

Unfairness of price and the doctrine of *laesio enormis* in consumer sales

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OPSOMMING

Onbillike koopprys en die leerstuk van *laesio enormis* in koopkontrakte met verbruikers

Die Wet op Verbruikersbeskerming 68 van 2008 (WVB) verskaf in Deel G aan die verbruiker die fundamentele verbruikersreg op billike, regverdige en redelike bedinge en voorwaardes. Artikel 48 wat deel vorm van hierdie fundamentele verbruikersreg verbied onbillike, onredelike of onregverdige kontrakbedinge. Weens die bewoording van artikel 48(1)(a)(i) ontstaan die vraag of die geabandonneerde leerstuk van *laesio enormis* deur die WVB teruggebring word in geval van verkope tussen verskaffers en verbruikers. Die historiese ontwikkeling van die leerstuk asook die gemeenregtelike posisie word ondersoek. Die bepalinge en bewoording van artikel 48(1) word krities geanaliseer en bespreek. In 'n soektog na riglyne ter bepaling van 'n billike koopprys word daar ook na die Wet op Mededinging 89 van 1998 gekyk. Daar word as deel van die gevolgtrekking aangevoer dat dit onprakties en onredelik sou wees om die leerstuk van *laesio enormis* op die koopprys van koopkontrakte met verbruikers toe te pas of af te dwing.

1 INTRODUCTION

For the first time in South African consumer law the Consumer Protection Act¹ (CPA) introduces eight core fundamental rights to the consumer.² One of these fundamental rights is the consumer's right to fair, just and reasonable terms and conditions.³ Section 48 governs unfair, unreasonable and unjust contract terms. Due to the wording of section 48(1)(a), the question arises as to whether the abandoned common law doctrine of *laesio enormis* pertaining to the purchase price is reintroduced by the CPA. In a nutshell the doctrine determines that the buyer will have a remedy where the value of the *merx* (thing sold) is less than half of the purchase price paid. The test for determining whether a contract term is fair, reasonable and just and the role of the courts regarding contractual disputes in consumer agreements are also included in Part G. A complete and comprehensive discussion of Part G warrants a critical and comparative study on its own and is beyond the scope of this discussion.

The whole concept of a fair, reasonable and certain purchase price involves an investigation into the many interpretations thereof by the courts,⁴ various

1 68 of 2008.

2 Chapter 2: Parts A–H.

3 Part G ss 48–52.

4 See eg *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *Brisley v Drotzky* 2002 4 SA 1 (SCA); *Afrox Healthcare; Price Waterhouse Coopers Inc v National*

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statutes⁵ and underlying principles of the law of contract such as *pacta sunt servanda*,⁶ the sanctity of contract, good faith (*bona fides*) and unequal bargaining positions of the parties.⁷ It is not necessary, however, to have an in-depth discussion of these general contractual principles for purposes of this discussion.

Though there are many provisions in the CPA relevant to the concept of price and purchase price (such as the prevention of price discrimination in terms of Part A⁸ or price advertising in terms of Part E⁹) only the possible applicability of the doctrine of *laesio enormis* in the context of section 48(1)(a)(i) of the Act is investigated.

2 DOCTRINE OF *LAESIO ENORMIS*: HISTORICAL BACKGROUND

The *iustum pretium* doctrine (influenced by the medieval church) was extended to the broader doctrine of *laesio enormis* which is discussed in detail below.¹⁰

Zimmermann¹¹ explains that the concept of *pacta sunt servanda* was still the core of most sale agreements and it was only because of the exploitation of farmers in agricultural areas by urban capitalists that Justinian felt compelled to intervene and make a remedy available to the seller.

According to Van den Bergh the literary meaning of *laesio enormis* is “abnormal injury”.¹² Kerr defines it to mean “serious loss” or “more than ordinarily prejudiced”.¹³

The *laesio enormis* doctrine has its origin in Roman law in the Justinian Code. The purchase price had to be *verum* or *iustum* in other words the actual value of the thing sold in relation to the purchase price.¹⁴ The rule was that the seller of land for less than half its real value might get back his land on returning the price, unless the buyer preferred to pay the full value.¹⁵ Conversely, the buyer could cancel the sale and reclaim the purchase price where the value of the *merx*

Potato Co-Operative Ltd 2004 6 SA 66 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Breedenkamp v Standard Bank of South Africa Ltd* 2009 5 SA 304 (GSJ), 2009 6 SA 277 (GSJ), 2010 4 SA 468 (SCA).

5 CPA, Competition Act 89 of 1998 and the Constitution of 1996.

6 Hiemstra and Gonin *Trilingual legal dictionary* (1992) 251: *Pacta servanda sunt* – “agreements are to be observed”.

7 Hawthorne “Materialisation and differentiation of contract law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention?” 2008 *THRHR* 438–453.

8 Consumer’s fundamental right to equality in the consumer market.

9 Consumer’s fundamental right to fair and responsible marketing.

10 There is a difference of opinion regarding the original application of the *laesio enormis* doctrine. See Van Warmelo *Inleiding tot die studie van die Romeinse reg* (1965) 289; Zimmermann *The law of obligations. Roman Foundations of the civilian tradition* (1990) 259–262 regarding the question of interpolation and extension of the *laesio enormis* principles.

11 Zimmermann 261.

12 Van den Bergh “The Roman tradition in the South African contract of sale” 2012 *THRHR* 53 69.

13 *The law of sale and lease* (2004) 40 fn 102.

14 Van Warmelo 289.

15 Lee *The South African law of obligations* (1980) 231.

was found to be less than half of the purchase price paid.¹⁶ The *Code* dealt directly with the relief of the seller of immovable property but its scope was extended to include relief to the buyer and to cover sales of movables of considerable or substantial value.¹⁷ It must be kept in mind that the law of sale in Roman law developed in a framework where it was upon the parties to regulate the agreement between them and the law had no consumer protection function.¹⁸

After reception of the doctrine into Roman law, it was implemented and used throughout Europe and became part of Roman-Dutch law, eventually governing almost the whole field of contract law pertaining to price.¹⁹ Lee refers to the use of the doctrine in Roman-Dutch law as an indulgence allowed to a buyer who had paid more than double the value of the *merx*.²⁰ This is an indication that the doctrine became a remedy used more often by the buyer than the seller.²¹

According to Voet²² the price had to be just and suitable for the merchandise, even though the contracting parties had a natural freedom to get the better of each other to a moderate degree regarding the price by using “a certain shrewdness”.²³ Van den Bergh explains that if the price was too high or too low, if the difference was less than half the value, the parties had to be satisfied with it.²⁴ A person who had been prejudiced to the extent of less than half, without fraud being involved, thus could not rescind the sale. The reason for this was that if sales were annulled for every kind of inequality it would be prejudicial to trade and the public interest, but if the disparity was more than half they could claim an annulment of the sale.²⁵ The writer remarks that the Dutch tried to limit the doctrine’s injurious effects by determining that it does not apply in sales, for example, where the value of the thing was essentially uncertain and the sale was of a speculative nature, for example where next year’s crop was bought or land was bought with the hope that it would contain minerals.²⁶ Nor did it apply where the party who had been disadvantaged knew at the time of the sale of the disparity between the price and value of the thing, in which case he was stopped from claiming the remedy of *laesio enormis*.²⁷ The writer argues that by the time the Dutch came to the Cape, it was seldom applied, since humanism and the law of nature spoke against it.²⁸

16 *Ibid.*

17 Van Warmelo 289.

18 Lötzt “Die koopkontrak: ’n Historiese terugblik (Deel 1)” 1991 *De Jure* 217 231 fn 99.

19 Hahlo and Kahn *The Union of South Africa: The development of its laws and constitution* (1960) 473.

20 Lee 233.

21 *Ibid.*

22 18 1 21.

23 Van den Bergh 2012 *THRHR* 70.

24 *Ibid.*

25 *Ibid.*

26 *Idem* 71.

27 *Ibid.*

28 *Ibid.*

3 MODERN SOUTH AFRICAN POSITION (COMMON LAW POSITION)

3.1 The rule or doctrine of *laesio enormis*:²⁹ Historical development in South Africa and abolition

Legislation rid both the Cape³⁰ and the Free State³¹ of the doctrine of *laesio enormis*. Though the doctrine was still applicable in other parts of the country, *Tjollo Ateljees v Small*³² led to the complete abolition thereof in terms of the General Law Amendment Act 32 of 1952.

In *Tjollo Ateljees v Small*,³³ the doctrine as a whole was condemned, while the extension to movables (with specific reference to Voet) was strongly criticised by Van den Heever and Schreiner JJA.³⁴ Ultimately the court urged for its repeal by way of legislation.³⁵ The court held that by not abolishing the doctrine, South Africa would be out of step with the *modern*³⁶ world with its highly developed commercial and financial organisations.³⁷ Ironically Hahlo and Kahn remarked:³⁸

“Now that an end has been put to *laesio enormis*, the weak and the ignorant must seek what statutory protection they can find in the indirect form of price and rent control and the prohibition of monopolistic practices.”

Preceding the ultimate abolition of the *laesio enormis*, however, there were some noteworthy decisions that gave a hint to its eventual downfall while indicating problems concerning the various interpretations and applications thereof. The most relevant of these are discussed below.

In *Levisohn v Williams*³⁹ the fair market value of the object was taken into consideration to determine whether or not *laesio enormis* was applicable. The case dealt with the fair value of a ring bought for £45 but only worth £20.

Problems arose where the courts had to determine to which kinds of *merx* the *laesio enormis* doctrine applied. In *Cotas v Williams*,⁴⁰ for example, the application of the doctrine was allowed in the case of a sale of movables. The court held, however, that the doctrine would not apply in those cases where speculation was inherent in the sale.⁴¹ It was determined that goodwill in its nature is not such a speculative thing, and the doctrine of *laesio enormis* may be applied to a sale of goodwill as well. The argument was that the basis of the exception to the doctrine was the difficulty of proving a just price, and that where that proof was likely to be too difficult, the law was that *laesio enormis* could not be invoked.⁴²

29 The words “doctrine” and “rule” with regard to *laesio enormis* apply interchangeably.

30 In 1879 in terms of the General Law Amendment Act 8 of 1879.

31 In 1902 in terms of the General Law Amendment Ordinance 5 of 1902.

32 *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A).

33 *Ibid.*

34 857.

35 *Ibid.*

36 Own emphasis.

37 859.

38 473 475.

39 1875 5 Buch 108 Supreme Court of the Cape of Good Hope.

40 1947 2 SA 1154 (T).

41 *Ibid.*

42 1155.

The impossibility of applying the doctrine to all cases of sale became manifest and numerous exceptions were granted to the rule, and eventually wherever the element of chance prevailed, the injustice of allowing the sale to stand when the transaction turned out favourable came to be universally recognised by the courts.⁴³ The court confirmed that the emphasis in the application of the doctrine was on the price being unjust.⁴⁴ It seems that whenever an exception had been allowed to the application of the doctrine the thing sold might have turned out to be more or less valuable.⁴⁵ The just price of the thing could not be fixed, however, because of the very nature of the thing sold which carries with it greater or less value.⁴⁶

In *Katzoff v Glaser*⁴⁷ the court had to determine whether the doctrine was applicable to immovable property or only to movable property. In coming to its decision the court referred to *McGee v Mignon*⁴⁸ and the interpretation of Voet.⁴⁹ The court came to the conclusion that Voet could not have had in mind a sale of land at any place other than where it was situated and that Voet 18 5 7 must be understood as referring to movables only.⁵⁰ The court held that because the true market value at the time and place of the sale was to be taken as the norm for purposes of an action based on *laesio enormis*, evidence of market values and prices at other places and at other times before and after the sale were irrelevant or immaterial, but the value of such evidence must depend on the particular circumstances of each case.⁵¹

It is interesting to note that even after the abolition of the doctrine the courts still had an opinion with regard to the effect of the doctrine in the South African law of sale. In *Cape Town Municipality v F Robb & Co Ltd*,⁵² for instance, Corbett J held that despite the wording of section 25 of the General Law Amendment Act 32 of 1952, the common law doctrine of *laesio enormis* never had the effect of rendering contracts, to which it was applicable, null and void *ab initio*.⁵³ By virtue of the doctrine the aggrieved party was entitled to offer to the other the alternative of having the contract rescinded or to submit to an equitable adjustment of the price.⁵⁴ The contract was, according to the court, more akin to a voidable than a void one.⁵⁵

In *Gangat v Bejorseth*⁵⁶ De Wet J held that Parliament's clear intention was to do away with *laesio enormis*, not to differentiate between one contract and the next. The court held that wherever more factors than merely the value of the thing were involved (for example delayed delivery), such factors would affect

43 Hackwill (ed) *Mackeurtan's Sale of goods in South Africa* (1984) 19–20.

44 *Katzoff v Glaser* 1948 4 SA 630 (T).

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 1903 TS 89 97.

49 18 5 7.

50 *Katzoff v Glaser* 1948 4 SA 630 (T) 642 referring to *McGee v Mignon* 97.

51 *Katzoff v Glaser* 1948 4 SA 630 (T) 642.

52 1966 4 SA 345 (C).

53 350.

54 *Ibid.*

55 *Ibid.*

56 1954 4 SA 145 (N).

the price and such a contract was not the sort of contract to which the doctrine of *laesio enormis* could be applied.⁵⁷ Kilian⁵⁸ aptly explains the inability of the judiciary to apply the doctrine properly:

“The precise scope of the extension remained in some doubt. Some of the old authorities applied the rule only to valuable movables, while others suggested no such limitation. Until 1949 the South African case law showed no hesitation in applying it to movables, but there were dicta importing the restriction to valuables. Indeed, in one case it was applied to the sale of goodwill, an incorporeal. The question of what constituted a ‘valuable movable’ remained unanswered. Was there a specified value, or was it relative to the means of the party? Voet, though he mentioned the limitation, did not refine it.”

3.2 Rescript on *laesio enormis*: Price determination by a third party

Kerr⁵⁹ discusses the *laesio enormis* doctrine when dealing with price determination by a nominated third party. According to Kerr the parties may only question such a price determination where the price can be described as unjust, unfair or manifestly unjust in terms of our common law.⁶⁰ Referring to case law (discussed below), Kerr argues that only two possible remedies exist and goes on to explain what the writer calls the “rescript” on the *laesio enormis* doctrine and the remedy of *bona fides* as used by the old authorities.⁶¹ Kerr discusses *Gillig v Sonnenberg*⁶² where it was agreed by the parties that an auditor would determine the price of shares sold. The court applied the general principles underlying *laesio enormis* (even though the case was heard after the abolition of the doctrine). Murray AJP referred to old authorities (Huber and Voet) and stated that even in the absence of fraud or misrepresentation, a buyer (or a seller) could on the ground of equity be given relief against a serious prejudicial bargain.⁶³ Kerr criticises the judge’s viewpoint and argues that the court’s interpretation of Huber and Voet is questionable.⁶⁴

In *Dublin v Diner*⁶⁵ the determination of a fixed price for shares was again the issue but the court made a ruling based on a manifest unjust price without referring to *Gillig*.⁶⁶

Kerr also discusses *Hurwitz v Table Bay Engineering (Pty) Ltd.*⁶⁷ He states that even though the courts did not *per se*⁶⁸ use the doctrine of *laesio enormis*, and rather made a correction of the price based on a manifestly unjust determination, the principles underlying the doctrine of *laesio enormis* were indirectly applied.⁶⁹ Kerr refers to the remark made by Murray J that if the general considerations

57 146.

58 “Between economic and legal analysis of incorporeal things: A critical ‘no’ to *aedilitian* remedies” 2006 (2) *PELJ* 1–31.

59 Kerr (2004) 39–55.

60 *Idem* 39 fn 100.

61 *Ibid.*

62 1953 4 SA 675 (T).

63 677.

64 Kerr (2004) 43.

65 1964 1 SA 799 (D).

66 Kerr (2004) 43–44.

67 1994 3 SA 449 (C).

68 Own emphasis.

69 Kerr (2004) 47.

underlying the abolished *laesio enormis* doctrine were applied; either party may elect to cancel the contract.⁷⁰ Kerr correctly argues that this statement differs from the position when the rescript on *laesio enormis* actually applied because under it the disadvantaged party sued to have the contract set aside and the advantaged party could restore the property or, at his option, make up the price to the fair value.⁷¹

The writer then considers the possible general *bona fides* action.⁷² The writer concludes that the basis of the action (when dealing with price determination by a third party) in modern law is equity, fairness and justice rather than the underlying principles of the doctrine of *laesio enormis* as applied in *Gillig*⁷³ and *Hurwitz*.⁷⁴ It is submitted that the recent judgments pertaining to good faith and reasonableness might change the proposed recommendations made by Kerr. This is so due to the fact that the Constitutional Court confirmed that an action based on good faith (*bona fides*) may not be elevated to a general rule.⁷⁵

Hartzenberg J in *Van Heerden v Basson*⁷⁶ differentiates between the doctrine of *laesio enormis* and the correction of a price determination by a third person. He confirmed *Gillig*,⁷⁷ *Dublin*⁷⁸ and *Hurwitz*⁷⁹ and held that where *laesio enormis* is concerned, the parties have freely and voluntarily, without any fraud, agreed on a price, which later turns out to be unreasonable.⁸⁰ In the case of a correction of a price determination by a third person, the price is objectively determinable and the third person merely has to make a reasonable determination.⁸¹ Where the third person makes a reasonable determination, the parties are bound thereby.⁸² Where the determination is unreasonable, a court can correct the determination.⁸³ In the event of such a correction, the other party should be given a choice as to whether to abide by the agreement or not.⁸⁴ Kerr⁸⁵ briefly mentions the *Van Heerden* case and states that where a price fixed is not far off a figure which might have been expected in the circumstances, both parties are bound to accept it. Kerr criticises Hartzenberg J's approach and recommends that it not be followed:⁸⁶

“With respect, while delays and the high cost of litigation may in particular circumstances loom large in any decision on the ground of equity, such delays and cost

70 *Ibid.*

71 *Ibid.*

72 *Ibid.*

73 *Gillig v Sonnenberg* 1953 4 SA 675 (T).

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

75 See also Hawthorne “The end of bona fides” 2003 *SA Merc LJ* 271–278 and Van den Bergh 2012 *THRHR* 71.

76 1998 1 SA 715 (T).

77 *Gillig v Sonnenberg* 1953 4 SA 675 (T).

78 *Dublin v Diner* 1964 1 SA 799 (D).

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

80 718.

81 718 719.

82 *Ibid.*

83 *Ibid.*

84 719 720.

85 “The legal position when the figure given by a third person nominated by the parties to fix the price or rent is manifestly unjust” 1999 *SALJ* 15. See also Kerr (2004) 47 fn 169.

86 Kerr 1999 *SALJ* 15–16.

ought not to be elevated to the status of an overriding factor or the only one to be taken into account. Many other factors may need to be considered, some of which may in the circumstances of a particular case be of greater importance than cost.”

Ledwaba J confirmed the *Van Heerden* case in *Breau Investments (Pty) Ltd v Maverick Trading*.⁸⁷ The parties *in casu* could not reach an agreement on the rental. The issue of rental was accordingly referred to a third party. The lessee disputed the third party determination and issued summons against the lessor for the determination of a reasonable rental by the court. The lessor’s attorneys demanded payment of rental, which demand was not met. As a result the lessor purported to cancel the contract of lease and brought an application for eviction. The lessee contended that the contract could not be cancelled pending determination of a reasonable rental by the court, relying on *Van Heerden v Basson*.⁸⁸ The court held that the use of the words “voordat litigasie ontstaan” (before litigation arises) in *Van Heerden* did not mean that *after*,⁸⁹ litigation commenced⁹⁰ a party had no choice to cancel the agreement.⁹¹ This, according to the judge, was clear from the fact that the lessor did not want to get involved in litigation regarding the reasonableness of the rent.⁹² The court allowed the cancellation of the agreement and the eviction of the lessee because the lessor had a strong case.⁹³

Naudé⁹⁴ discusses the issue of price determination by third parties and deals with the concept of a “manifestly unjust price” which is found in the common law rule that a court may set aside a price set by a third party appointed by the parties for that purpose as long as it was manifestly unjust.⁹⁵ The writer also refers⁹⁶ to the *Hurwitz*⁹⁷ and *Van Heerden*.⁹⁸ The reasoning in *Van Heerden* is accepted and according to Naudé shows that such a situation is distinguishable from one where the parties specifically agreed on a manifestly unjust price.

4 LEGAL POSITION IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

4.1 Section 48: Unfair, unreasonable or unjust contract terms

Section 48 forms part of a consumer’s right to fair, just and reasonable terms and conditions.⁹⁹ Section 48(1)(a) provides that a supplier must not offer to supply, supply, or enter into an agreement to supply, any goods or services at a *price* that is unfair, unreasonable or unjust;¹⁰⁰ or on terms that are unfair, unreasonable or unjust.¹⁰¹

87 2010 1 SA 367 (GNP) 370.

88 1998 1 SA 715 (T) 718.

89 Own emphasis.

90 After issue of the summons.

91 370 371.

92 *Ibid.*

93 371.

94 “The consumer’s ‘right to fair, reasonable and just terms’ under the new Consumer Protection Act in comparative perspective” (Part 2) 2009 *SALJ* 505 515.

95 *Ibid.*

96 Naudé (Part 2) 2009 *SALJ* 533 fn 152.

97 1994 3 SA 449 (C).

98 2010 1 SA 367 (GNP).

99 Ch 2 Part G.

100 S 48(1)(a)(i).

101 S 48(1)(a)(ii).

Section 48 should be read not only in conjunction with the rest of part G but also with regulation 44 that lists contract terms which are presumed to be unfair. Regulation 44 only applies, however, where the consumer is a natural person who bought goods for private purposes.¹⁰² Regulation 44(3) contains a list of contract terms which are presumed to be unfair. Regulation 44(3)(h) provides that a consumer agreement is presumed to be unfair if it has the purpose or effect of allowing the supplier to increase the price agreed with the consumer when the agreement was concluded without giving the consumer the right to terminate the agreement.

Part G of the CPA also consists of section 49 dealing with the notice required for certain terms and conditions, section 50 regulating written consumer agreements,¹⁰³ section 51 dealing with prohibited transactions, agreements, terms and conditions¹⁰⁴ and section 52 regulating the powers of the court to ensure fair and just conduct, terms and conditions. In essence therefore Part G deals in particular with contractual disputes.

Naudé explains that in their initial briefing to Parliament on the Consumer Protection Bill, the Department of Trade and Industry explained that the Bill gives exclusive jurisdiction to the courts over “contractual disputes” due to a compromise reached with the Department of Justice, which was concerned that the courts’ jurisdiction was eroded by the creation of various tribunals in terms of the CPA.¹⁰⁵

Because of the direct role of the courts regarding contractual disputes in terms of part G as well as the wide implication of this consumer right, much has been written on the subject already.¹⁰⁶ In fact, an in-depth critical analysis of Part G warrants a full thesis on its own to do it justice. The focus of this discussion is on whether section 48(1)(a) establishes a return of the *laesio enormis* doctrine.

4.2 Unfair price

Naudé confirms that all terms of all agreements covered by the CPA are subject to review for unfairness.¹⁰⁷ This means that specifically negotiated terms, including core terms relating to the contract price or definition of the main subject matter, may also be challenged under the Act.¹⁰⁸ The writer refers to other jurisdictions regarding the grounds on which the terms as to the price and definition of the main subject matter of the contract are excluded from review.¹⁰⁹

102 Reg 44(1) CPA.

103 S 50 CPA.

104 S 52 CPA.

105 Naudé (Part 2) 2009 *SALJ* 526.

106 Van Eeden *A guide to the Consumer Protection Act* (2009) 181–195; Naudé “Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective” (Part 1) 2009 *SALJ* 515–547, *idem* (Part 2) 505–536; Jacobs, Stoop and Van Niekerk “Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis” 2010 *PELJ* 353–362 (hereinafter Jacobs *et al*); Sharrock “Judicial control of unfair contract terms: The implication of Consumer Protection Act” 2010 *SA Merc LJ* 295–325; Du Plessis “The unilateral determination of price in contracts of sale governed by the Consumer Protection Act 68 of 2008” (LLM diss UP 2012) 108–129.

107 Naudé (Part 2) 2009 *SALJ* 531.

108 *Ibid.*

109 *Ibid.*

It seems that they will be excluded where they are “transparent”, in other words, expressed in clear and intelligible language.¹¹⁰

Section 48(2) sets out a test for unfairness but writers such as Du Plessis,¹¹¹ Sharrock¹¹² and Van Eeden¹¹³ correctly argue that it is not applicable to price. Because the Act itself does not provide for a fairness test for price, Van Eeden argues that the courts will have to create such a test themselves taking into account the factors listed in section 52(2) of the Act.¹¹⁴ The factors listed under section 52(2) are:

- the fair value of the goods or services in question;
- 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;
- 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;
- the conduct of the supplier and the consumer, respectively;
- whether there was any negotiation between the supplier and the consumer, and if so the extent of that negotiation;
- 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;
- the extent to which any documents relating to the transaction or agreement satisfied the requirements of section 22;
- 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 custom of trade; and any previous dealings between the parties;
- the amount for which, and circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and
- in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.

The writer further argues that the factors listed in section 52(2) deal primarily with procedural rather than substantive fairness but states that some of the factors could provide guidance as to when a price would be considered to be unfair.¹¹⁵ He gives the example of taking into account the fair value of the goods in terms of section 52(2)(a).¹¹⁶

110 *Ibid.*

111 LLM diss 126.

112 2010 *SA Merc LJ* 308.

113 184.

114 185–186.

115 191–193.

116 *Ibid.*

Van Eeden¹¹⁷ and Naudé¹¹⁸ both express the view that where courts have to determine the adequacy of price it will be done with caution. The test according to Naudé should be whether the price is manifestly unjust as in terms of the common law:

“It would also create uncertainty if courts are willing to set aside a contract simply on the basis that the price exceeds what is ultimately found to be the market value and is therefore ‘unfair’. In my view core terms should rather have been explicitly excluded from review on the basis of their fairness, provided the aforesaid qualifications are met. Of course, the stricter common-law and constitutional control mechanisms and s 40 of the Act on unconscionability would still provide control over unjust core terms.”¹¹⁹

According to Van Eeden, although the CPA does not contain any direct price control mechanisms, it does make provision for remedial steps to be taken into account regarding prices that are unfair, unreasonable and unjust.¹²⁰ The writer is of the opinion that it would have been inappropriate for the legislature to provide for a price control mechanism in the Act, as the control of price levels would appropriately fall within the ambit of the fiscal and monetary authorities.¹²¹ The writer predicts that when applying section 48(1)(a) on the issue of fair price the courts will most likely use a market price as the yardstick but adds that a relevant market price for goods and services can arguably be established based on market analysis.¹²² A determination as to whether the market price itself is “fair, reasonable or just” could also be used.¹²³ Another alternative measure may be a margin by which an “unfair, unreasonable or unjust” price must deviate from such a market price.¹²⁴

5 POSSIBLE GUIDANCE IN TERMS OF THE COMPETITION ACT¹²⁵

5.1 Relevant provisions and concepts

The question may be posed as to whether the provisions of the Competition Act might provide assistance with the interpretation of section 48 of the CPA and whether or not the *laesio enormis* doctrine should be included in the interpretation of the latter provision. The rationale for investigating the provisions of the Competition Act is because it was implemented in the period leading up to the CPA and part of the Department of Trade and Industry’s attempt to update South Africa’s existing consumer protection laws. Competition law contains provisions or rules which aim to ensure and sustain a market where vigorous (but fair) competition will result in the most efficient allocation of economic resources and the production of goods and services at the lowest price.¹²⁶

117 *Idem* 185.

118 Part 2 2009 *SALJ* 533.

119 *Ibid.*

120 Van Eeden 185.

121 *Ibid.*

122 *Idem* 186.

123 *Ibid.*

124 *Ibid.*

125 89 of 1998.

126 Neuhoff *A practical guide to the South African Competition Act* (2006) 12.

The Competition Act aims to achieve the traditionally accepted competition law goals of lower prices and greater choice for consumers.¹²⁷ The Act also aims to regulate pricing behaviour. The Competition Act further aims to regulate prohibited practices and merger control.¹²⁸ With regard to pricing, the following concepts are briefly discussed: price fixing, resale price maintenance, price discrimination and excessive pricing.

Price fixing is regulated by section 4(1)(b) of the Competition Act which deals with restrictive horizontal practices. A restrictive horizontal practice is a practice between competitors (suppliers) which is prohibited.¹²⁹ It is prohibited for competitors to “fix” or agree on prices. The fixing of prices occurs wherever a contract, arrangement or understanding has the effect or likely effect of fixing, controlling or maintaining prices or discounts in relation to goods bought or sold by any party in competition with another.¹³⁰

Section 5 of the Competition Act regulates resale price maintenance. Minimum resale price maintenance refers to any attempt by a supplier to control or maintain the minimum price at which the product is resold by its customer (retailers who sell the product to the consumer are considered to be the customer in terms of section 5).¹³¹ Section 5(2) provides that the resellers of a particular product may sell it at any price, even below cost. Minimum resale price maintenance is absolutely prohibited in terms of the Competition Act.¹³² Setting a maximum resale price is not absolutely prohibited. However, where a supplier sets a maximum resale price it may be scrutinised under the general prohibitions in terms of section 5(1) of the Act.

It should be noted that the Competition Act does not prohibit price discrimination.¹³³ In other words the Act does not prohibit charging different buyers dissimilar prices for the same goods. Price discrimination only prohibits illegal price discrimination if the following four conditions are met, namely:¹³⁴

- the discriminator (supplier) must be dominant in a relevant market;
- the price differential must relate to equivalent transactions;
- the different prices must be charged to competing buyers for the same product; and
- the price discrimination must lead to a substantial lessening or prevention of competition between buyers of the product.

An “excessive price” means a price for goods which bears no reasonable relation to the economic value of the goods and is higher than the reasonable economic value.¹³⁵ Section 8 provides that the abuse of the dominant position that a firm

127 *Idem* 13.

128 S 1 Competition Act. See also Neuhoff 15.

129 Neuhoff 15 63 64.

130 *Ibid.*

131 S 5(2) Competition Act.

132 *Ibid.*

133 See Neuhoff 132–139 for the economist’s view of price discrimination. The content thereof is not relevant to this discussion.

134 S 9(2) of the Competition Act.

135 S 1 def Competition Act. See also Neuhoff 113 for a discussion on “the economics of a product”. The cost of research and development; manufacturing and distributing and the price of the product in different geographical markets are taken into account.

(supplier) may hold is prohibited. It is prohibited for a dominant firm¹³⁶ to charge an excessive price to the detriment of consumers.¹³⁷

Mbana¹³⁸ explains that where a dominant firm charges an excessive price, it harms consumers by charging higher prices, restricting innovation or reducing the array of choices that consumers would face under more competitive conditions. In *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited*,¹³⁹ the Competition Tribunal¹⁴⁰ formulated a two-stage approach to determine whether a dominant firm was guilty of excessive pricing.¹⁴¹ According to Mbana, the approach followed by the Competition Tribunal can be paraphrased into two questions.¹⁴² Firstly, does the structure of the market in question enable those who participate in it to charge excessive prices? The market structure should show that the dominant firm is not a “mere” dominant firm but a “super-dominant” firm.¹⁴³ Secondly, has the “super-dominant” firm abused its structural opportunities by imposing excessive prices on its customers? If both questions are answered in the affirmative, the dominant firm has engaged in excessive pricing in contravention of section 8(a) of the Competition Act.¹⁴⁴

On appeal,¹⁴⁵ the Competition Appeal Court replaced the two-stage approach formulated by the Competition Tribunal with the following four enquiries:¹⁴⁶

- the actual price of the goods or services which is alleged to be excessive must be determined;
- the economic value of the goods or services in monetary terms must be determined;
- if the actual price is higher than the economic value, a determination must be made as to whether the relationship between the price of the goods or services and its economic value is reasonable; and
- if there is no reasonable relation, a value judgement must be made as to whether the charging of the excessive price is to the detriment of consumers.

Mackenzie¹⁴⁷ criticises the lack of guidance given by the Competition Appeal Court as to how the overly broad concepts of “economic value” and the “reasonable relation” between that value and price, combined with the implications for the role of competition enforcement, should be interpreted. The writer argues that the uncertain results of the Competition Appeal Court’s decision will make the application of the latter concepts very difficult in practice.¹⁴⁸

136 See s 7 of the Competition Act for the legal requirements for when a firm will be considered dominant. See also Neuhoff 107–108.

137 S 8 Competition Act.

138 “Market dominance: When does a position of dominance result in an abusive excessive price?” 2007 (Dec) *De Rebus* 24.

139 (70/CAC/Apr 07) [2009] ZACAC 1 (29 May 2009).

140 Mbana 2007 (Dec) *De Rebus* 24.

141 *Ibid.*

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*

145 *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited* (70/CAC/Apr 07) [2009] ZACAC 1 (29 May 2009).

146 Para 32.

147 “Excessive pricing in South African law” 2009 (Sept) *Without Prejudice* 12 13.

148 *Ibid.*

5.2 Inference: No guidance provided by either the Competition Act or its judicial interpretation

The concept of price fixing was explained above.¹⁴⁹ Because the provisions regarding price fixing govern the relationship between competitors (suppliers) and do not contribute to the argument regarding fair, just and reasonable prices and the doctrine of *laesio enormis*, no further discussion thereof is necessary.

The absolute prohibition of a minimum resale price or the possibility of scrutinising a maximum resale price does not contribute to the investigation into a fair, just or reasonable price either.¹⁵⁰ Competitors may resell goods at any price even if it is below cost and the relation between the value of the goods and the purchase price is irrelevant in this regard.

The provisions regarding price discrimination in terms of the Competition Act is contrary to the principles underlying the *laesio enormis* doctrine in that charging different buyers dissimilar prices for the same goods does not amount to price discrimination.¹⁵¹ Price discrimination only prohibits illegal price discrimination which will only occur if the specific four conditions as explained in the Act itself are met.¹⁵²

At first glance it would seem that the provisions governing the charging of an “excessive price” could be helpful in the search for answers. The definition of “excessive price” means a price for goods which bears no reasonable relation to the economic value of the goods and is higher than the reasonable economic value.¹⁵³ This seems to support the inclusion of the *laesio enormis* doctrine in the interpretation of the CPA. Unfortunately the interpretation of the provisions in the Competition Act regarding excessive pricing by the courts¹⁵⁴ raised more questions than answers and prevented proper application of the provisions in practice.¹⁵⁵ To complicate matters even further the test to determine an excessive price in terms of the Competition Act differs from the test endorsed by the courts.¹⁵⁶

6 CONCLUSION: APPLICABILITY OF THE DOCTRINE OF *LAESIO ENORMIS* TO CONSUMER SALES

Writers such as Van den Bergh¹⁵⁷ and Jacobs *et al*¹⁵⁸ are uncertain as to whether section 48(1)(a) reintroduces (or should reintroduce) the doctrine of *laesio enormis*.

Van Eeden¹⁵⁹ correctly states that the price at which goods or services are sold constitutes one of the terms of a contract. A price is meaningless unless it is

149 See 5.1 above.

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 S 1 Competition Act.

154 *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited* 70/CAC/ Apr 07 [2009] ZACAC 1 (29 May 2009).

155 Mackenzie 2009 (Sept) *Without Prejudice* 12–13.

156 *Ibid.*

157 2012 *THRHR* 71–72.

158 2010 *PELJ* 355 fn 361.

159 186.

considered in relation to and in conjunction with other terms.¹⁶⁰ Before any significance can be ascribed to a given price it must first be considered in relation to the other terms and conditions of the transaction.¹⁶¹ These terms may have a fundamental impact on the price. Unequal bargaining positions as well as the degree of competitiveness in the relevant market could also be relevant to fair price determination.¹⁶² By referring to the important role of competition law and policy Van Eeden correctly argues against section 48(1)(a) being a price control mechanism.¹⁶³ Instead it is submitted that the section is aimed at situations where a market practice affects a consumer (or even multiple consumers) by virtue of conduct that involves deception, unfairness and unconscionability.¹⁶⁴

Zimmermann¹⁶⁵ remarks that besides the practical problems in the application of the *laesio enormis* doctrine, another primary reason why it deteriorated and was abolished was because of the natural human ability of a contracting party to take care of his own interests. This was also because a party was bound to the agreement he concluded (the *pacta sunt servanda* principle which is still part of our common law).

The CPA aims to promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection.¹⁶⁶ Such protection presupposes the regulation of fair price (although a monetary price mechanism is not provided for in the Act).¹⁶⁷

Naudé correctly argues that all prices attacked in terms of section 48(1)(a)(i) of the Act should be proven to be *manifestly unfair*¹⁶⁸ and not just unfair.¹⁶⁹ The test for fairness in consumer sales should be limited to standard terms, and not be extended to core or negotiated terms such as price and the courts should therefore refrain from interfering with the price unless it is manifestly unjust.

Ultimately one cannot ignore the concerns raised by the courts with regard to the application of the doctrine of *laesio enormis* prior to the implementation of the CPA.¹⁷⁰ One can also not ignore the concerns raised by writers with regard to using a market value as an objective guideline.¹⁷¹

As mentioned earlier, the surrounding circumstances and other factors such as unequal bargaining positions have to be taken into account when determining a fair price. It is clear that there will always be more factors than merely the value of the thing. To take the argument further, De Wet J held in *Gangat v Bejorseth*¹⁷² that wherever more factors than merely the value of the thing were involved, such factors must affect the price and such a contract was not the sort

160 Kerr (2004) 29.

161 *Ibid.* Eg other terms regarding risk, ownership, defects, warranties and credit.

162 Van Eeden 186.

163 *Ibid.*

164 *Idem* 187.

165 Zimmermann 267–268.

166 Preamble to CPA.

167 Van Eeden 202–204.

168 Own emphasis.

169 Naudé (Part 2) 2009 *SALJ* 532–533.

170 See 3 1 above.

171 Van Eeden 186, Naudé (Part 2) 2009 *SALJ* 533.

172 1954 4 SA 145 (N).

of contract to which the doctrine of *laesio enormis* could be applied.¹⁷³ If this is the correct position, the doctrine of *laesio enormis* does not (and should not) form part of consumer sales. It would also therefore not be possible to apply the general considerations underlying the doctrine of *laesio enormis* “excluding all the ramifications that caused the criticisms in the first place” as Kerr suggests.¹⁷⁴

173 146.

174 Kerr (2004) 48.