* case are essentially similar. But the outcome of the two cases was quite different. One must therefore ask which is preferable. The answer should not depend on whether one agrees with the view of Joubert JA in *Bank of Lisbon* that the *exceptio doli* is a ‘defunct anachronism’ which no longer serves a need.¹¹⁹ Rather it should turn on whether one believes that the respective deeds of suretyship, and the bonds in the *Bank of Lisbon* case, should have been used to hold the sureties liable in the circumstances – a question that rests, really, in the construction of the agreement of the parties. This was not an issue

¹¹⁷ Carol Lewis “The demise of the *exceptio doli*: is there another route to contractual equity?” (1990) 107 *SALJ* p 26.

¹¹⁸ See par 1.2.2.5.

¹¹⁹ At 607B.

that was addressed by the court in *Bank of Lisbon*. The judgment of the majority of the court in that case was devoted almost exclusively to an investigation of authorities for and against the application of the *exceptio doli*.

5.2.1.2 The function of the *exceptio doli generalis* and the rules of interpretation

There remains one type of situation in which the *exceptio doli* has been expressly invoked – the one in issue in both *Bank of Lisbon* and *Rand Bank*. It is the use of a contract for a purpose not intended by the parties. Indeed, it has been argued by some that this is the only circumstance in which the *exceptio* is appropriate.¹²⁰ And the question which naturally springs to mind is why it has been thought necessary in this context.

Lewis's answer is that it is because our rules of contractual interpretation have developed in such a way as to exclude a consideration of the actual intention of the parties to a contract, and therefore also of equity. In seeking an equitable solution, parties and courts have had to rely on the *exceptio doli*. The *exceptio* is no longer available as a defence, and possibly never should have been according to Lewis. She advocates that if we wish to achieve equity in such circumstances – and of course no one could argue otherwise- we must change our approach to the interpretation of contracts.

The *exceptio doli* was never, in Roman or Roman-Dutch law, used for the purpose of tempering provisions that operated unfairly against one of the parties. It should be noted, moreover, that a provision in a contract that is unconscionable might, in terms of the recent decision of the Appellate Division in *Sasfin (Pty) Ltd v Beukes*¹²¹, be contrary to public policy and therefore unenforceable.

The issue with which Lewis is specifically concerned is the use of a provision of a contract, on the face of it both fair and valid, for a purpose for which it was not intended. Sohm stated that one of the functions of the *exceptio doli* was to protect 'the real meaning of a formal promise from the consequences of a mere literal interpretation, and of thus protecting the underlying economic relation.'¹²²

This is precisely what Botha J sought to achieve when he upheld the *exceptio doli* in *Rand Bank Ltd v Rubenstein*. Why counsel for the defendant relied on this defence when its very existence had been placed in issue, and when there was so much uncertainty as to its boundaries, remains uncertain. The answer must surely be that, had the defendant attempted to adduce evidence as to what the parties had intended the suretyship to cover, that evidence would have been inadmissible. Why is our law's approach to interpreting a contract inimical to discovering the real intention of the parties? South African courts have established firmly the principle that intention is to be ascertained from a literal interpretation of the document recording the agreement of the parties. One of the bluntest

¹²⁰ See Lotz JG 'Die Billikheid in die Suid-Afrikaanse reg', unpublished lecture delivered at the University of South Africa in 1979.

¹²¹ 1989 (1) SA 1(A).

¹²² The passage is quoted in *Zuurbekom Ltd v Union Corporation Ltd* at 536.

expositions of this principle is to be found in the judgment of Greenberg JA in *Worman v Hughes & others*.¹²³

‘The intention of the parties must be gathered from their language, not from what either of them may have had in mind.’

The consequence is that, unless the document itself is unclear or ambiguous, evidence may not be led as to any factor that sheds light upon the real meaning of the words in the document, or what the parties intended them to cover. Thus, although extrinsic evidence may be given of facts which will place the court, as far as possible, in the situation of the parties when they entered into the contract, and of facts which will enable the identification of people or things referred to in the document, no evidence may be led for the purpose of interpreting the language used. The court makes it clear that words cannot be looked at in isolation: they must be read within the context of the contract as a whole.¹²⁴ But the court still cannot examine surrounding circumstances and factors known to the parties at the time of contracting unless there is uncertainty or ambiguity.

What has made our law take this direction? One of the answers is the need for legal certainty. This is the view of Lubbe and Murray.¹²⁵ They argue thus:

‘It seeks to protect judges against intractable disputes of fact regarding subjective states of mind and the concomitant risks of fraud and perjury that will undoubtedly arise should parties be entitled to resort freely to extrinsic evidence during the process of interpretation.’

An examination of the most recent Appellate Division decision in which the literal approach was applied, it is shown that it can, and sometimes does, result in injustice and even absurdity. The parties in *Pritchard Properties (Pty) Ltd v Koulis*¹²⁶ had entered into a contract of lease for an initial period of five years. Clause 4 of the lease provided that if the lessee failed to pay the rent promptly on due date, or if the lessee committed any other breach of the lease, and failed to remedy the *latter* breach within seven days of receipt of written notice to remedy the breach, the lessor would be entitled to convert the lease to a monthly tenancy, terminable on notice. The word ‘latter’ had been deleted by the parties, but was still legible.

The lessee failed to pay the rental timeously. Without giving notice, the lessor purported to convert the lease into a monthly tenancy, and in due course gave notice to the lessee to vacate the premises. The lessee applied for an order declaring that the conversion of the lease and the ensuing notice were invalid since proper notice had not been given. The court of first instance, in concluding that the provision for seven days’ notice applied also to the failure to pay rental timeously, took into account the deletion of the word ‘latter’. The majority of the court, in an appeal, held that it was not entitled to have regard to the

¹²³ 1948 (3) SA 495 (A) at 505.

¹²⁴ *Delmas Miling Co Ltd v Du Plessis* 1955 (3) SA 447 (A).

¹²⁵ Farlam and Hathaway op cit note 35 at 463.

¹²⁶ 1986 (2) SA 1 (A).

fact that the word had been deleted: that it had to ignore the existence of the word and its deletion, and that, on a literal construction of the document as a whole, the parties had intended that no notice was required in the event of a failure to pay rental timeously. The termination of the lease had therefore been effective, and the appeal succeeded. According to these judgments, the state of our law is still such that uncertainty and ambiguity are the ‘open sesame’ to the admissibility of extrinsic evidence. The better approach, Lewis believes, would have been to accept evidence to show what the word had been: and once that was known to the court, it would have been an obvious inference that the parties intended notice to remedy the breach to be a requirement in all cases.

5.2.1.3 Conclusion

Lewis’s principle inquiry is whether the law in its current state is likely to produce an equitable result. The literal approach to interpretation does not. If we return to the *Bank of Lisbon* and *Rand Bank* cases and ask whether the sureties would have succeeded in persuading the courts that they had not intended that the deeds of suretyship, and other instruments of security, should be used to extend to unforeseen liabilities of a different nature, that answer must surely be ‘no’. For the plain meaning of the documents embraced every possible liability. Yet clearly that was not what was contemplated by any of the parties. Had evidence of the surrounding circumstances – the facts informing the contract – such as the need for the overdraft facility and the anticipated transactions of the respondents been admitted and considered by the court a different conclusion might well have been reached and the legitimate expectations of the parties fulfilled.

The *exceptio doli* has, in modern law, served a particular purpose – the use of a contract for an end that was not intended when it was concluded. And clearly that is a worthy, indeed an essential function if justice is to be done. But Lewis does not advocate a resuscitation of the defence which, while appropriate in ancient Rome, is no longer compatible with modern procedure. Instead, she argues that we must recognize that the literal approach to interpretation needs to be modified, at least to allow evidence of surrounding circumstances where the words in issue are apparently clear and unambiguous. This change would not only avoid the inequity that has arisen in cases like *Bank of Lisbon*, but would be consonant with trends in England and America.¹²⁷ We can do without the *exceptio doli* – but only if we adopt a more enlightened approach to the construction of contracts.

¹²⁷ See par 5.2.3.

5.2.2 Good faith as an alternative to the *exceptio doli generalis* and the CPA

5.2.2.1 The view of Lambiris

What Lambiris is suggesting is that it ought to be possible in South African law to raise notions of good faith and equity as a defence to an action to enforce legal obligations.¹²⁸ Such a legal development would, for example, provide useful mechanism for the protection of consumers, as well as in other circumstances where unequal bargaining power and use of standard form contracts leads to harsh and unfair terms being imposed on a contracting party.

One possibility involves doing away with the formal technicalities of Roman law, but nevertheless only allowing a defence to be raised, by pleading relevant facts, in the same circumstances as it was possible to do so in Roman law and Roman-Dutch law. The alternative for us is, having done away with the technicalities, to generalize further the legal basis on which a defence founded on breach of good faith or equity is available, so as to extend it beyond what was available in Roman and Roman-Dutch law. This last alternative seems to have been the basis of Wessels JA's decisions in *Weinerlein v Goch Buildings Ltd*.¹²⁹ The notion of an extended *exceptio doli generalis* also forms the basis of the decision in *Zuurbekom Ltd v Union Government Ltd*¹³⁰ and *Paddock Motors (Pty) Ltd v Ingesund*.¹³¹ However, these cases were considered by Joubert JA in the *Bank of Lisbon* case, who concluded that the views expressed in them were based on insufficient authority, and therefore not binding.

There are undoubtedly some who will find the majority judgment in the *Bank of Lisbon* case unappealing. Some might have preferred, from commendable motives of seeking in legal decisions justice and equity as well as logic and legal elegance, a decision in which the role of a general equitable defence modeled on the *exceptio doli generalis* was recognized in our law, even in fledgling form. But if one acknowledges the fundamental principles of our law, and the limits of its historical development in Roman and Roman-Dutch law, the majority decision in this case seems to Lambiris to be correct. This means that other ways will have to be found to limit the occasions where a court has to enforce legal obligations in circumstances when to do so seems unconscionable. One possibility is the reliance on the discretionary power of a court to refuse an order of specific performance in appropriate cases. But this is not the same thing as allowing a general defence, as of right, to any defendant who can allege and prove that the enforcement of valid legal obligations operates harshly or unconscionably on him.

¹²⁸ Lambiris MA "The *exceptio doli generalis*: an obituary" *SALJ* p 644.

¹²⁹ See fn 13.

¹³⁰ See fn 16.

¹³¹ See fn 19.

5.2.2.2 Case law that rejected good faith in favour of public policy

In the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*¹³², after reviewing the case law on the role of good faith in our modern law of contract, Oliver JA concludes at 326G:

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

Olivier JA’s proposal in *Saayman* to develop the concept of good faith has not prospered.¹³³ In *Brisley v Drotzky*¹³⁴ the majority dismissed his views as those of a single judge, and decided that good faith could not be accepted as an independent basis for setting aside or not enforcing contractual provisions. But in a short concurring judgment Cameron JA drew attention to the concept of public policy as a recognized basis.¹³⁵

“In its modern guise, ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.”

Shortly after *Brisley v Drotzky* another attempt was made, in *Afrox Healthcare Bpk v Strydom*¹³⁶, to persuade the Supreme Court of Appeal to set aside a contractual provision on the basis that it was in conflict with the principle of good faith. The court declined to do so, pointing out that in *Brisley v Drotzky* it had put Olivier JA’s judgment in *Saayman* in perspective as the view of a single judge and that although the concept of good faith serves as a foundation and justification for legal rules, the court cannot act on the basis of abstract ideas but only on the basis of established legal rules. The appellant’s argument that the contractual provision was contrary to public policy was not dismissed in the same way but rejected on the facts.

In the result the Supreme Court of Appeal has rejected the concept of good faith and reaffirmed the concept of public policy as an instrument for handling cases of contractual unfairness that cannot be satisfactorily be handled by existing rules. Was it wise to do so? On reflection, yes, because public policy is likely to prove the more satisfactory instrument. Roman-Dutch law is known for embracing public policy: Voet¹³⁷ accepted it as a test for the validity of contracts and it was embraced in a number of South African

¹³² 1997 4 SA 303 (A).

¹³³ Christie *The Law of Contract* (5th ed) 2006 Butterworths Publishers.

¹³⁴ 2002 4 SA 1 (SCA).

¹³⁵ At [91].

¹³⁶ 2002 6 SA 21 (SCA).

¹³⁷ 2 14 16.

cases.¹³⁸ As a result of these developments, it can be said with some confidence that public policy is a sufficiently flexible and tested concept in South Africa to achieve all the results that could be achieved by the concept of good faith and to achieve them in a more predictable way. The flexibility of public policy results from its being a question of fact, not law,¹³⁹ changing with “the general sense of justice of the community, the *boni mores*, manifested in public opinion“, public opinion being understood in the sense of seriously considered public opinion on the general sense of justice and good morals of the community.¹⁴⁰ In using this flexible instrument, the courts are not required to carry out an exercise in comparative law, because it is internationally recognised that it is for each country to define and apply its own public policy.

5.2.3 Unconscionable contracts: the universal solution¹⁴¹

In any discussion relating to the doctrine of freedom of contract, it has become almost a matter of etiquette to begin with the celebrated dictum of Sir George Jessel MR delivered in 1875 in the case of *Printing and Numerical Registering Company v Sampson*:¹⁴²

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

It was not generally realized that true or perfect equality in the bargaining process rarely, if ever, exists, and that invariably the parties to an agreement barter from disparate positions of bargaining strengths. The fact that there is this difference in contractual bargaining positions, and that the weaker party to the contract is often abused by the stronger, has not gone unnoticed in many foreign legal systems. In the United States of America, for instance, the legislature has enacted section 2-302 of the Uniform Commercial Code to protect buyers of goods and services against contractual abuse. Section 2-302(1) reads:

“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.“

Consumer-credit enactments in Canada have permitted the courts to strike down credit and money lending contracts where a lender has failed properly and frankly to disclose the terms of credit to a poorly educated borrower, where a creditor has unconscionably

¹³⁸ See, for example, *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A).

¹³⁹ Aquilius “Immorality and illegality in contract” (1941) 58 SALJ 337.

¹⁴⁰ See Corbett “Aspects of the role of public policy in the evolution of our common law” (1987) 104 SALJ 52 67-68.

¹⁴¹ Aronstam PJ “Unconscionable contracts: the South African solution” (1979) 42 THRHR 21.

¹⁴² (1875) LR 19 Eq 462 465.

exploited the need or lack of business experience of a borrower, and where a lender has stipulated for an excessively high rate of interest.¹⁴³ The German Civil Code contains two important provisions – par 138 and 242 – which give the German courts the power to police the use of unconscionable contractual terms. The German judiciary has refused to enforce a term located in a standard form contract in a place where it would not normally be expected even if the contract were to be read with some attention.¹⁴⁴ In Sweden, the Act Prohibiting Improper Contract Terms 1971 permits the Swedish market court and the Swedish consumer ombudsman to strike down a term in a contract of sale or supply which, having regard to the price and all other circumstances, is to be considered as ‘improper’ towards consumers. The relevant section reads as follows:

“A contract or term may typically be regarded as improper towards consumers if, deviating from invalid dispositive law, it gives entrepreneurs an advantage or deprives consumers of a right and in that way produces a weighting of the parties rights and obligations so lopsided that a responsible balance between the parties no longer exists.”¹⁴⁵

In some foreign jurisdictions, the courts have been able to formulate, without any legislative basis, criteria according to which the fairness of contractual terms may be judged. The decisions in a few American cases provide an interesting illustration of the powers exercised by the American courts in this regard. In the case of *Frederick L Morehead v New York ex re Joseph Tipaldo*¹⁴⁶ Hughes CJ made the following statement:

“We have repeatedly said that liberty of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one wills or to contract as one chooses... Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community.”

Recent cases in the United Kingdom indicate that the courts there are attempting to formulate a general criterion or standard according to which the fairness of a contract or one of its terms may be judged. An example of this is to be found in *Lloyds Bank Ltd v Bundy*.¹⁴⁷ Lord Denning MR, after referring to several lines of decisions dealing with duress, undue influence, fraud and “unconscionable” transactions, said:¹⁴⁸

“Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on ‘inequality of bargaining power’. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires,

¹⁴³ An interesting survey of these enactments and the cases in which they have been applied is made by I Davis “Unconscionable Contracts – Some Recent Cases” (1972) 50 *Canadian Bar Review* 296.

¹⁴⁴ Judgment of 4 November 1964, BGH [1965-1] *NJW* 246. Cf J Dawson (1976) 89 *Harvard LR* at 1108 ff.

¹⁴⁵ Directive of the Swedish Minister of Justice, cited by JE Sheldon 35.

¹⁴⁶ 298 US 587 (1935).

¹⁴⁷ [1975] QB 326.

¹⁴⁸ At 339.

or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”

No attempt has yet been made in South African law to provide or formulate a general, all-embracing criterion according to which the “morality” of contracts may be judged. True, parliament has provided some relief to certain categories of persons who have weak bargaining powers. An example is the Conventional Penalties Act 1962 which permits a court to ameliorate the severe or harsh effects of penalty provisions in contracts. This kind of legislation does not provide a general criterion of control. The courts have also applied certain rules of interpretation of contracts to prevent the exploitation of persons having weak bargaining powers.¹⁴⁹ Where, for example, a contractual term imposes an undue hardship on a person, or deprives him of his common law rights, the court will give that term as narrow a meaning as possible.¹⁵⁰ Where a harsh term in a contract is ambiguous, the courts will interpret it contra proferentem to relieve the weak party from its oppressive provisions.¹⁵¹ A general rule against contractual unconscionability will of necessity have to provide a general criterion of control, be so clear and precise that it does not give rise to problems of uncertainty, be flexible enough to meet changing conditions, and be capable of quick and simple application to solve the problems. The rules and principles adopted by the courts in this regard are not suited, it is submitted, to solving the problems of abuse of the contractually weak. One gains the impression of a haphazard, random, fragmented approach: there is no comforting single principle to order and resolve.

The question then arises whether there are any legal rules, principles or “institutions” in South African law that may be used to overcome the difficulties created by both the common-law and statutory approaches to the control of abuse of unequal bargaining power with a minimum of expense and delay. One such institution that may be of some use to our courts in this regard is the *exceptio doli*. The exception afforded a defence to a person against whom an action had been brought in breach of the requirements of good faith.¹⁵² In other words, *dolus* was present when the plaintiff knew for some reason, for example, because of his fraud or intimidation, that his suit was inconsistent with good faith. The *exceptio doli* was accordingly used for the purpose of mitigating the harshness of the *jus strictum* that governed all transactions in which the resulting obligation was strictly and literally interpreted; for the purpose, in other words, of protecting the real meaning of a formal promise from the consequences of a mere literal interpretation, and thus protecting the underlying economic relation from the strict legal operation of a formal contract.¹⁵³

The courts, it has been pointed out, have on many occasions refused to apply considerations of equity to deal with harsh and unconscionable contracts. The reasons for

¹⁴⁹ See generally CC Turpin (1956) 73 SALJ 144.

¹⁵⁰ *Weinberg v Olivier* 1943 AD 181; *Kemsley v Car Spray Centre (Pty) Ltd* 1976 1 SA 121 (SEC).

¹⁵¹ *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 3 SA 99 (AD) 121-122.

¹⁵² R Dannenbring *Roman Private Law* (2nd ed 1968) 114-145; Sohm's *Institutes of Roman Law* (3rd ed) 1907, 279-280.

¹⁵³ Per Sohm 280-281.

this come across clearly from a statement made by Colman J in *Techni-Pak Sales (Pty) Ltd v Hall*.¹⁵⁴

“If the courts are to interfere with contracts on the ground of equity alone in commercial bargains, where does the process end? Some of the dicta seem to suggest that we have here the thin end of a wedge whose exact shape and full dimensions remain undefined. A few more taps, maybe, and the granite concept of sanctity of contract will be shattered.”

The *exceptio doli*, it is submitted, have been moulded by policy of extensive judicial interpretation into a remedy that could have provided a general criterion according to which the fairness of all contractual conduct could have been judged. It need not have been as inflexible as it would now appear to be, but could have been adapted to meet changing commercial conditions. In view of the reluctance by the courts to apply a principal of law, the *exceptio doli*, which has an inherent equitable content to deal with the unconscionable abuse of disproportionate bargaining power, the question then arises whether there may be any other principle or rule in our law according to which South African courts could deal with the abuse of unequal bargaining power. It is submitted that, because the South African courts are extremely reluctant to extend the principles of the common law to vest themselves with a jurisdiction based on the principles of equity to deal with problems caused by unconscionable contractual conduct, the legislature should introduce or create such a general jurisdiction for them.

5.3 Conclusion

In this chapter alternatives to the *exceptio doli generalis* and the CPA were explored. With the uncertain status of the *exceptio doli generalis* in South African law of contract and with the problems that are foreseen with the effective enforcement of the CPA, alternatives that can be considered are the following: 1) changing the rules of interpretation of contract as Lewis suggested;¹⁵⁵ 2) using good faith or public policy as a means to ensure that the enforcement of contracts in circumstances that are unfair is avoided¹⁵⁶ or; 3) the legislature should create a general jurisdiction for the courts to deal with unconscionable contractual conduct.¹⁵⁷ One might argue that the CPA created such a general jurisdiction for our courts, but one may doubt its usefulness if section 52 is not accessible to the consumers most in need of its protection.

A general rule against contractual unconscionability will of necessity have to provide a general criterion of control, be so clear and precise that it does not give rise to problems of uncertainty, be flexible enough to meet changing conditions, and be capable of quick and simple application to solve the problems.¹⁵⁸ It is submitted that the legislature should create such a statutory rule, capable of meeting the aforementioned criteria, because it seems that the *exceptio doli generalis* as well as the CPA's provisions, are not up to the

¹⁵⁴ 1968 3 SA 231 (W).

¹⁵⁵ See par 5.2.1.

¹⁵⁶ See par 5.2.2.

¹⁵⁷ See par 5.2.3.

¹⁵⁸ Aronstam.

task. What is suggested, as an alternative to the amendment of section 52 of the CPA, is legislation that deals specifically and exclusively with unreasonableness, unconscionableness and oppressiveness in contracts or terms of contract. This would be in accordance with the South African Law Commission's proposal.¹⁵⁹

¹⁵⁹ See par 2.2.5.2.

Chapter 6

Conclusion

6.1 The legal problem defined

The purpose of this dissertation was to determine whether the provisions of the CPA lead to a revival of the *exceptio doli generalis*. It is submitted that in the light of *Van der Merwe v Meades*¹⁶⁰ this defence cannot be regarded as “abolished”. Thus, it appears that the *exceptio doli generalis* doesn’t need revival via the CPA, since the court that declared the *exceptio doli generalis* dead, also announced its return from the grave.¹⁶¹ But since so many legal minds and writers and even some courts accept the view of the majority of the court in *Bank of Lisbon*, the focus was turned to the question whether the *exceptio doli generalis*’s rightful place in our legal system will be fully restored and confirmed by the new Consumer Protection Act.

6.2 The Consumer Protection Act 68 of 2008

6.2.1 The relevant provisions

It is argued that the provisions of sections 40, 41 and 48 of the CPA reaffirm the existence of the *exceptio doli generalis* in the South African law of contract, since these provisions provide the same function and outcome as this defence. The section that speaks to the heart of the *exceptio doli generalis*, is section 40(1) which provides that a supplier or an agent of the supplier must not use physical force, coercion, undue influence, pressure, duress or harassment, **unfair tactics or any other similar conduct**, in connection with the supply of services to a consumer and also in the negotiation, conclusion, execution or **enforcement of an agreement**.¹⁶² The conclusion can be drawn that this section specifically reintroduces the presumably abolished *exceptio doli generalis*. Whether the courts will call this defence by its name - *exceptio doli generalis* - or not, the fact remains that it appears as if this defence, by which the consumer can defend himself against a claim by a supplier, is alive and kicking. The Act’s provisions appear to serve the same function as the *exceptio doli generalis*.

6.2.2 The CPA deemed ineffective

The question that needs to be asked is whether the CPA will perform its task successfully. Will the Act provide relief to a party who finds himself in the situation where a contract

¹⁶⁰ See fn 29.

¹⁶¹ *Bank of Lisbon*.

¹⁶² Own emphasis.

is being enforced in a manner never contemplated by him or any other party to the contract? Section 52 deals with contraventions of sections 40, 41 and 48 of the Act. It grants the ordinary courts the power to declare agreements, in whole or in part, unfair or unconscionable.¹⁶³ 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 document, to avoid repetition of the supplier's conduct.¹⁶⁴ However, all 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'.¹⁶⁵

That only the ordinary courts would have jurisdiction in respect of unfair contract terms, is not stated unequivocally, but is implicit in the absence of any reference to the NCT or provincial consumer courts in section 52. It is a well-known fact that the costs, risks and effort of court action are just too high for ordinary consumers, including middle class consumers. For this reason it is unlikely that this legislation in its current form will have a real impact on the eradication of unfair contract enforcement. What is suggested, is an amendment to section 52 in order to bestow jurisdiction on the NCT and the consumer courts as well.

Further, it should be stated that the shortcomings of section 52 is by no means the only concern regarding the Act. While the Act seeks to address a variety of topics and forms of consumer practices, it does so in too much of a generalized sense. Its approach should have been more specific and contextual. And despite the plain and understandable language requirement included in the Act, the structure of the Act itself is not user friendly and it will probably be very difficult for the average consumer or supplier to make sense of.¹⁶⁶ The Act also has limited application and does not apply to each and every contract or transaction.¹⁶⁷

With the uncertainty surrounding the availability of the *exceptio doli generalis* in our law and the problems that are likely to occur with the effective enforcement of the CPA, one has to ask the question whether a defendant who finds himself in similar shoes than that of the defendants in the *Bank of Lisbon* case, will be able to find any relief. Accordingly, alternative remedies to assist a party to a contract enforced in circumstances that are unfair, was explored.¹⁶⁸

¹⁶³ Sec 52(3)(a).

¹⁶⁴ Sec 52(3)(b).

¹⁶⁵ Sec 52(2)(b).

¹⁶⁶ See par 2.2.6.

¹⁶⁷ Sec 5(1) and 5(2) of the Act.

¹⁶⁸ See chap 5.

6.3 Alternatives to prevent the enforcement of contracts in unfair circumstances

Alternatives that can be considered are the following: 1) changing the rules of interpretation of contract as Lewis suggested;¹⁶⁹ 2) using good faith or public policy as a means to ensure that the enforcement of contracts in circumstances that are unfair is avoided¹⁷⁰ or; 3) the legislature should create a general jurisdiction for the courts to deal with unconscionable contractual conduct.¹⁷¹ One might argue that the CPA created such a general jurisdiction for our courts, but what is the use if the section¹⁷² of the Act that is suppose to create such a jurisdiction, can only be enforced by the ordinary courts and not also by other, more accessible, forums? And regardless if an improvement to section 52 is made or not, the fact remains that this Act is flawed in many ways.¹⁷³

A general rule against contractual unconscionability will of necessity have to provide a general criterion of control, be so clear and precise that it does not give rise to problems of uncertainty, be flexible enough to meet changing conditions, and be capable of quick and simple application to solve the problems.¹⁷⁴ As an alternative to the amendment of section 52, it is submitted that the legislature should create such a statutory rule, capable of meeting the aforementioned criteria, because it seems that the *exceptio doli generalis* as well as the CPA are not up to the task. What is suggested, is legislation that deals specifically and exclusively with unreasonableness, unconscionableness and oppressiveness in contracts or terms of contract. The enactment of legislation dealing specifically with the problems previously dealt with by applying the *exceptio doli generalis*, will ensure that legal certainty is created as to the availability of a remedy in circumstances where the enforcement of a contract is unfair. This is in accordance with the proposal made by the South African Law Commission's Project 47.¹⁷⁵

¹⁶⁹ See chap 5, par 5.2.1.

¹⁷⁰ See chap 5, par 5.2.2.

¹⁷¹ See chap 5, par 5.2.3.

¹⁷² Sec 52.

¹⁷³ See comment in par 2.2.6.

¹⁷⁴ Aronstam.

¹⁷⁵ See par 2.2.5.2.

Bibliography

Statutes

Consumer Protection Act 68 of 2008.

Case law

Afrox Healthcare Bpk v Strydom 2002 6 SA 21 (SCA).

Bank of Lisbon and South Africa Ltd v De Ornelas and another (1988) 3 SA 580 (A).

Barkhuizen v Napier (7) BCLR 691 (CC).

Brisley v Drotskey 2002 (4) SA 1 (SCA).

Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman 1997 4 SA 303 (A).

Evens v Llewellyn (1787) 29 ER 1191.

Frederick L Morehead v New York ex rel Joseph Tilpaldo 298 US 587 (1935).

Lloyds Bank Ltd v Bundy [1975] QB 326.

Morehead v New York ex rel Joseph Tilpado 298 US 587 (1935).

Napier v Barkhuizen 2006 (4) SA 1 (SCA).

North Vaal Mineral Co Ltd v Lovasz 1961 3 SA 604 (T).

Otto v Heyman 1971 4 SA 148 (T).

Paddock Motors (Pty) v Ingesund 1976 (3) SA 16 (A).

Prenn v Simmonds [1971] 3 ALL ER 237 (HL).

Printing and Numerical Registering Company v Sampson (1875) LR Eq 462 465.

Pritchard Properties (Pty) Ltd v Koulis 1986 (2) SA 1 (A).

Rand Bank Ltd v Rubenstein 1981 (2) SA 207 (W).

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

Techni-Park Sales (Pty) Ltd v Hall 1968 3 SA 231 (W).

USA v Bethlehem Steel Corporation 315 US 289 (1941).

Van der Merwe v Meades 1991 (2) SA 1 (A).

Weinerlein v Goch Buildings Ltd 1925 AD 282.

Worman v Hughes and Others 1948 (3) SA 495 (A).

Zuubekom Ltd v Union Corporation Ltd 1947 (1) SA 514 (A).

Text books

- Christie RH *The Law of Contract* (5th edition) Butterworths (2006).
Christie RH *The Law of Contract* (3rd edition) Butterworths (1996).
Hawthorne L *et al*, *The Contract Law Casebook*, second edition, Juta (2007).
Melville NJ, *The Consumer Protection Act made Easy*, Book of Life Publications (2011).
Van der Merwe S *et al* *Contract: General Principles* (3rd edition) Juta (2007).

Journal articles

- Aronstam PJ “Unconscionable contracts: the South African solution“ (1979) 42 *THRHR* 21.
Glover G “Lazarus in the constitutional court: an exhumation of the *exceptio doli generalis*?“ (2007) 124 *SALJ* 449.
Kerr AJ “The defence of unfair conduct on the part of the plaintiff at the time action is brought: the *exceptio doli generalis* and *replicatio doli* in modern law“ (2008) 125 *SALJ* 241.
Kerr AJ “The *replicatio doli* reaffirmed“ (1990) 108 *SALJ* 583.
Lambiris MA “ Die *exceptio doli generalis*: an obituary“ (1988) 105 *SALJ* 644.
Lewis C “The Demise of the *exceptio doli*: is there another route to contractual equity?“ (1990) 107 *SALJ* 26.
Naude T “The consumer’s ‘right to fair, reasonable and just terms‘ under the new Consumer Protection Act in comparative perspective” *SALJ*.
Van der Merwe SWJ “The *exceptio doli generalis*: *requiescat in pace-vivat aequitas*“ (1989) 106 *SALJ* 235.

Other

- Lötz DJ, an unpublished work: *Consumer Protection Act 68 of 2008: an overview*.
Marsland L: “Marketers reject new consumer bill as ‘unworkable’”
<http://www.bizcommunity.com> (date last accessed: 2011-09-28).

South African Law Commission Discussion Paper 65 Project 47.

Wright R: “Summary of the Consumer Protection Act 68 of 2008” www.marketingweb.co.za

(date last accessed: 2011-09-28).